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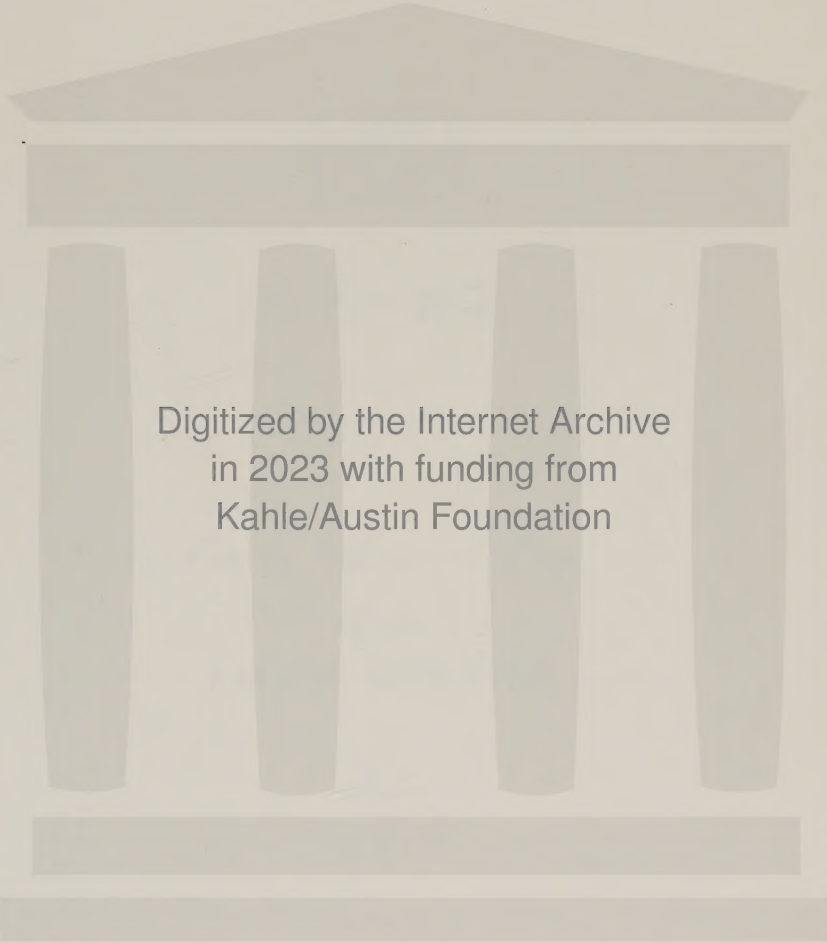
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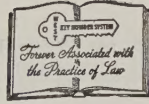
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PEOPLE v. BROWN *et al.* (No. 20,177.)

(*Supreme Court of California.* December 10, 1887.)

SUBORNATION OF PERJURY—PROCURING AFFIDAVIT OF INCOMPETENT PERSON—DUTY TO KNOW OF INCAPACITY.

Defendants were indicted for procuring false evidence, in causing a person, whom they were charged with knowing to be incompetent, to make affidavit, to be used on a motion for a new trial. *Held*, that if defendants did not know or suspect the mental unsoundness of affiant, and she apparently understood, assented to, and swore to the affidavit, they would not be criminally liable, although, upon investigation, they might have discovered her incompetency.

In bank. Appeal from superior court, city and county of San Francisco; D. J. MURPHY, Judge.

Geo. W. Tyelr, for appellants. *Geo. A. Johnson*, Atty. Gen., for the People.

TEMPLE, J. The defendants were prosecuted for procuring false evidence, to-wit, an affidavit to be used on the motion for a new trial in *Sharon v. Sharon*, 67 Cal. 185, 7 Pac. Rep. 456, and 8 Pac. Rep. 709, from a person who was to their knowledge incapable of making an affidavit. The controversy at the trial was as to the capacity of the affiant, and whether, if she were incompetent, the defendants knew the fact. The last and most material question depended largely upon the degree of intelligence manifested, and whether, from the very appearance of the affiant, the defendants must have known or suspected her want of capacity.

The instructions plainly imply that a duty rested upon the defendants—one of whom was a notary employed to take the affidavit—to investigate as to the competency of the affiant, independently of any doubt or suspicion actually entertained by them; and, further, if by the use of reasonable diligence they could have discerned her incompetency, such means of knowledge is equivalent to knowledge. This cannot be the rule as to criminal responsibility. If the defendants were employed to procure the affidavit, and did not know or suspect the mental unsoundness of Mrs. Clark, and she apparently understood, assented to, and swore to it, I think they could not be held criminally liable, although, had they investigated the matter, they would have discovered her incompetency. To constitute the crime in question there must be an intent to produce false evidence for a fraudulent and deceitful purpose. Allowing it to be done through carelessness, however gross, without such intent, cannot constitute the offense.

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In the course of a long charge, the court instructed the jury as follows: "And I therefore charge you that if you believe from the evidence, beyond all reasonable doubt, that on the eighteenth day of May said Isabella Clark was of unsound mind, and that these defendants, at the time of the taking of the affidavit testified to, knew, and had reason to believe and know, that at that time the said Isabella Clark was of unsound mind, and with said knowledge caused her to subscribe to said affidavit, with the intent to produce said affidavit, or allow it to be produced, in the action of *Sharon v. Sharon*, on said motion for a new trial, for any fraudulent or deceitful purpose, as genuine and true, then I charge you it was and is, within the purview of the Penal Code, a false affidavit, paper, and instrument in writing, and it is wholly immaterial whether or not the matters set forth in the affidavit were true or false. * * * I therefore charge you, in plain words, that if it is established to your satisfaction, and beyond such reasonable doubt as I have explained to you, that the said Isabella Clark was on the eighteenth day of May, 1885, a person of unsound mind, with mental powers so impaired, and her organs of sense so weakened, as to make her incapable of perception, and rendering her incapable of making known her perceptions to others, and that the defendants knew or had knowledge, or might have known by the exercise of ordinary observation and inquiry, of her mental unsoundness and incapacity, and knowing such to be her condition," etc., "then the defendants, and each of them, are guilty as charged in the information, and it will be your duty to so find by your verdict." And again the jury are told: "In regard to the question of knowledge, did these defendants know, at the time said affidavit was presented to said Isabella Clark for her to subscribe and swear to, that she was of unsound mind? And the question here arises, what is legal knowledge of a fact? There is great misapprehension in the popular mind on this subject. There seems to be a prevalent notion that no one is chargeable with more knowledge than he chooses to have; that he is permitted to close his eyes upon all sources of information, and then excuse his ignorance by saying that he does not see anything. While it is true that a man is not supposed to have known facts of which it appears he was ignorant, yet, if he has the means of ascertaining the true state of facts by the exercise of ordinary diligence, he is bound to do so, and if, instead of so doing, he is grossly negligent or culpable in not using such diligence, then his ignorance is no defense for any criminal act committed by him. In criminal cases, as well as civil affairs, every man is presumed to know everything that he can learn upon fair and reasonable inquiry, when he has facts in his possession which suggest the inquiry; that is, when the surroundings are such as to put him upon inquiry."

If such a rule ever obtains in a criminal case, it certainly can have no application to an offense of this character. The rule is *nullus reus nisi mens sit rea*. The rule of *caveat emptor* as to notice cannot apply to criminal responsibility. It is not at all analogous to the rule according to which it is sometimes conclusively presumed that one intended the natural and obvious consequences of his acts, and will not permit him to say he did not know that the consequences would follow. Nor is it like those cases of involuntary manslaughter in which carelessness or recklessness are held to be criminal. Undoubtedly, there are cases in which language similar to that contained in the charge of the learned judge is used; but they are all cases in which a duty is imposed upon the person to inquire, and not to do so is itself a dereliction. Thus, a woman who has been married took a second husband. On being charged with bigamy, she averred that she thought her husband dead. It was held that her belief was no defense. Here, she knew herself disqualified to marry unless the fact of the death of her husband existed. Unless she knew such fact, she ought not to have married. Another case was the sale of impure milk. It was held that defendant could not say he did not know it was

impure; he is presumed to know, for he ought to have known. But in this case a special intent was required to make out the offense. It is like the offense of receiving stolen goods, larceny, or an assault with a particular intent. If one, acting in good faith, takes the property of another, believing it to be his own, he is not guilty of larceny, although the mistake is the consequence of gross carelessness. So the receiver of stolen goods must know they are stolen, and it will not do to say that his failure to know through gross negligence is equivalent to knowledge. If a case could arise, however, in which it should appear that he suspected the fact, and abstained from inquiry lest he should know, knowledge might be inferred. One must have some knowledge of the fact before he can close his eyes lest he may know. Of course, I admit the relevancy of proof of opportunity as bearing upon the issue of actual knowledge. But there must be such actual knowledge, and facts which would ordinarily suggest inquiry are not sufficient. The jury must believe that they did in fact suggest the inquiry to the defendant.

For these reasons I think the judgment should be reversed, and new trial ordered. So ordered.

We concur: SEARLS, C. J.; PATERSON, J.; SHARPSTEIN, J.; MCKINSTRY, J.; MCFARLAND, J.

74 Cal. 316

MURPHY v. SUMNER. (No. 11,516.)

(Supreme Court of California. December 12, 1887.)

1. PUBLIC LANDS—CONFLICTING TITLES—SURVEYS.

In a suit to recover land, plaintiff claimed title under a survey made by the United States in 1868, and a certificate of purchase from the state describing the land as in section 18. Defendant showed that, the first survey proving incorrect, a new survey was made in 1880, when defendant made a homestead entry upon the land then described as the N. W. $\frac{1}{4}$ section 17. *Held*, that as plaintiff had never been in actual possession of the land, nor had it been listed to the state when he purchased, nor prior to the second survey, the title would follow the second survey.

2. SAME—EVIDENCE—CERTIFICATE OF REGISTER OF LAND-OFFICE.

In a suit to recover possession of certain land, to prove that it had been listed to the state, the plaintiff introduced the certificate of the register of the United States land-office showing that as a fact. *Held* that, as there was no such certificate known to the law, it was improperly admitted.

In bank. Appeal from superior court, San Luis Obispo county; D. S. GREGORY, Judge.

D. B. Murphy, plaintiff, sued Sandy Sumner, defendant, to recover possession of 77 acres of land. Judgment for the plaintiff, and defendant appealed. *F. Adams*, for appellant. *Graves, Turner & Graves*, for respondent.

TEMPLE, J. This is an action to recover 77 acres of land, being lots 1, 2, and 3, section 18, township 30 S., range 14 E., Mount Diablo base and meridian. Plaintiff recovered judgment, and defendant appeals from the judgment, and from an order denying his motion for a new trial.

The land was twice surveyed under the direction of the United States surveyor general for California, and each survey was duly approved by that officer, and the plat placed on file in the United States land-office. The first survey was made and approved in 1868, and it was afterwards found that the lines actually run on the ground did not accord with other surveys, and were incorrect. A second was therefore ordered, which was made and approved in 1880, and the plat thereof duly filed in the United States land-office in lieu of the first erroneous survey. The plaintiff obtained from the state a certificate of purchase as lieu land, dated January 18, 1870, 10 years before the new and correct survey was made. On the trial, plaintiff introduced his certificate of purchase, and proved the first survey, and the approval of it, and that the plat was filed in the United States land-office. He also showed that, according to

the lines actually run on the ground, the defendant's house is upon his land. The defendant claims no part of section 18, but does claim the N. W. $\frac{1}{4}$ of section 17, in the same township, under a homestead entry made after and according to the corrected survey and plat of 1880. On the trial, the defendant proved the second survey and his homestead entry, and that according to that survey he was not in possession of any portion of section 18. The land thus in controversy consists of a strip about 200 yards wide, on which are the defendant's improvements. Many exceptions were taken at the trial which, under the view we take of the case, it is not necessary to notice.

It is not claimed that the defendant has intruded upon the actual possession of the plaintiff, or that plaintiff ever was in actual possession of the land. He relies upon strict title. It may be admitted that upon proof that the land had been surveyed, and a certificate of purchase duly issued to him, he made a *prima facie* case. The defendant then proved the corrected survey and a homestead entry, and that according to this last survey he is in possession only of the land included within his homestead entry. It is not claimed that the lands had been actually listed to the state when the certificate of purchase was issued. The statute did not require the surveyor general to ascertain that fact before issuing the certificate, and we know that at the time this certificate was issued the practice was to issue such certificate before the lands had been listed over. That no such presumption arises from the fact of the issuance of the certificate seems to be held in *Hodapp v. Sharp*, 40 Cal. 69, a case upon which respondent relies.

Unless the plaintiff had acquired some rights under the first survey to a specific tract of land, we see no reason why a correct survey could not be made, and substituted for the incorrect survey. Unless, therefore, the land had been listed to the state prior to the second survey, the plaintiff cannot insist upon the first survey as decisive of the controversy; and it would follow that the evidence of the defendant overcame the *prima facie* case of the plaintiff, if it be conceded that the certificate of purchase did make a *prima facie* case. To prove that the land described in the certificate of purchase had been listed to the state prior to 1880, the plaintiff offered the certificate of W. R. Wheaton, register of the United States land-office, showing that the lands had been listed to the state of California on March 2, 1875. The offered evidence was objected to on the ground that it is not evidence of any facts, and that there is no such certificate known to the law. The objection was overruled, and the defendant excepted, and in his statement on motion for a new trial specifies the ruling as error. The point was not made in appellant's points, but was at the oral argument. The certificate was as follows:

"I, Wm. R. Wheaton, register, do hereby certify that lots 1, 2, and 3, section 18, T. 30 S., R. 14 E., M. D. M., were approved to the state of California by Hon. secretary of interior on March 2, 1875. Indemnity sections.

"WM. R. WHEATON, Register."

We are not cited to any statute which makes such a certificate evidence. If the secretary did so list the land to the state, the list transmitted to the register was on file in his office, and a copy might have been procured; but to give such a certificate is no part of the official duty of the register. There was no other evidence of this essential fact, and, as the court erred in receiving this, a new trial must be ordered. So ordered.

We concur: SEARLS, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; MCKINSTRY, J.; PATERSON, J.; THORNTON, J.

74 Cal. 313

DURKEE v. COTA et ux. (No. 11,741.)

(Supreme Court of California. December 12, 1887.)

COVENANT—ACTION FOR BREACH—PLEADING—AMBIGUITY.

In an action by plaintiff to compel defendants to furnish more water, in pursuance of a covenant, in a contract for the sale of land, "to sell a full and abundant water-right for all of the above land," the pleading set out the contract *in hæc verba*, but did not explain for what the water was needed, nor put a definite construction on the contract by any averment. *Held*, that a demurrer for ambiguity was properly sustained.

Commissioners' decision. In bank.

Appeal from superior court, San Bernardino county; H. M. WILLIS, Judge. Daniel Durkee, plaintiff, sued Leonardo Cota and Ynez Yorba de Cota, defendants, to compel them to furnish more water for certain lands purchased of them, under a covenant in the contract of sale. A demurrer to the complaint was sustained, and plaintiff appealed.

Byron Waters, for appellant. *Rowell & Rowell*, for respondents.

HAYNE, C. The complaint sets out a contract *in hæc verba* for the conveyance of land. This contract contains the following covenant: "We also agree to sell a full and abundant water-right for all of the above land." In pursuance of this contract, the defendants conveyed the land, and also a water-right, which the plaintiff alleges was not sufficient, and which he says he was induced to accept by the fraudulent misrepresentations of defendants. A demurrer was sustained on the ground that the covenant as to the water-right was too uncertain to be enforced, and final judgment was given against plaintiff on demurrer.

Whether or not the contract is so uncertain that it could not be interpreted by the aid of surrounding circumstances,—to be proved by evidence,—need not be determined. It is evident that the covenant is ambiguous. For what purpose was the water-right to be "full and abundant,"—for any particular purpose, or for all purposes which the fancy of the plaintiff might suggest? The pleading does not enlighten us on this point. It simply sets out a copy of the contract, leaving it to speak for itself. It is obvious that the pleading must partake of whatever ambiguity there is in the contract. It is perfectly proper to set out a contract *in hæc verba*. But in such case, if the contract is uncertain, the pleader must put some definite construction on it by averment. As remarked in *Joseph v. Holt*, 37 Cal. 253: "The instrument which is thus adopted as a part of the complaint must show upon its face in direct terms, and not by implication, all the facts which the pleader would have to allege under the former mode of pleading by averment." The appellant's counsel urges in his brief that evidence would be admissible in aid of the contract. Possibly it would, and possibly, also, it might remove the uncertainty. But it would not cure the defects in the pleading. The ambiguity was sufficiently pointed out by the demurrer, and we think the judgment should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

74 Cal. 320

LARSEN v. HANSEN. (No. 12,125.)

(Supreme Court of California. December 13, 1887.)

PARENT AND CHILD—STEP-CHILDREN—SUPPORT—IMPLIED PROMISE TO PAY FOR.

Civil Code Cal. § 209, provides that if a husband receives his wife's children by a former husband into his family, and supports them, it is presumed he does it as a

father, and they are not liable to him for support, nor he to them for services. Plaintiff sued defendant, her step-father, on a note for money loaned. She had lived in his family for many years; had had an illegitimate child, who also had been treated as one of defendant's children. Defendant pleaded as a counter-claim the board and lodging of plaintiff's child. *Held*, that no implied promise to pay for the support arose under these circumstances, and, as there was no express agreement to do so, the counter-claim was properly disallowed.¹

In bank. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

Anna H. C. Larsen, plaintiff, sued H. F. Hansen, defendant, on a promissory note. Judgment for plaintiff, and defendant appealed.

Wigginton, Creed & Hawes, for appellant, *W. D. Tupper*, for respondent.

SEARLS, C. J. This is an action upon a promissory note made by defendant, March 1, 1886, for \$1,128, with interest at 1 per cent. per month. Defendant set up as a counter-claim the expenditure of \$250 at the instance and request of plaintiff, and a further charge by way of counter-claim of \$20 per month for 24 months, board and lodging, care and custody, of the infant child of plaintiff. The cause was tried by the court without a jury. Defendant was allowed \$107 for money found to have been laid out and expended by him for plaintiff, and that plaintiff was not indebted to defendant in any sum for the board or lodging or care or custody of her infant child. Plaintiff had judgment, from which, and an order denying a new trial, defendant appealed.

It appears from the statement that defendant married the mother of the plaintiff when the latter was about the age of 12 years, and that from the date of such marriage plaintiff lived in and as one of the family of defendant for many years, and finally gave birth to an illegitimate child, which has always lived with and been treated as one of defendant's children, but was never legally adopted as such; defendant declining to so adopt it. There was no agreement or understanding that defendant should receive compensation for the care and support of the child. Plaintiff, who is now married, lived with defendant in like manner, performing some services in the family, and was subject to no charge for her support. The consideration of the note upon which suit is brought was money received by plaintiff from the estate of her deceased father, and loaned to defendant. A parent is bound to support his own children. "A husband is not bound to maintain his wife's children by a former husband; but if he receives them into his family, and supports them, it is presumed that he does so as a parent; and where such is the case they are not liable to him for their support, nor he to them for their services." Civil Code, § 209.

Ordinarily, one who performs services for another may recover therefor upon the presumption which the law raises of a promise or liability therefor on the part of the person benefited. In these cases the law presumes the *fact* of the promise from the services rendered, and the benefit arising therefrom. It is a conclusion to which the mind readily comes from a knowledge of the particular case, and from the ordinary motives of men in their dealings with their fellow-men; but when the transaction so far departs from the usual practices of men in dealing with each other as to raise a probability that the service was prompted by love and affection, by benevolence or charity, or by any motive other than gain, the implied promise is not indulged.

As a parent may not recover for the support and maintenance of his child,

¹ Respecting the presumption of the existence of contract obligations between parent and child to pay for maintenance or services, see *Moyer's Appeal*, (Pa.) 3 Atl. Rep. 811, and note; *Wall's Appeal*, (Pa.) 5 Atl. Rep. 220, and note; *Sawyer v. Hebard's Estate*, (Vt.) 3 Atl. Rep. 529, and note; *Brown's Appeal*, (Pa.) 5 Atl. Rep. 13, and note; *Leary v. Leary*, (Wis.) 32 N. W. Rep. 623; *Dodson v. McAdams*, (N. C.) 2 S. E. Rep. 453; *Young v. Herman*, (N. C.) 1 S. E. Rep. 792; *Ormsby v. Rhoades*, (Vt.) 10 Atl. Rep. 722; *Cowan v. Musgrave*, (Iowa,) 35 N. W. Rep. 496.

and is not liable for the services of the latter, so one occupying the position of *loco parentis*, in the absence of an express contract, is subject to the same rule. A man is not legally bound to maintain his nephews and nieces; yet, if they live with him as members of his family, without any contract or understanding that he shall pay for their services, or receive pay for their maintenance, the law will not imply a promise to pay on either side. *Robinson v. Cushman*, 2 Denio, 149; *Andrus v. Foster*, 17 Vt. 556; *Fitch v. Peckham*, 16 Vt. 150; *Williams v. Hutchinson*, 3 N. Y. 312; *Starkie v. Perry*, 12 Pac. Rep. 508.

Under the circumstances detailed in evidence, we are of opinion no implied promise on the part of the plaintiff to pay defendant for the support and maintenance of her child arises, and as no express agreement so to do was proven, the court was warranted in finding in favor of plaintiff on that issue. The finding on this question is not as full and explicit as is desirable, but is deemed sufficient in substance.

The other questions raised are not important to the decision.

The judgment and order appealed from are affirmed.

We concur: THORNTON, J.; TEMPLE, J.; SHARPSTEIN, J.; MCKINSTRY, J.; PATERSON, J.

74 Cal. 332

SUTRO *et al* v. PETIT, County Treasurer. (No. 11,665.)

(Supreme Court of California. December 16, 1887.)

1. COUNTIES—BONDS—AUTHORITY TO ISSUE—OVERISSUE.

St. Cal. 1871-72, p. 369, authorized the board of supervisors of a county to issue bonds of the county for the purpose of erecting a court-house, "not exceeding in the aggregate the sum of \$40,000." The board issued 400 in number for \$100 each, and also issued 20 additional bonds, which were purchased for value before maturity, and in the ordinary course of business. They were in form negotiable, and the interest on them was paid for several years. In supposed accordance with St. 1883, p. 305, which provided that the board of supervisors of any county having an outstanding indebtedness, evidenced by bonds, could pay them with the proceeds of the sale of new bonds issued for that purpose, the board issued and sold new bonds, realizing over \$42,000, and ordered the whole number to be paid. *Held*, that as the board had no power to issue bonds without express authority of the legislature, the 20 additional bonds were overissues, and the county treasurer was right in refusing their payment.

In bank. Appeal from superior court, San Luis Obispo county; D. S. GREGORY, Judge.

J. R. Patten and *Jasper N. Turner*, for appellant. *J. M. Wilcox*, for respondents.

McFARLAND, J. This is an appeal from a judgment of the superior court of San Luis Obispo county, rendered on a writ of *mandamus*, commanding the appellant to pay to the respondents certain bonds alleged to have been issued by said county.

The legislature, by an act passed April 4, 1870, which was amended by an act passed March 14, 1872, authorized the board of supervisors of the county of San Luis Obispo to issue bonds of said county, "not exceeding in the aggregate the sum of \$40,000," for the purpose of erecting a court-house. St. 1869-70, p. 816; St. 1871-72, p. 369. The act provides what interest the bonds should bear, and when they should be payable, and that they should be "of such denominations, respectively, as the board shall order." It is also provided that the clerk of the board should keep a register of the date and number of each bond issued, and the amount realized from the sale thereof, with the name of the purchaser. Two copies of said register were required to be made by the clerk; one to be kept in the office of the county auditor, and the other in the office of the county treasurer. The bonds were to be

issued from time to time as the work on the court-house progressed. The board determined that the bonds should be of the denomination of \$100, and accordingly 400 bonds were issued, and numbered consecutively from 1 to 400, which, of course, amounted to \$40,000, the whole amount allowed by the act. But 20 additional bonds were issued, numbered from 401 to 420, which were overissues, and entirely unauthorized by the act. These 20 last-named bonds were purchased by respondent for a valuable consideration before maturity, and in the ordinary course of business, and are the subject of this litigation. They were in form negotiable. Interest was paid on them for several years. On the first day of January, 1880, they were outstanding and unpaid.

Subdivision 14 of section 25 of the county government act (St. 1883, p. 305) provides that "the board of supervisors of any county having an outstanding indebtedness on the first day of January, 1880, evidenced by bonds or warrants thereof," may fund or refund the same, or may pay them with the proceeds of the sale of new bonds issued for that purpose. In supposed accordance with this provision, the board of supervisors of San Luis Obispo county, on May 4, 1885, ordered that the whole of said 420 court-house bonds, amounting to \$42,000, together with \$10,000 of road-repair bonds, be redeemed and paid with the proceeds of the sale of \$52,000 worth of new bonds. The new bonds were issued and sold, realizing over \$52,000. The appellant (treasurer) paid all of said court-house bonds, numbered from 1 to 400, but refused to pay the said 20 bonds held by respondents, numbered from 401 to 420; and from the judgment of the superior court commanding him to pay them the treasurer appeals.

There is a line of judicial decisions in cases where the validity of municipal bonds depended on the happening of some precedent contingency of fact, and the question was whether the officers executing the bonds were vested with the discretion or power to determine if the contingency had happened. For instance, when municipal officers have been authorized to issue bonds in aid of railroads, after a proposition to issue them shall have been adopted by the people at an election, the question has frequently arisen whether the officers had power to determine that such election had been properly held, and whether a recital of that fact on the face of the bonds was binding on the municipality. And on such questions the decisions of courts have not been uniform. The subject will be found fully discussed, and authorities cited and quoted, in the last few pages of 1 Dill. Mun. Corp. But no such question arises in the case at bar. The validity of the bonds issued under the act of April 4, 1870, did not depend upon any fact—any matter *in pais*—to be determined by the supervisors. The power to issue the bonds, and the limitation of that power, depend wholly upon the language of the act itself, and not upon any extrinsic contingency. There was nothing left to the discretion of the officers, as in the case of *Porter v. Haight*, 45 Cal. 631, nor was there any authority to do what "might appear to them advantageous to the county," as in *Bank v. Steinmitz*, 64 Cal. 301. Neither can the doctrine of estoppel, or of ratification, or of *bona fide* holding be successfully invoked by respondents. Those doctrines can be invoked against municipal corporations—if at all—only in cases of informality, irregularity, etc., on the part of an authorized agent. Dill. Mun. Corp. (3d Ed.) §§ 457, 463, 511–553, and cases cited. "Where there is a total want of authority to issue municipal bonds, there can be no *bona fide* holding of them." *East Oakland v. Skinner*, 94 U. S. 255. It is clear—in this state at least—that the issuance of bonds is not within the scope of the general and ordinary powers of a board of supervisors, and that such bonds can be legally issued only by virtue of express authority of the legislature. Dill. Mun. Corp. §§ 85, 507, and cases there cited; *Lindon v. Case*, 46 Cal. 172; *Wallace v. Mayor*, 29 Cal. 181; *El Dorado Co. v. Davidson*, 30 Cal. 521; *Robinson v. Supervisors of Sacramento*, 16 Cal. 208; *Foster v. Coleman*, 10 Cal. 281; *People v. Supervisors of El Dorado Co.*, 11 Cal. 170. The

bonds in question, therefore, were issued without any authority at all, and are wholly void. And the action of the board of May 4, 1885, ordering these bonds to be redeemed, was, of course, of no value. The character of one void act of public officers cannot be changed by a second void act of the same officers, declaring the first act to be valid.

It is quite probable that the respondents paid full par value for these bonds, and that they will lose their money. But "those who contract with a municipal corporation are bound to know the extent of the power of its officers." *Wallace v. Mayor, supra*. Respondents would have discovered the worthlessness of the bonds upon the slightest inquiry. At all events, hard cases cannot be allowed to make bad law. An overissue of \$20,000 would have been no less valid than the overissue of \$2,000; and any other rule would put the people of a county in the complete power of careless or unscrupulous public officers.

The judgment of the superior court is reversed, with direction to dismiss the proceeding.

We concur: SEARLS, C. J.; THORNTON, J.; MCKINSTRY, J.; TEMPLE, J.; SHARPSTEIN, J.

2 Cal. Unrep. 823

CARR v. QUIGLEY. (No. 9,531.) *

(Supreme Court of California. December 19, 1887.)

1. APPEAL—REVIEW—QUESTIONS DECIDED ON FORMER APPEAL.

The result of a former appeal in a suit involving the title to land claimed through a United States patent to a railroad company, where the judgment was reversed because the court below rejected evidence to the effect that, at the time the grant from congress to the railroad company took effect, the land was within the limits of a Mexican grant, then *sub judice*, is that if, at the time, the land was within the limits of a Mexican grant then *sub judice*, the patent was void, and could be attacked collaterally, and, the decision never having been appealed from, is not now subject to review.

2. PUBLIC LANDS—PATENTS—GRANT SUB JUDICE.

The Mexican government granted a certain described tract of land, known as "Las Pocitas," in 1839, which afterwards became a part of the state of California, "containing in all two square leagues." A survey of it was made by the surveyor general, which showed that ten leagues were included within the description. This survey was set aside by the secretary of the interior, on the ground that it contained more land than was called for in the grant, and a new survey was made, and approved by the secretary of the interior in 1871, and a patent for the two leagues issued upon this last survey in 1872. *Held*, that the grant was *sub judice* until the final survey was approved by the secretary of the interior, and a title to land contained within the exterior limits of the Mexican grant, claimed through a United States patent to a railroad company in 1862, was void.

3. SAME—CONFLICTING TITLES—OPINION OF COMMISSIONER—EFFECT ON PERSONS NOT PARTIES.

The Mexican government granted a certain described tract of land, which afterwards became a part of the state of California, "containing in all two leagues," and it actually contained ten leagues. The survey of the two leagues was made, and approved by the secretary of the interior in 1871, and a patent issued in 1872. Upon an action in ejectment by a person who claimed title to land within the limits of the grant, through a patent from congress to a railroad company in 1862, *held*, that the defendant was not affected by opinions of the commissioner and the secretary of the interior, in proceedings in the land-office to which he was not a party, to the effect that a preliminary survey made in 1854, but never approved by the secretary of the interior, established the exterior limits of the Mexican grant.

Commissioners' decision. In bank.

Appeal from superior court, Alameda county; A. M. CRANE, Judge.

Shafter, Parker & Waterman, for appellant. *Mich. Mullany*, for respondent.

HAYNE, C. Ejectment. The plaintiff claims through a United States patent issued to the Central Pacific Railroad Company, as successor in interest of

*Affirmed in banc. See 21 Pac. 607, 79 Cal. 130.

the Western Pacific Railroad Company, under the act of July 1, 1862, and the amendatory acts. The defendant was in possession at the commencement of the action, claiming that the land was public land, and that he had complied with the pre-emption laws. The court below gave judgment for the defendant, and the plaintiff appeals. Inasmuch as the plaintiff relies solely upon a paper title, he must recover upon the strength of that title. It is therefore immaterial whether the defendant's pre-emption proceedings were regular or not. The question is as to the validity of the patent.

Upon the former appeal, the judgment was reversed, because the court below rejected evidence to the effect that, at the time the grant from congress to the company took effect, the land was within the limits of a Mexican grant then *sub judice*. *Carr v. Quigley*, 57 Cal. 395. The necessary result of this decision (although it is not stated in terms) is that, if at said time the land was within the exterior limits of a Mexican grant then *sub judice*, the patent was void, and could be attacked collaterally. The case does not appear to have been taken to the supreme court of the United States, and consequently the decision became the law of the case, and is not now subject to review. This is a familiar rule in this state, and, as we understand, it prevails in the federal court. *Ex parte Sibbald*, 12 Pet. 491; *Bridge Co. v. Stewart*, 3 How. 413.

The record before us recites that, upon the retrial in the court below, the defendant "proved by testimony *and established*," among other things, that the Mexican government, in 1839, granted to Jose Noriega and Robert Livermore a tract of land known as "Las Pocitas," and described as follows, viz.: "Bounded on the north by the Lomas de las Cuevas; on the east by the Sierra de Buenos Ayres; on the south by the dividing line of the establishment of San Jose, and on the west by the *rancho* of Don Jose Dolores Pacheco; containing in all two square leagues, a little more or less, provided that quantity be contained within the said boundaries; and, if less than that quantity be found to be contained therein, then that less quantity, and all of said described tract of land." This grant was confirmed by the same description by the board of land commissioners on February 14, 1854, and by the United States district court on February 18, 1859. Among the things which defendant "proved by testimony and established" was that the tract in controversy was "within the boundaries designated and set forth in the said decree of the board of land commissioners and the United States district court." And this was expressly stipulated on the motion for new trial. Was this grant *sub judice* at the time of the location of the line of the road, viz., on April 16, 1868? The decree of the district court was affirmed by the supreme court in 1861; the mandate being filed in the lower court in October, 1865. In that year a "final" survey was made by one Dyer, a deputy in the office of the surveyor general. By this survey it would seem that nearly 10 leagues were included in the description above given. This survey was approved by the surveyor general in 1867, and by the commissioner of the land-office in 1868, but was set aside by the secretary of the interior on July 30, 1868, on the ground that it included a great deal more land than the two leagues which the grantees were entitled to. A new survey was made in 1869, and approved by the secretary of the interior in 1871, and a patent for the two leagues was issued upon this last survey on August 20, 1872.

We think that the grant must be considered *sub judice* until the final survey was approved by the secretary of the interior. The underlying idea of the decision on the former appeal, and of the case which it followed, (*Newhall v. Sanger*, 92 U. S. 761,) was that congress had not by its grant undertaken to prejudice the validity of claims then pending, but had intended to except the land covered by such claims from the operation of its grant to the company. Now, to say that the congressional grant covered land within the exterior limits of a Mexican grant at a time when it could not be known what

portion within those limits the Mexican grant would take, is to say that congress *had* prejudged the matter. Until a final survey was made, it could not be known what portion within the exterior limits the two leagues would cover; and until such survey was approved by the secretary of the interior it was subject to be set aside by him, as was the case with the Dyer survey, made in 1865.

If, therefore, the case stood as it did at the close of the defendant's evidence, it would, we think, be perfectly clear that the judgment should be affirmed. But, in order to overcome the effect of the defendant's evidence, the plaintiff proved that a "preliminary" survey had been made in 1854 by one Lewis, a deputy in the surveyor general's office. This survey included about four leagues, but did not take in the land in controversy here. It was "approved" by the surveyor general, but the date of such approval does not appear. The plaintiff also put in evidence proceedings in the land-office in contests between other parties, and the opinions therein of the commissioner of the land-office and the secretary of the interior, to the effect that land outside of the Lewis survey was not a part of the ranch; in other words that the Lewis survey established the exterior limits of the Mexican grant. As a matter of course, the defendant here, not having been a party to such proceedings, cannot be affected by them. They were probably offered by counsel to show that, in the view of the authorities of the land-office, the Lewis survey established the exterior boundaries of the *rancho*, and were doubtless admitted by the court below upon the somewhat loose principle that, inasmuch as there was no jury, they could do no harm.

It is a very serious question whether the appellant is not precluded by his stipulation from maintaining that the Lewis survey established the exterior boundaries of the *rancho*. He stipulated in the court below that the tract in controversy is outside of the Lewis survey, and his argument here is based upon that fact, which is necessary to his position. Taking that fact as established, it follows that, if the Lewis survey established the exterior boundaries, the tract in controversy must be outside of them. But the appellant further stipulated in the court below that the tract in controversy is *within* the exterior boundaries. Can he, in the face of this stipulation, be permitted to affirm on appeal that the tract is *not* within those boundaries? This argument does not cut both ways. It is true that the respondent stipulated that the tract is outside of the Lewis survey; but he has not stipulated, and does not affirm, that the Lewis survey established the exterior boundaries of the *rancho*. If, however, we assume, in favor of the appellant, that he is not precluded by the stipulation from maintaining that the Lewis survey established the exterior boundaries of the *rancho*, we must, with submission to the learned commissioner of the land-office and the learned secretary of the interior, be permitted to doubt whether this survey had any such effect. We are unable to see how a "preliminary" survey, made before the decree of the district court, could be final, or how, if it was not final, it could "establish" the exterior boundaries of the *rancho*. The time to appeal to the district court had not expired, and therefore the case was then pending; and that is equivalent to saying that it was *sub judice*. To say that a pending case is not *sub judice* is a contradiction in terms. It is equally a contradiction in terms to say that a "preliminary" survey could effect a final segregation. For this reason it seems to us very clear that this survey did not "establish" anything, and we should dismiss the subject without further consideration were it not for the deference due to the opinion of the learned heads of the land department. Their opinion seems to us to rest upon several unfounded assumptions, which we will examine.

1. It is assumed that the Lewis survey was intended to be of the exterior boundaries of the *rancho*, as distinct from the tract claimed by the grantees; and that, although the survey did not stand as a delineation of the tract to

which the grantees were entitled, it might stand as a delineation of a larger tract within which the tract claimed by the grantees was to be located. We see nothing in the record before us which justifies this assumption. In the instructions of the surveyor general to Lewis, it is stated that the attorneys for one of the claimants had applied for a survey of Las Pocitas, "a tract of land claimed by the latter;" that "the claim" had been confirmed, as per the description above quoted, by the board of land commissioners; and that the survey made was to "conform to the above decree." Lewis, who was called as a witness, testified that what he made out was "the initiatory survey of the Rancho Las Pocitas claimed by Robert Livermore." We see nothing to indicate that the survey was intended to be of a tract from which the claim of Livermore was to be segregated. It purported to be what he claimed. It did not stand for this; and we do not see how it can stand for something else which it did not purport to be.

2. It is assumed that the survey was made in pursuance of a statute of the United States. The opinion of Commissioner Drummond says that the survey was "evidently made pursuant to act of congress approved August 31, 1852." The only act of this date which has any relation to the matter is the general appropriation bill, which contains the following provision: "For surveying private land claims in California which may have been presented in good faith to the board of land commissioners, \$22,500: provided, that the authority hereby conferred upon the surveyor general shall apply only to such unconfirmed cases as in the gradual extension of the lines of the public surveys he shall find within the immediate sphere of his operations, and which he is satisfied ought to be respected and actually surveyed in advance of confirmation." 10 St. U. S. 91. This claim was not "unconfirmed" by the land commission; it does not appear to have been "within the immediate sphere of his operations" upon the public surveys; and, what seems absolutely conclusive, it was not a survey made at public expense, and hence could not come within the purview of a provision appropriating public money. The surveyor general, in his instructions to Lewis, expressly says to him: "As this is a preliminary survey, for your compensation you will make arrangements with the claimant. I shall add that *under no circumstances will this office be responsible* for any surveys connected with the execution of these instructions." The survey, then, was not made under the above-mentioned act of 1852, as supposed by the learned commissioner. He refers for illustration to the act of March 3, 1853; but it is apparent that this act had nothing to do with the Lewis survey. It provides that the surveyor general "shall also cause all private claims to be surveyed after they have been confirmed, so far as may be necessary to complete the surveys of the public lands;" and that "for surveying the base and meridian lines, and *private claims*, and meandering navigable waters, the deputy surveyor shall be allowed not exceeding \$16 per mile." 10 St. U. S. 245. This provision is for a survey to be made at the public expense where necessary "to complete the surveys of the public lands." The Lewis survey does not appear to have been necessary for that purpose, and was made at the expense of private parties.

It may be added, although it is not suggested by the learned commissioner, that it was not made under the act of 1860, and hence is not within the decision of *Railroad Co. v. Garcia*, 64 Cal. 515, 2 Pac. Rep. 397. The act of 1860, upon which that case was decided, was passed more than five years after the Lewis survey was made. If it be assumed that it could have any relation to the Lewis survey, there is nothing in the record to show that the publication required by the act was had. We see nothing to indicate that the survey had any official character or stamp. It was expressly said to be merely "preliminary," and was made at private expense; the surveyor general instructing his deputy to "run any lines which any contending parties may desire you to run, if they are willing adequately to compensate you for such work;" and "to

qualify *as if* performing public work." The probability is that the claimants knew that no final survey could be had until the matter had passed through the courts, or the time to appeal had expired, but wanted for their own information to get an approximate idea of where their lines would run; hence this "preliminary" survey.

3. The opinion of the learned commissioner seems to assume that this preliminary survey, which had no force of itself, could derive force from the acts *in pais* of the claimants; for he dwells at some length upon the fact that the survey was made at the instance of the claimants, who assisted therein, and consequently knew all about where the lines were run, but made no sort of protest or objection thereto. Of this it may be remarked that the record here does not show any such condition of affairs; the statements in the opinion of the commissioner not being evidence against the defendant. But, in addition to this, we do not think that the word "claim," as used in the legislation on the subject, was intended to be controlled or defined by the conduct of the parties. That would be too vague and uncertain a test. The "claims" referred to must have been founded upon writings. And where, as here, the writings were presented to and confirmed by the land commission, the description in the decree could not be added to or varied by the acts *in pais* of the parties. The principal of estoppel can have no application. In the first place, no action was taken by the government, or by anybody else, upon the faith of this survey; and, in the second place, subsequent pre-emp-tions do not in any sense claim through the claimants under the Mexican grant.

We think the Lewis survey does not overcome the effect of the case made by the defendant, and we therefore advise that the judgment and order denying a new trial be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

I dissent: PATERSON, J.

74 Cal. 365

In re REINHARDT'S ESTATE. (No. 11,418.)

(*Supreme Court of California.* December 20, 1887.)

WILLS—CONSTRUCTION—ESTATE ON CONDITION—INTESTACY AS TO REMAINDER.

Testatrix bequeathed to her husband the use and income of all her property as long as he remained a widower, without power to dispose of or incumber the same, and with the proviso that, should he marry again, her share in the common property should go to her children. *Held* that, under this will, the husband was entitled to the use and income of the property as long as he remained a widower, and, as to the fee, the decedent died intestate, and one-third should go to the husband, and the remaining two-thirds to the children, in accordance with the provisions of Civil Code Cal. § 1386, regulating the distribution of estates.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

This was an appeal from a decree of distribution of the estate of Caroline Reinhardt, deceased. The appeal is brought by the children of the deceased, namely: Augusta Henrici, Flora Muller, Charlotte Brand, and Louis Reinhardt, and J. C. Bates and G. A. Fudickar as assignees of Augusta Henrici. The respondent is John B. Reinhardt, husband of the deceased.

J. M. Wood and Jos. Rothschild, for appellants. Stanly, Stony & Hayes, for respondent.

THORNTON, J. This is an appeal from a decree of distribution made and entered by the superior court of the city and county of San Francisco.

The case here presented turns on the meaning of the following portion of the will of the deceased above named: "I give and bequeath to my said husband, John B. Reinhardt, the use and income of all my property of which I may die possessed, to his sole use and benefit, as long as he remains my widower; provided, however, and it is hereby made an express condition, that he shall not be authorized to sell, convey, or dispose of, or mortgage, or in any way incumber, any of such property. But, in case he should marry again, then I direct that my share in the common property shall go to my children." The property subject to distribution, and distributed by the decree, was the *separate* property of the testatrix. No common property is involved herein, for there was none at the time the decree was rendered. J. B. Reinhardt, the husband mentioned in the will, remained unmarried and a widower. Four children survive the testatrix. The court held that J. B. Reinhardt took and held the use and income of the estate under the will as long as he remained the widower of the deceased; that is, that he took a determinable life-estate under the will only; and as to all the estate, except this determinable life-estate, the decedent died intestate. The court, having so held, then proceeded to distribute the estate according to the statute of descent in this state, and ordered its distribution as follows: To J. B. Reinhardt, widower of said deceased above named, the use and income of all the real and personal estate of decedent, and an undivided one-third in fee of said estate; to the children, or those who represented them, the residue.

There can be no doubt that the husband, J. B. Reinhardt, took a determinable life-estate, as the court ruled. That the remaining portion of the fee is undisposed of by the will is equally clear. We say "portion of the fee remaining," for the reason that the particular estate and the remainder, and, here, the life-estate, and that which is left at its termination, constitute one estate,—the fee. They are different and distinct parts of one whole. 2 Bl. Comm. 164. There is in the will no disposition of the residuum. We can perceive nothing in the words, "but, in case he should marry again, then I direct that my share of the common property shall go to my children," adverse to such a conclusion. The fact that there was no common property of the testatrix does not alter the words of the devise of the common property; nor does the ignorance of the testator of the signification of the words used by him in a will affect the meaning which should attach to them.

A will is to be construed according to the intention of the testator. Civil Code, § 1317. The intent is to be deduced from the words of the will. The meaning of the words employed in the will evince the intent. These words "must be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained." Civil Code, § 1324. "Where the words employed are *technical*, they are to be taken in their technical sense, unless the context clearly indicates a contrary intention." Civil Code, § 1327. There is nothing in the context here which shows that the words "common property" were not used in their technical sense. To give a different sense to the words of a will, because the testator did not know their meaning, would be contrary to every rule adopted for the construction of such instruments, and would in effect do away with the statute which requires them to be in writing. There is nothing inconsistent in devising the use and income of separate property to one for life, leaving the residue of the separate property undisposed of, and the common property to another when the life-estate terminates. If the testator had no power to devise common property, or had none to devise, we cannot see that the meaning of the words of the will would be changed or affected thereby. A devise of common property when there was none would not convey separate property. If a testator thought, as a matter of law, or was so

advised by counsel learned in the law, that he could pass a right to it by will, while under the law he could not, it could not be held, unless we disregard the law, that such a provision in a will should be construed to refer to and pass property which he could devise. As well might it be contended that a bequest of a watch, when the testator did not have one to bequeath, would pass some other article of personal property; or that a devise of a city lot, when the testator did not own one, would pass a farm in the country. As to the remainder of the separate property after the life-estate carved out of the fee has come to an end, the will is absolutely silent, unless we can hold that a life-estate of such property is the fee, which would be absurd.

We can find nothing in the will before us which tends to maintain the view that the children of the testator took the whole property distributed when the surviving husband married or died, under a devise arising by implication. As to the portion of the fee remaining on the termination of the life-estate, the will, as we have said above, and we say again, is silent. There is, then, nothing to support the implication. The foundation is wanting on which such implication can arise or stand. The implication must arise from and stand on something expressed in the will. It must be deduced from something said in the will. When the will is silent, and there is nothing from which an implication can be deduced, no implication can be indulged. We can discover in the will before us no devise by implication of the character mentioned. There is nothing in the point just discussed to alter the conclusion of intestacy heretofore announced.

If a larger estate will not be implied where a smaller estate is expressly granted, and we think this is sound law, (see Schouler, Wills, §§ 559, 561,) it cannot be held that a bequest or devise of common property is under any circumstances a bequest of separate property. *Nickerson v. Bowly*, 8 Metc. 424, supports the result we have reached. The case cited arose upon the will of Thomas Rider, which was in these words: "As to such worldly interests as God hath been pleased to bless me with in this life, I give, bequeath, devise, and dispose of the same in the following manner, viz.: I give and bequeath to my wife, Polly Rider, the use and improvement of all my estate, real and personal and mixed, for her own use and benefit, so long as she may continue my widow. I also constitute and appoint my wife, Polly Rider, to be executor of this, my last will and testament." No other disposition of any part of the testator's estate was made by will. He left no issue. Polly Rider died unmarried, having enjoyed the use and improvement of the estate during her life. She left a will appointing Bowly, the appellee, her executor. On the distribution of Thomas Rider's estate, one-half of it was decreed to the executor of Polly Rider, (In the report of this case there is some confusion in the name of the testator. The name is stated on page 424 to be Thomas Rider. On the succeeding page, in stating the estate to be distributed under the will, it is said to be that of David Rider. The words used are "said David Rider." As there is no David Rider mentioned before, and Thomas Rider is the only one of that name mentioned, the implication is irresistible that the estate distributed was that of Thomas Rider.) The opinion is by SHAW, C. J., (no one dissenting.) After referring to the statute of distributions, under which the widow of an intestate, there being no issue, was entitled to have one-half of the estate distributed to her, he proceeded: "It is a well-established rule of law that the right to a distributive share of personal estate, under the statute of distributions, is a vested interest, vesting, in point of right, at the time of the decease of the intestate, although the persons to take, and the amount to be received, must be ascertained and determined by a decree of the probate court; which, from various causes affecting the settlement of the estate, may not be made till long afterwards. *Davers v. Dewes*, 3 P. Wms. 49, note; *Foster v. Fifield*, and *Hayward v. Hayward*, 20 Pick. 70, 519. It seems to follow as a necessary consequence that Mrs. Rider's vested right to one-half

of the personal property, subject to the gift of the use thereof to herself for life, like all other vested rights to personal property, went to her personal representatives. Such was the view which appears to have been taken of the case by the probate court; and we are of opinion that it was correct."

In the case cited, it was urged that it could not be reasonably inferred that it was the intention of the testator, after giving the property to his wife for life, that he intended that the life-tenant should have any part of it absolutely, and, in the absence of all expression of his intentions, it should be construed as a gift to his heirs by implication. As to this, the learned justice said: "A gift by implication must be founded upon some expressions in the will from which such intention can be inferred. It cannot be inferred from an absolute silence on the subject. It may be admitted, in a popular sense, that, when a deceased person has given a part of his property to one object of his bounty, he had no intention that such person should take another portion. But we think the true answer is that the intention of the testator is to govern so far only as he has communicated that intention *by his will*, either in terms or by implication; but, if he has left undevise property, the disposition of it is not governed by his will, but by another rule, having its origin in another source, in the application of which the intent of the testator is not the governing rule, and can have no influence. It operates in the same manner as if the deceased had left no other property, and made no will. If, therefore, the intent of the testator not to give the remainder to the same person could reasonably be inferred from a gift of personal property to one for life, in terms, it could have no effect in regulating the disposition of intestate property. If, however, it were thought important to inquire into the intent of the deceased, where he has made a will, but left property undisposed of, either in terms or by implication, as every man is presumed to know the law, it may reasonably be inferred as his *intention* that the residue should be disposed of according to law." The opinion then proceeds to state that the point seems to be well settled, both in England and Massachusetts, and cites *Davers v. Dewes*, 3 P. Wms. 40; *Dicks v. Lambert*, 4 Ves. 725. 732; *Briggs v. Hosford*, 22 Pick. 288; *Ex parte Kempton*, 23 Pick. 163. See, also, Schouler, Wills, § 568, and cases cited in notes. In the case just above cited the parties setting up the claim to the part distributed to the representative of Polly Rider were collateral heirs, and personal property was also involved. But these facts do not detract from it as authority here. We will add further, in the case cited by counsel for appellant (*Robinson v. Greene*, 14 R. I. 181) a devise by implication was allowed because the conclusion was irresistible. The court so said; at the same time observing that "the rule in regard to devises and bequests by implication is very strict." Page 101.

The subject of devises raised by implication is much discussed in *Parker v. Tootal*, 11 H. L. Cas. 143. We think the conclusion here reached is sustained by what is said in that case. We refer particularly to the observations of the lord chancellor (WESTBURY) on page 162, as well as to the judgments of the other law lords therein. Lord WESTBURY, in his argument, lays stress on the rule that the intention must be collected from the language that the testator has used, and that, if the language is satisfied by going to a certain extent, there is no obligation to go further; which last is, in our judgment, but saying that a court cannot go further, consistently with the well-settled rule.

We are of opinion the court ruled correctly that, as to the residue of the fee above defined, the decedent, Caroline Reinhardt, died intestate. The property of persons dying intestate descends, under the statute, to those mentioned in it, of which the surviving husband is one. As to the residue of the property, not passing to the husband, of which the testator died intestate, it descended, under the statute, to her children. The intestate in this case left four children. In such a condition of the family, one-third vested at the time of the death of Caroline in the surviving husband, Reinhardt, and the other

two-thirds in her children in right, but not in its enjoyment, until the date at which they were entitled to distribution.

We find no error in the record, and the judgment is affirmed.

We concur: McFARLAND, J.; SHARPSTEIN, J.

74 Cal. 356

WALSH v. McMENOMY *et al.* (No. 11,721.)

(Supreme Court of California. December 20, 1887.)

1. MECHANIC'S LIEN—MATERIAL MEN—RIGHTS AGAINST OWNER—PAYMENTS MADE BEFORE DUE.

Under the California mechanic's lien law, as it existed prior to the amendment of March 18, 1885, the liens of material-men furnishing materials to a contractor are subject to the original contract. *Held*, that where, by the terms of the contract, a portion of the price is to be paid as the work progresses, and the balance a month after the work is completed, the owner, if he pays the full price before it becomes due, is liable to the material-man for materials furnished to the extent of the money thus paid before due.

2. SAME—PRIORITIES—HOMESTEAD.

Civil Code Cal. § 1240, provides that a homestead is not exempt from execution or forced sale on debts secured by mechanics', laborers', or vendors' liens upon the premises. *Held* that, under this section, a homestead cannot be sold under the lien of a material-man, even though the materials were furnished before the homestead was declared, the lien being filed subsequent to the declaration.¹

THORNTON, J., dissenting.

In bank. Appeal from superior court, Los Angeles county; A. BRUNSON, Judge.

This was an action brought by T. Walsh against J. C. McMenemy, Mary McMenemy, his wife, and George Brittlestone, to enforce a lien for materials furnished to said Brittlestone, as contractor, to be used in the construction of a house for said McMenemy. Judgment was rendered for the plaintiff, and defendants appealed.

Bicknell & White and *H. T. Gage*, for appellants. *Barclay & Wilson* and *Wells, Van Dyke & Lee*, for respondent.

SEARLS, C. J. This is an action to foreclose a mechanic's lien in favor of a material-man, and for labor performed. Plaintiff had judgment; from which, and from an order denying a new trial, defendants J. C. McMenemy and Mary J. McMenemy, his wife, appeal. The defendant Mary J. McMenemy owned a lot of land in the city of Los Angeles. Her husband, J. C. McMenemy, in 1884, made a contract with the defendant Brittlestone to build a house upon said lot of land. By the terms of the contract, 75 per cent. of the value of the work done was to be paid to the contractor upon the certificate of the architect, as the work progressed, and the balance of the contract price was to be paid within 35 days after the completion and delivery of the house, upon a certificate of the architect that the work had been done. Plaintiff furnished material to the contractor, which was used in the construction of the building, and finally the contractor, having failed to complete the work, performed labor to a small extent thereon, and it was completed within the time provided by the bondsmen of the contractor, without other expense to the owner than the contract price, which was \$1,930. The building was completed April 28, 1885, accepted by McMenemy and wife, who went into possession, and have ever since occupied it. In January, 1885, and before the building was completed, defendant J. C. McMenemy paid the contractor in full for the erection of the building; all of which, except \$1,100, was paid without any certificate

¹Respecting what debts will prevail over a claim of homestead exemption, see *Berry v. Ewing*, (Mo.) 3 S. W. Rep. 877; *Butler v. Nelson*, (Iowa,) 32 N. W. Rep. 399; *Roberts v. Riggs*, (Ky.) 1 S. W. Rep. 431; *Holcomb v. Hood*, Id. 401, and note.

from the architect, and before it fell due, and after plaintiff had notified him of his demand. The court finds that defendant Mary J. McMenomy had knowledge of the contract, and of the erection of the house upon her land, and consented to the same. Plaintiff's lien was filed May 25, 1885. Defendants McMenomy filed a homestead on the property in question, May 2, 1885. This was after the material was furnished by plaintiff, and used in the building, but, as may be seen, before plaintiff's lien was filed. Appellants make two points upon the judgment roll, viz.: (1) "The contract price having been paid before the filing of the lien, plaintiff has no cause of action;" (2) "the fact that a homestead was declared upon the premises prior to the filing of the notice of lien is itself sufficient to defeat this action."

Upon the first proposition, it has been held that under the law as it existed prior to the amendment of March 18, 1885, the liens of material-men furnishing materials to a contractor, and of laborers under such contractor, are subject to the original contract; and if, in accordance with the original contract, such contractor has been paid in full, or if, by reason of abandoning the contract, nothing remains due him, no lien can be enforced by the material-man or subcontractor. *Dingley v. Greene*, 54 Cal. 333, and cases there cited; *McCants v. Bush*, 70 Cal. 125, 11 Pac. Rep. 601; *Wiggins v. Bridge*, 70 Cal. 437, 11 Pac. Rep. 754; *Turner v. Strenzel*, 70 Cal. 28, 11 Pac. Rep. 389. The subcontractor cannot acquire any rights against the owner in violation of the terms of the original contract, and knowledge of a contract in writing by the owner with the original contractor charges him with notice. *Bowen v. Aubrey*, 22 Cal. 566. But, if the material-man and subcontractor are bound by the contract between the owner and original contractor, it should follow that when a contract is made by the owner for the construction of a building, by the terms of which a portion of the contract price is not due until after the building is completed, and when, as here, materials have been furnished for and used in the construction, presumably in view of such contract, and when thereafter, and with notice thereof, the owner pays his original contractor before the building is completed, and before the money is due, he must be held liable to the material-man to the extent of the money thus prematurely paid. To hold otherwise would be to enable the owner to practice a fraud; and the contract, instead of a chart for the direction of material-men, subcontractors, and laborers under the original contractor, would become a delusion and a fraud. We think this conclusion is fairly deducible from *Renton v. Conley*, 49 Cal. 185; *Quale v. Moon*, 48 Cal. 478, and other adjudicated cases,—in which, although the question is not directly adjudicated, yet the court in holding the owner not to be liable takes care to show his payments to have been made in compliance with the contract.

Does the fact that the homestead was declared upon the premises after the materials were furnished, but before the lien therefor was filed, defeat the lien? Homesteads, prior to March 9, 1887, were subject to execution or forced sale in satisfaction of judgments obtained—(1) * * *; (2) "on debts secured by *mechanics', laborers', or vendors' liens*, upon the premises," etc. Civil Code, § 1241. As the section omitted from the liens for which the homestead could be sold that of *material-men*, this court held in *Richards v. Shear*, 70 Cal. 187, 11 Pac. Rep. 607, that one who furnished materials for the construction of a building on real property, after it had been impressed with a homestead, could not obtain a lien thereon for the materials furnished.

But in the case at bar the homestead did not exist when the materials were furnished, and the question arises, does this alter the case? We think not. It is true the mechanic's lien law provides that "the liens provided for in this chapter [chapter 2] are preferred to any lien, mortgage, or other incumbrance which may have attached subsequent to the time when the building, improvement, or structure was commenced, work done, or materials were commenced to be furnished; also to any lien, mortgage, or other incumbrance of which

the lienholder had no notice, and which was unrecorded at the time," etc. Code Civil Proc. § 1186. So, too, section 1185 of the same Code provides that the land upon which a building is constructed shall be subject to the lien, if, at the commencement of the work, or of the furnishing of materials for the same, the land belonged to the person who caused the building to be constructed, etc. These provisions relate to liens generally, and apply to all property to which liens can attach.

The question still remains, can a lien for materials furnished be taken and enforced against a homestead under the law as it stood prior to March 18, 1885? Section 1240 of the Civil Code, hereinbefore referred to, exempts it from execution or forced sale, except in the cases specified, viz.: In satisfaction of judgments obtained before the declaration was filed for record, which constitute liens on the premises; on debts secured by mechanics', laborers', or vendors' liens; on mortgages executed and acknowledged by husband and wife; and on debts secured by mortgages executed and recorded before the declaration of homestead was filed for record. A homestead can only be sold under execution or forced sale in these excepted cases, and, as a sale under a lien for materials furnished does not come within any of the exceptions enumerated, it cannot be enforced against the homestead. With the justice or injustice of the rule as fixed by the statute we have nothing to do. Its provisions must be enforced as to cases which arose while it was in existence. The recent change of the law will prevent this apparent injustice, to which the former statute gave rise.

The judgment and order appealed from are reversed, and the cause remanded.

We concur: PATERSON, J.; MCKINSTRY, J.; SHARPSTEIN, J.

McFARLAND, J. I concur in the judgment, on the ground that the lien of a material-man cannot be enforced against a homestead. As to the other matters discussed in the opinion of the chief justice I express no opinion.

I concur: TEMPLE, J.

I dissent: THORNTON, J.

74 Cal. 362

MACHADO v. FERNANDEZ. (No. 12,056.)

(*Supreme Court of California*. December 20, 1887.)

PRINCIPAL AND SURETY—RIGHTS OF SURETIES—CONTRIBUTION.

Plaintiff and defendant were accommodation indorsers on a promissory note, payable on demand, with interest. More than one year after its date, the payee demanded payment, and, it not being made, brought suit. Plaintiff paid it without trial. *Held*, under Civil Code Cal. § 3214, which provides that mere delay in presenting a bill of exchange, payable, with interest, at sight or demand, does not exonerate any party thereto; and section 3248, which provides that the above section applies to promissory notes,—that the delay in presenting the note for more than one year did not exonerate the indorsers from payment, and defendant was liable for contribution.¹

Commissioners' decision. In bank.

Appeal from superior court, San Bernardino county; J. A. GIBSON, Judge.

Action for contribution. Plaintiff, Juan Machado, and defendant, Vencente Fernandez, were accommodation indorsers. Plaintiff paid the debt, and sued for contribution. Defendant demurred. Demurrer sustained, and action dismissed. Plaintiff appealed.

¹A surety who voluntarily pays a promissory note is entitled to contribution from his co-sureties, notwithstanding he might have successfully resisted the enforcement of the note. *Houck v. Graham*, (Ind.) 6 N. E. Rep. 594. See note, *Id.* 599.

Harris & Allen, for appellant. *Rowell & Rowell*, for respondent.

BELCHER, C. The facts of this case, as they are shown by the complaint, are as follows: The plaintiff and the defendant were accommodation indorsers of a promissory note, which was made and dated February 26, 1885, and was payable on demand, with interest. On the ninth day of July, 1886, the payee of the note demanded payment thereof from the makers, and, his demand not being complied with, gave notice of its dishonor to the indorsers. Subsequently the payee brought suit on the note against the makers and indorsers, and thereupon the plaintiff, without any trial of the case, paid to him the full amount due for principal, interest, and costs. This action was then commenced by the plaintiff to enforce contribution from the defendant of one-half of the amount so paid. A general demurrer was interposed to the complaint and sustained. Judgment was then entered against the plaintiff, and from that judgment he has appealed.

In support of the judgment, it is argued for the respondent that as the note was payable on demand, with interest, its apparent maturity, under section 3135 of the Civil Code, was one year after its date; and as it was not presented for payment till more than four months after that time had elapsed, and no reason for not sooner presenting it was shown, the indorsers were released from all liability, and consequently the payment by plaintiff was voluntary, and no cause of action for contribution was thereby created against the defendant. It is undoubtedly true that a payment, to be the foundation of a claim for contribution, must be compulsory; that is, there must be a fixed and positive obligation to pay. And if one has voluntarily paid money where there was no fixed and positive obligation resting upon him to pay it, he cannot maintain an action for contribution. The question then is, did the mere delay in presenting the note in question for payment for more than four months after its apparent maturity release the indorsers from all obligation to pay it?

The rule upon this subject has not been uniform. For example, it was held in this state, before the Codes were adopted, that a note, payable on demand with interest, must be presented within a reasonable time, in order to hold an indorser, and that, in the absence of any showing why the demand was not sooner made, a delay of two weeks was unreasonable. *Keyes v. Fenstermaker*, 24 Cal. 329. On the other hand, it has been held in New York that such a note is a continuing security; that an indorser remains liable upon it until demand is actually made; and that the holder is not chargeable with neglect for omitting to make such demand within any particular time. *Merritt v. Todd*, 23 N. Y. 28; *Pardee v. Fish*, 60 N. Y. 265. It is claimed for the appellant that the rule announced in *Keyes v. Fenstermaker* was changed by the provisions of the Civil Code, and that, in effect, the rule prevailing in New York was adopted. The sections of the Code referred to read as follows:

"Sec. 3135. The apparent maturity of a promissory note payable at sight or on demand is, (1) if it bears interest, one year after its date; or, (2) if it does not bear interest, six months after its date."

"Sec. 3248. If a promissory note, payable on demand or at sight, without interest, is not duly presented for payment within six months from its date, the indorsers thereof are exonerated, unless such presentment is excused."

"Sec. 3214. Mere delay in presenting a bill of exchange payable, with interest, at sight or demand, does not exonerate any party thereto."

"Sec. 3247. Chapter 1 of this title, and sections 3181 and 3214 of this Code, apply to promissory notes."

Now, if section 3214 be changed so as to apply to promissory notes, it will then read: "Mere delay in presenting a promissory note, payable with interest, at sight or on demand, does not exonerate any party thereto." What party is referred to by the words, "any party thereto?" It must be the indorser, for the maker, the surety, and the guarantors are never exonerated

by any mere delay till the statute of limitations runs in their favor. It would seem, then, as claimed by the appellant, that a distinction is clearly made as to the liability of indorsers, between notes payable on demand without interest, and those payable on demand with interest. In the one case, it is clearly declared that the indorser is released from liability if the note is not duly presented for payment within six months after its date; and, in the other, that he is not released from liability by any mere delay in presenting it. If this be the correct construction of the sections cited, and we are unable to see how any other construction can be given them, it must follow that the indorsers upon the note in question were not released from their obligation to pay it because presentment and demand of payment were not sooner made. It must also follow that, when suit was brought against all the parties to the note, the plaintiff had the right to at once pay the amount due, and to then call upon the defendant to contribute his share of that amount.

In our opinion the judgment should be reversed, and the cause remanded, with directions to the court below to overrule the demurrer.

We concur: HAYNE, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded, with directions to the court below to overrule the demurrer.

74 Cal. 381

In re ABBOTT. (No. 11,159.)

(*Supreme Court of California.* December 22, 1877.)

1. **INSOLVENCY—PROCEDURE—TRIAL—ISSUE AND FINDINGS.**

On petition, under the California insolvent act of 1880, to put a debtor into involuntary insolvency, the court made findings in favor of petitioners, but omitted to state that the indebtedness arose as set forth in the petition. *Held*, that the findings were intended to and did cover the whole issue, and a new trial will not be granted for the purpose of making the language more exact.

2. **SAME—APPEAL—WHEN LIES—SUPPLEMENTAL ORDER.**

A supplemental order requiring an insolvent to verify his schedule and inventory is not appealable, under the California insolvent act of 1880, § 67.

Commissioners' decision. In bank.

Appeal from superior court, San Luis Obispo county; D. S. GREGORY, Judge.

Petition by J. F. Eubanks, William Thatcher, B. F. Broch, Phillips Bros. & Co., and Zederman & Co. to adjudge Alvin B. Abbott an insolvent debtor. A decree granting the prayer of the petition was entered in March, 1885; and from this, and an order to verify a schedule and inventory filed in the court, the insolvent appeals.

Wm. Shipsey and J. R. Patton, for appellant. *McD. R. Venable and C. W. Goodchild*, for respondent.

BELCHER, C. C. This is a proceeding commenced under the insolvent act of 1880 for the purpose of putting Alvin B. Abbott, an alleged insolvent, into involuntary insolvency. The court below adjudged him to be an insolvent debtor, and he has appealed; the case coming here on the judgment roll. Two points only are made by the appellant.

1. The petition was signed by five creditors only; one of them being Zederman & Co. In the petition it is alleged that "the said Alvin B. Abbott is indebted to said firm of Zederman & Co. in the sum of \$86.36, on an account for goods, wares, and merchandise sold and delivered by said firm to said Abbott at his instance and request," etc.; and also that "the said Alvin B. Abbott is further indebted to said firm of Zederman & Co. in the sum of \$5, for monies paid on March 11, 1884, by said firm to one ——— Miller, at the written

request of said Abbott." The answer denied that appellant "is or ever was indebted to the firm of Zederman & Co. in the sum of \$86.36, or in any sum on an account for goods, wares, or merchandise sold or delivered by said firm to him, or for any other cause or thing." And it also denied that "he is indebted to said Zederman & Co. in the sum of \$5, or in any sum whatsoever, for money paid by said firm to ——— Miller, or to any other person, at the written request of said Abbott or otherwise." The court found that Abbott was on October 13, 1884, the time when the proceeding was commenced, and still is, indebted to Zederman & Co. "in a certain sum of money, to-wit, \$91.36, and that said firm of Zederman & Co. was on October 13, 1884, and still is, a creditor of said Alvin B. Abbott." It is claimed for the appellant that the finding is insufficient, because it does not appear from it that the indebtedness arose in the manner stated in the petition. But we think the finding can be sustained. The real question at issue was as to whether or not Zederman & Co. were creditors of Abbott, and this, as an ultimate fact, is clearly found against him. Besides, the amount of the indebtedness is named, and it exactly agrees with the aggregate of the sums named in the petition. The finding seems to have been intended to cover the whole issue, and we think it substantially does so. And, as said in *McKinney v. Smith*, 21 Cal. 385: "It is not requisite to order a new trial for the purpose of having the language of the finding made more exact, when it is sufficiently distinct as to the subject-matter of the action."

2. The order adjudging Abbott an insolvent directed "that said Alvin B. Abbott file in this court, within fifteen days from date hereof, a schedule and inventory in accordance with sections 3 and 4 of said act." Abbott filed an unverified schedule and inventory, and then the court made the following supplemental order. "It appearing to the court that the schedule and inventory filed herein by the above-named Alvin B. Abbott, on the thirteenth day of April, 1885, is not verified, now, on motion of counsel for petitioning creditors herein, it is ordered that the said Alvin B. Abbott file in this court, within three days after service upon him of a copy of this order, a schedule and inventory, in accordance with sections 3 and 4 of the insolvent act of 1880, verified by his affidavit." It is claimed that the court erred in requiring Abbott to verify his schedule and inventory; that sections 3 and 4 of the act are silent upon the subject of verification; and that section 5, which does provide for it, applies only to voluntary insolvents. The answer to this objection is that the order is not an appealable one, and we are therefore precluded from expressing any opinion in reference to it. Insolvent act 1880, § 67.

It follows that the order adjudging Abbott an insolvent should be affirmed, and the appeal from the order requiring him to file a verified schedule and inventory should be dismissed.

I concur: FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the order adjudging Abbott insolvent is affirmed, and the appeal from the order requiring him to file a verified schedule and inventory is dismissed.

74 Cal. 413

WELCH v. STROTHER, Auditor. (No. 12,282.)
(*Supreme Court of California.* December 23, 1887.)

1. COUNTIES—LIMIT OF LIABILITY—SALARIES OF OFFICERS FIXED BY LAW.

Act Cal. February 27, 1878, provided that neither the board of supervisors, nor any officer having power to authorize or contract liabilities against the county, shall authorize, contract for, or pay, in any one month, any demand against the treasury, or any of the funds thereof, which shall exceed one-twelfth of the amount allowed by law to be expended in the fiscal year of which the month is a part

Held, that salaries of officers fixed by law do not rest upon the authorization of the board of supervisors, or any officer, nor are they subject to their control, and consequently do not fall within the provisions of the act.

2. SAME.

Act Cal. February 27, 1878, provided that no county officer shall pay in any month demands against the treasury exceeding in amount one-twelfth of the amount allowed to be expended in the year. The board of supervisors of San Francisco county limited the expense of the county clerk's office for deputies and copyists to \$72,000 per year. The auditor of the county refused to audit the bills of the county clerk's office for a certain month, because they aggregated \$8,000. These bills included salaries fixed by law. On application for *mandamus* to compel the audit of the claims, the auditor based his answer upon Const. Cal. art. 11, § 18, which provides that no county shall incur any indebtedness exceeding in any one year the income and revenue provided for it for such year, without the assent of two-thirds of the electors. *Held*, that the amount fixed by the board of supervisors is not the limit of the revenue of the county clerk's office for salaries fixed by law, they being made payable out of the general fund of the county, and, in the absence of any showing that the general fund would be exhausted thereby, payment cannot be excused by the prohibition in the constitution.

In bank. Application for a writ of *mandamus*.

This was an application by L. W. Welch for a writ of *mandamus* directed to Fleet W. Strother, auditor of San Francisco county, commanding him to audit a claim for salary presented by the petitioner. The respondent moved to quash the writ, which motion was denied, and the respondent given 10 days to answer. The application now comes on to be heard on the merits.

McAllister & Bergin, for petitioner. *George Flournoy, Jr.*, City and Co. Atty., (*Samuel M. Wilson*, of counsel,) for respondent.

MCFARLAND, J. During the month of July, 1887, the petitioner was a regularly appointed and acting deputy county clerk of the city and county of San Francisco, being register clerk of department 4 of the superior court of said city and county. His salary was fixed by law at \$175 per month. In August, 1887, he presented his demand for his salary for the preceding month of July to the respondent, who was and is the auditor of said city and county, and he refused to audit the same. Petitioner then commenced this proceeding in *mandamus* in this court to compel the respondent to audit said demand.

The refusal of the respondent seems to have been based mainly upon these grounds: The board of supervisors passed an order fixing the estimate of expenses for "county clerk's deputies' and copyists' salaries" for the year at \$72,000, and providing that such expense should be limited to that amount. And by an act of the legislature, relating to said city and county, passed February 27, 1878,—usually called the "One-Twelfth Act,"—it was enacted that neither the board of supervisors, nor any other officer having the power "to authorize or contract liabilities against the treasury," shall authorize, contract for, pay, etc., in any one month, any demand or demands against the treasury, or any of the funds thereof, which shall exceed one twelfth part of the amount allowed by laws existing at the time of such contract authorized, etc., to be expended within the fiscal year of which said month is a part. Worley's Consolidation Act, 219.

The said demand upon respondent was made on behalf of petitioner by the county clerk of said city and county, who at the same time presented demands of other deputy clerks and copyists in said month of July, which amounted in the aggregate to over \$8,000; and respondent refused to audit any of them, because they were in excess of one-twelfth of the \$72,000 which the board had declared to be the limit of such expenses for the year, as aforesaid. But this ground of refusal was expressly held by this court to be untenable in *Cashin v. Dunn*, 58 Cal. 582. That case was *mandamus* against the auditor, on application of a deputy street superintendent, to compel the former to audit the monthly salary of the latter. The defense set up was that

to audit the demand would be to allow in one month more than one-twelfth of the whole amount appropriated for the current fiscal year by the board of supervisors for the payment of salaries of deputies of the office of superintendent of streets. But the court held that the "One-Twelfth Act," (so called) "has no application to the auditing and payment of demands for salaries of officers whose appointment is provided for, and salaries fixed, by law." And we see no good reason for overruling that case, as we are asked to do by counsel for respondent. Salaries are not liabilities against the treasury which rest upon any authorization or contract by the board of supervisors, or any other officer. They are fixed by law, and are not subject to the control of such officers. They are payable out of the general fund, and are not limited to any particular part of that fund which the board may choose to set apart for their payment.

Respondent contends that the writ should not issue on account of that section of the state constitution which provides that "no county * * * shall incur any indebtedness in any manner, or for any purpose, exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors," etc. But we do not see how this point can arise on the facts of this case. Leaving out of view the meaning of the words "indebtedness" and "liability," as used in the section of the constitution just quoted, and assuming, for the sake of the argument, that they include the salary of a public officer fixed by law, it nowhere appears, as we understand it, that there would be any excess of indebtedness over the revenue provided for the year. The averment of the answer is merely that, if all the demands presented by the county clerk for the month of July had been audited, they would have exceeded the one-twelfth of the \$72,000 of the general fund to which the board had undertaken to limit the payment of these demands. Assuming, therefore, that the \$72,000 was the "income and revenue provided" for the payment of county clerks' salaries, respondent contends that if over \$6,000 had been audited for July, and a like amount should be audited for the other months, the excess of the aggregate over \$72,000 would be an indebtedness unprovided for. But the \$72,000 is not the revenue provided for the payment of salaries; they are paid out of the general fund. Moreover they are preferred claims; and there is no pretense of an averment that the payment of preferred claims would exhaust the revenue provided for the general fund. And, again, it is provided by law that, in case of a deficiency of funds for the payment of such demands, they shall be registered, and paid when there shall be such funds in the order of their registry. Const. arts. 95, 96. The demand of petitioner, therefore, should have been audited by respondent; and, as held in *Cashin v. Dunn*, *supra*, the writ of mandate is the proper remedy.

Let the writ issue as prayed for.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; TEMPLE, J.; MCKINSTRY, J.; PATERSON, J.; THORNTON, J.

HAUMEISTER v. PORTER. (No. 11,412.)

(Supreme Court of California. December 1, 1887.)

In bank.

BY THE COURT. On the authority of *Bates v. Porter*, No. 11,575, (15 Pac. Rep. 732,) the judgment herein is reversed, and the cause remanded. A like judgment will be entered herein as directed in *Bates v. Porter*.

Ordered accordingly.

74 Cal. 351

MILLER v. THAYER. (No. 11,609.)

(Supreme Court of California. December 20, 1887.)

JUDGMENT—OPERATION AND EFFECT—RES ADJUDICATA.

A purchaser of land subject to a mortgage brought an action against the mortgagee to redeem, but failed to pay the sum found in that action to be due. The

mortgagee then proceeded to foreclose, making the original owner and the purchaser parties, and offered in evidence the judgment roll in the action for redemption to show the amount due. On his disclaimer the original owner was dismissed from the action, no personal judgment against him being asked. *Held* that, the parties to the two actions being the same, the judgment roll was admissible.

In bank. Appeal from superior court, Sacramento county; T. B. McFARLAND, Judge.

H. C. Firebaugh and *L. S. Taylor*, (*A. L. Rhodes*, of counsel,) for appellant. *Estee & Nelson*, (*Beatty & Denson*, of counsel,) for respondent.

PER CURIAM. Thayer gave Miller a mortgage as security for a loan. The mortgage consisted of a deed absolute on its face, and a defeasance in a separate instrument, in which Miller agreed, upon the payment of the money, with interest, to reconvey the property to Thayer. This was certainly a proper, perhaps the only, mode of entering upon the record evidence of the satisfaction of such a mortgage. Thayer conveyed the land to Hewlett and assigned to him the contract to reconvey upon payment. Hewlett offered to Miller the money which he, Hewlett, claimed to be due, and then brought suit to compel a conveyance according to the terms of the contract. It was an action for specific performance, but under such circumstances an action to compel a specific performance is nothing else than an action for the redemption of the land, or rather to declare the mortgage satisfied. On the trial a larger sum than Hewlett had offered was found to be due. Hewlett failing to pay that amount to effect a redemption, Miller brought this suit to foreclose. It is evidently the counterpart to the suit brought by Hewlett, and the issues are in all respects the same. Thayer was not a party to that suit, but is made a defendant in this, the complaint alleging that he had, or claims to have, some interest in the premises. He answered, disclaiming any interest. No personal judgment was asked or obtained against him. The real parties to this suit, therefore, are the same as in the suit of *Hewlett v. Miller*, 63 Cal. 185. We think there was no error in the admission of the judgment roll in that case, and that it constituted an estoppel. Holding these views, it is unnecessary to discuss the other points.

Judgment affirmed.

74 Cal. 353

In re LANGAN'S ESTATE. (No. 12,142.)

(*Supreme Court of California.* December 20, 1887.)

1. WILL—CONTEST—SPECIAL ISSUES AND GENERAL VERDICT—SETTING ASIDE JUDGMENT.

When, in proceedings to probate a will, special issues were tried by jury, and the findings thereon were insufficient to support a general verdict for the contestants, a judgment entered on such general verdict was properly set aside on motion, and an appeal or motion for a new trial was unnecessary.

2. JUDGMENT—MOTION TO SET ASIDE—TIME TO MAKE.

Ten days after a judgment is entered in the superior court, which has no terms, is a reasonable time within which to move to set such judgment aside.

Commissioners' decision. In bank. Appeal from superior court, Merced county; CHAS. H. MARKS, Judge.

This was a proceeding to probate the will of Honora Langan. A contest arose, and the following special issues were submitted to a jury: (1) Was the said Honora Langan, deceased, of sound mind at the time of the execution of said alleged will? (2) Was the said alleged will signed by the said Honora Langan? (3) Was the said alleged will declared by said Honora Langan to be her last will, and attested as required by law? (4) If said alleged will was signed by said Honora Langan, or by some one at her request, was she, the said Honora Langan, then under the duress or under influence of, or acting by the menace or fraud of, Thomas F. Langan and Jane Langan, his wife, or either of them? (5) Was the instrument now offered for probate subscribed at the end thereof by the testator, or by some person for her and

in her behalf, in her presence and by her direction? (6) Was the name of the said Honora Langan signed to said instrument at the end thereof by another person than herself, but under her direction and in her presence and at her request? If the answer to the last question is in the affirmative, then answer the following: (7) Did such other person who so signed her name to said instrument, thereupon, in her presence, and at her request, write his own name near said signature of said Honora Langan, as a witness to her said signature?

As to special issues 1, 2, and 4, the jury disagreed; to 3 and 7 they answered, "No;" and to 5 and 6, "Yes;" and also found a general verdict for the contestants. Judgment for the contestants was entered on the verdict and special findings of the jury, but was afterwards set aside as unwarranted by such verdict and findings.

Frank H. Farrar, for appellants. *J. K. Law* and *F. M. Ostrander*, for respondents.

BELCHER, C. This is an appeal from an order vacating and setting aside a judgment. The question grows out of the contest of a will, in which several special issues were framed and tried before a jury. The jurors returned a general verdict in favor of the contestants, and found for them on the issues numbered 3 and 7, and against them on those numbered 5 and 6; and they disagreed and returned no verdict on those numbered 1, 2, and 4. Upon the verdict so returned, a judgment denying probate of the will was entered on the thirtieth day of September, 1886, and within 10 days thereafter the motion to set it aside was made.

It is claimed for the contestants, appellants here, that the respondents' only remedy was a motion for new trial or appeal, and that the court had no jurisdiction to make the order complained of. We think the court had jurisdiction to make the order, and that its action under the circumstances was proper. The general verdict was not authorized, and consequently furnished no support for the judgment. Code Civil Proc. §§ 1312, 1314. The finding upon issue No. 3 was a finding of conclusions of law and not of fact. *Paulsen v. Nunan*, 64 Cal. 290. And the finding upon issue No. 7 was upon an immaterial and irrelevant matter. *Estate of Toomes*, 54 Cal. 509. We have, then, a case where there was simply a mistrial, and where there was no lawful authority to enter any judgment. In this respect the case would have been the same if there had been no pretense of a trial. A judgment entered under such circumstances is void and may be set aside on motion.

As the superior court has no terms, a motion to set aside a judgment should be made within a reasonable time, and we think the motion here was so made. *Ex parte Gillmore*, 12 Pac. Rep. 800.

The order should be affirmed.

We concur: HAYNE, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

74 Cal. 345

TOLMAN v. SMITH *et al.*, (REED, Intervenor.) (No. 12,177.)

(Supreme Court of California. December 20, 1887.)

HUSBAND AND WIFE — WIFE'S SEPARATE ESTATE — CONVEYANCES — MORTGAGE — ACKNOWLEDGMENT.

Civil Code Cal. § 1186, provides that the acknowledgment of a married woman to an "instrument" purporting to be executed by her must not be taken unless she is made acquainted by the officer with the contents of the instrument, on an examination, without the hearing of her husband, nor certified unless she thereupon acknowledges that she executed the instrument, and does not wish to retract such

execution; and section 1189 provides that a "conveyance" by a married woman must be acknowledged in the same manner. *Held*, that a mortgage given by a married woman upon her separate estate is an "instrument" and "conveyance" within the meaning of those sections, and is invalid unless acknowledged with the formalities therein prescribed.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; A. BRUNSON, Judge.

H. M. Smith, W. H. Clark, and Victor Montgomery, for appellants. *Holloway & Kendrick*, for respondent.

FOOTE, C. This is an action to correct a defective acknowledgment to a mortgage as against Eunice W. Smith, a married woman, and others, and to foreclose the same. William Reed intervened, in order to foreclose two mortgages upon the property included in the instrument sought first to be foreclosed. Plaintiff Tolman pleaded full satisfaction of Reed's mortgages. The court found in favor of the plaintiff on that issue. Judgment was rendered by that tribunal in favor of the plaintiff against Eunice W. Smith as prayed for, and that the mortgages of the intervenor, Reed, be canceled and declared satisfied. Eunice W. Smith and Reed are the only parties who appeal from the judgment and an order denying a new trial.

The answer of Eunice W. Smith denied that she had acknowledged the mortgage sought to be foreclosed against her, in the manner required by sections 1186 and 1191 of the Civil Code, and alleged that she "was not made acquainted with the contents of said instrument, without the hearing of her said husband, by a notary public or other officer authorized to take such acknowledgments," and further alleges "that she did not acknowledge to such officer that she had executed said instrument, and did not wish to retract such execution, and that defendant, therefore, denies that she executed a mortgage to secure the payment of said note, or at all, as is alleged in said complaint." The defendants objected to the introduction in evidence of the mortgage, but the objection was overruled, and that instrument was admitted in evidence. The defendant Eunice W. Smith also set up in her answer, upon which the court made no finding, that she signed the note, which the alleged mortgage was intended to secure, not for any debt of her own, but for and on account of an antecedent debt of her husband. The court found that as a fact the property included in the mortgage was her separate property, and that the mortgage was never acknowledged by her in the manner and form, or substantially as required by sections 1186 and 1191 of the Civil Code of California; that at the time she signed said mortgage she had full knowledge of its contents, derived, however, solely from her husband, and that she signed the same for the purpose and with the intent of charging the real estate therein mentioned with a mortgage lien to secure the payment of a promissory note which she had signed with her husband, but that she was not at that time, nor at any other time, made acquainted with the contents of the mortgage by the notary public who took her acknowledgment thereto, and that she never acknowledged to said notary public, without the hearing of her husband, that she did not wish to retract the execution of said instrument. As a conclusion of law based upon this state of facts, the court found that "the plaintiff's mortgage was never duly acknowledged by Eunice W. Smith as a married woman, but that in equity the plaintiff is entitled to have his lien declared and enforced according to the intention and purpose of the parties as hereinbefore found."

The plaintiff contends that inasmuch as Mrs. Smith intended to execute the mortgage upon her separate property to secure her note made jointly with her husband, that the court had a right to order the mortgage to be foreclosed, notwithstanding the fact that the instrument in question never was acknowledged as required by the provisions of sections 1186 and 1191 of the Civil Code. As we understand the argument of the plaintiff's counsel upon the

point in dispute, it is that these sections do not require a mortgage given by a married woman upon her separate property to be acknowledged and certified, as her deed would have to be, but that it may be done as if she were a *feme sole*. They affirm that the grants and conveyances only of a married woman must be acknowledged and certified as laid down in those sections of the Civil Code, *supra*, and that the legislature, in enacting them, did not intend that a mortgage should be included by the terms thereof. They cite various sections of the Civil Code as confirmatory of this view, and particular stress is laid upon the language of section 158 of that Code, viz.: "Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried." We are asked to say that the words "any engagement or transaction with respect to property" includes the power to mortgage a married woman's separate estate,—it may be to secure an antecedent debt of the husband,—without her acknowledging that instrument in any other way than if she was a *feme sole*. We do not so interpret the several sections of the Civil Code, the construction of which is involved in the matter. Nor do we perceive why any different rule should exist as between the acknowledgment by a married woman of a mortgage or a deed. One of the main objects of the statutes, in giving the power to a married woman of alienating her real property, seems to have been that she should be placed in a situation where she could be independent of her husband's control and influence, as to the disposition of her separate estate. He might influence her just as much to her injury in executing a mortgage to secure his debt, as by inducing her to deed away her land and give him the money. So that there does not seem to be any controlling reason why the legislature should have made a difference so radical in its character between the essentials necessary to make valid a deed of a married woman, rather than a mortgage. In section 1186, *supra*, it is provided that the acknowledgment of a married woman to an instrument, etc., must not be taken or certified unless under certain conditions. This is a limitation of course upon the powers conferred upon her by section 158, *supra*. The next section, 1187, refers to the conveyance of a married woman, and annexes a condition to its execution, without a compliance with which the instrument is invalid. A conveyance is an instrument within the meaning of section 1186.

The question then is, was it the legislative intention in carrying out its desire to prevent the husband from improperly influencing the wife to alienate her landed estate by deed, also to place the same protection over her rights by annexing a condition to her mortgaging it? We think that the body did intend to include "mortgage" in the terms "instrument" and "conveyance," as used in the sections of the Civil Code, *supra*, and that a mortgage signed by a married woman is not executed so as to be valid, unless acknowledged as a deed is required to be. It is true this court has declared that a mortgage is merely a lien upon, and passes no estate or interest in the mortgaged premises, except for taxation. *Williams v. Mining Ass'n*, 66 Cal. 193, 5 Pac. Rep. 85. But in that case, what was said upon the matter under consideration was intended to define what was the nature of the interest which passed in the mortgaged premises by that instrument. It did not declare what was the legislative intent in using the words "instrument" and "conveyance" in the two sections of the Civil Code, *supra*, as to the necessary formalities of an acknowledgment of a married woman. Section 1215 of the Civil Code, which is a part of the article treating of the recording of written instruments, declares that mortgages shall be held to be included in the term "conveyance." *Hassey v. Wilke*, 55 Cal. 528. Therefore it is at least certain that the legislature has upon occasion used the word "conveyance" in a sense which would include the word "mortgage." Section 2922 of the Civil Code provides as follows: "A mortgage can be created, renewed, or extended only by

writing, executed with the formalities required in the case of a grant of real property."

A grant of the separate property of a married woman, being real estate, is not valid unless acknowledged by her as required by sections 1186 and 1191 of the Civil Code. Section 1093, Civil Code. It follows that, as a mortgage must be executed with the formalities of a grant, and as a grant by a married woman of her separate property is invalid unless acknowledged by her after an examination separate and apart, etc., from her husband, etc., as provided in section 1186, that a mortgage not thus acknowledged by her is void.

The view which the respondent asks us to take of the matter in hand, is, as it seems to us, very extreme, and opposed, as we think, to views heretofore entertained by this court in *Leonis v. Lazzarovich*, 55 Cal. 55; *Wedel v. Herman*, 59 Cal. 507; *Joseph v. Dougherty*, 60 Cal. 360.

There is nothing in this record which indicates that the debt, to secure which the mortgage was given upon the separate property of the wife, was for money advanced to her, or for anything of which she had the benefit; the findings are silent as to the allegation in her answer that the debt was an antecedent one of her husband. Therefore we do not perceive any equity existing in the transaction in favor of the plaintiff, which should be held to work as an *estoppel in pais*, upon the defendant, Mrs. Smith, a married woman, so as to compel her to be bound by an instrument she never executed, which, so far as this record shows, was of no benefit to her or her estate, especially when there is no proof or finding that the creditor was deceived into allowing a debt to be contracted in the first instance by either her or her husband, upon the faith that she would execute a mortgage to secure that debt.

The certificate of acknowledgment of the mortgage being confessedly defective according to the complaint, and a part of the prayer for relief having been that it might be perfected, we are not called upon, nor do we pass upon the question as to what the rights of the parties might have been, had the certificate been in due form according to the statute. No necessity is perceived for determining any other point made, and the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

74 Cal. 373

PEOPLE v. STACY *et al.* (No. 12,137.)

(Supreme Court of California. December 21, 1887.)

1. BONDS—ACTIONS ON OFFICIAL BONDS IN NAME OF STATE.

An action upon an official bond, given by a license tax collector appointed by the board of supervisors of a county, is properly brought in the name of the state of California.

2. SAME—RIGHTS OF SURETIES—FAILURE OF ONE TO SIGN.

In an action upon an official bond it appeared that one surety had not signed it, and another had signed it, but no sum was stated in the body of it for which he was bound. There were no conditions or stipulations by the sureties, requiring other signatures or limiting their liability. *Held*, that the bond was valid as against the parties signing it.

Commissioners' decision. In bank. Appeal from superior court, San Bernardino county; JAS. A. GIBSON, Judge.

H. C. Rolfe and J. C. Perkins, for appellants. Geo. A. Johnson, Atty. Gen., and Andrew B. Paris, Dist. Atty., for respondent.

BELCHER, C. C. It is alleged in the complaint that on the third day of August, 1885, one H. T. Walker was appointed by the board of supervisors

of San Bernardino county a license tax collector for the First supervisory district of that county; that to secure the faithful performance of the duties of the office, Walker gave a bond in the penal sum of \$3,000, which was accepted and approved by the chairman of the board; and that subsequently one of the sureties on his bond withdrew, and he thereupon gave a supplemental bond, which was also accepted and approved by the chairman of the board. It is further alleged that Walker, while acting as such tax collector, collected the sum of \$1,650.50 for licenses, and that he converted the money to his own use, and failed to pay over any part of it to the county. This action was brought against the sureties on his bonds to recover the amount of money alleged to have been so collected and appropriated. In the court below judgment was rendered in favor of the plaintiff, and from that judgment the defendants have appealed.

1. It is first claimed for the appellants that the action was improperly brought in the name of the people of the state of California. The answer to this objection is that the board of supervisors had authority to appoint a collector of license taxes, (*People v. Ferguson*, 65 Cal. 288, 4 Pac. Rep. 4; *County of Amador v. Kennedy*, 70 Cal. 458, 11 Pac. Rep. 757;) and the bonds given by their appointee for the faithful performance of his duties were official bonds. *Hubert v. Mendheim*, 64 Cal. 213. The Political Code provides that: "All official bonds must be * * * made payable to the state of California," (section 958); and "every official bond executed by any officer pursuant to law is in force and obligatory upon the principal and sureties therein to and for the state of California, and to and for the use and benefit of all persons who may be injured or aggrieved by the wrongful act or default of such officer in his official capacity." Section 961. The Code of Civil Procedure also provides that: "An executor or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the action is prosecuted. A person with whom or in whose name a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section." Section 369. Now, the contracts sued on in this case were made in the name of the state for the benefit of the county, and an action upon them was therefore expressly authorized to be brought in the name of the state. See *Shelby Co. v. Simmonds*, 33 Iowa, 345.

2. It is further claimed that the original bond was void, because one William Reed was named as a surety, in the sum of \$1,000, in the body of the bond, but never signed it; and because one C. P. Hall signed the bond, but no sum was stated in the body of it, for which he was bound. The principal was bound in the sum of \$3,000, and each of the sureties in the sum of \$1,000; and, so far as appears, there were no conditions or stipulations by the sureties when they signed, requiring other signatures or affixing any limitations to their liability. The sureties became, therefore, jointly and severally liable on the bond when it was accepted and approved. Political Code, § 956. A bond signed under such circumstances is valid as against the parties signing it. It was so held in *Los Angeles v. Mellus*, 59 Cal. 444, where similar objections were made to the bond involved in that case. See, also, *State v. Pepper*, 31 Ind. 76.

The objections of appellants cannot, therefore, be maintained; and, as the foregoing are the only points made by them, the judgment should be affirmed.

We concur: HAYNE, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

74 Cal. 376

CALLENDER v. McLEOD. (No. 11,550.)

(Supreme Court of California. December 22, 1887.)

SALE—WHAT CONSTITUTES—PROPERTY NOT SET APART—RIGHTS OF ATTACHING CREDITORS.

Under an agreement between the plaintiff and his tenant, 496 sacks of wheat in a certain pile belonging to the tenant were to be delivered by him to the plaintiff in repayment of a loan. Before the sacks had been separated, the whole pile was seized by the sheriff under an execution against the tenant at the suit of a third party. *Held*, that the plaintiff had acquired no right to the sacks which he could assert against an attaching creditor.

HAYNE, C., and PATERSON, McFARLAND, and THORNTON, JJ., dissenting.

Commissioners' decision. In bank. Appeal from superior court, San Luis Obispo county; D. S. GREGORY, Judge.

This action was brought by C. R. Callender against A. C. McLeod, for damages for an alleged conversion by him, as sheriff of the county of San Luis Obispo, of certain sacks of wheat claimed by the plaintiff. The judgment of the court below was in the plaintiff's favor. The defendant appealed.

McD. R. Venable and *C. W. Goodchild*, for appellants. *R. B. Treat*, for respondent.

BELCHER, C. C. This action was brought to recover damages for the alleged conversion of 496 sacks of wheat, taken by defendant as sheriff, under a writ of attachment against one J. H. Armfield. The court found that the plaintiff was the owner and in possession of the wheat when it was taken, and rendered judgment in his favor. The defendant moved for a new trial, and his motion being denied, appealed from the judgment and order.

It is claimed for the appellant that the findings were not justified by the evidence, and in our opinion this claim must be sustained. The facts, as they are shown by the record, are substantially as follows: Some time in the year 1883 the plaintiff leased to Armfield, on shares, a piece of land in San Luis Obispo county, to be cultivated in wheat. Later, in the fall of that year, Armfield told the plaintiff that for want of seed he would have to give up the lease, and thereupon the parties agreed that the plaintiff should furnish 100 sacks of seed, and the defendant should return for it two sacks for one, out of the next season's crop. In 1884 Armfield's crop was light, and he wished to retain the 200 sacks until 1885. Plaintiff told him to keep them "on the same way," and then furnished him 48 sacks more. Just when Armfield had finished heading his crop in 1885, it turned out that there was some misunderstanding between the parties as to how many sacks plaintiff was entitled to receive. He claimed two for one for the 200 sacks and 48 sacks, furnished as aforesaid; and, after some conversation, it was agreed that he was entitled to receive the number claimed. It was then further agreed that Armfield, after threshing and sacking his crop, should haul the 496 sacks, going to plaintiff, to San Luis Obispo, and deliver them to him there. Armfield threshed and sacked his crop, and piled his sacks up in a small *corral* on the leased ground. Shortly thereafter the defendant, as sheriff of the county, under a writ of attachment duly issued against Armfield, levied upon and took into his possession the whole pile. After the attachment, the plaintiff demanded and received from the defendant the number of sacks which he was entitled to claim as rent, and Armfield demanded and received the number which he was entitled to hold as exempt from execution. The plaintiff then demanded that 496 sacks more be given up to him, and, his demand being refused commenced this action.

The plaintiff, as a witness in his own behalf, testified: "All the grain was piled up together,—Armfield's, the seed, and the rent part in one pile. I got all my rent grain. * * * When I said that I knew and owned the 496 sacks of wheat, I meant that 496 out of the pile of sacks of wheat were mine.

There were no marks to distinguish the 496 sacks from the other sacks in the pile. I never handled it myself. The only thing I ever did to take possession was to tell Armfield to pile it together with his grain, and haul it into town. He was to haul and deliver to me, in San Luis Obispo, 496 sacks out of the general crop. I do not know what he was going to do with his part of it. The 496 sacks claimed in this action were never in any way separated from Armfield's grain. It was kept together in a general pile. It was never marked in any manner, and I never knew which sacks out of the general pile were mine. Any 496 sacks out of the general pile would have answered the purpose. There was no segregation between the several sacks. They were the same-sized sacks. All that was ever done with this grain as to hauling and handling was done by Armfield and his men. I never had anything to do with it except through Armfield."

Armfield was a witness for plaintiff, and testified in reference to the 496 sacks as follows. "Callender became the owner in this way: He furnished me seed, and I was to pay him back. * * * After the grain was threshed I hauled it and piled it all in the small *corral*, but I had straw laid between Callender's grain and mine, and could distinguish between them. * * * It was in my care in accordance with directions. Mine was piled back next to the straw pile, and his in front, because I intended to haul his first. There were no marks on the sacks, for I usually marked it as I hauled it. I afterwards took out of the same pile 118 sacks allowed me as exempt. The keeper gave me part of them from the front side of the pile and part from the other. Callender had nothing to do with the grain. I told him there were so many sacks, and he told me to pile it up and take care of it."

Upon these facts it seems clear to us that the plaintiff was not the owner and in possession of the 496 sacks of wheat in controversy when they were attached and taken into his possession by the defendant. Whether, by reason of the fact that Armfield was farming on shares, plaintiff owned, as a tenant in common with him, that part of the crop which he was to receive as rent, it is not necessary to inquire. The 496 sacks were not rent, but were to be returned to plaintiff for the loan made by him in 1883 and 1884, and as to them he must be treated as a purchaser, and not as a tenant in common of a growing crop. Civil Code, §§ 1727, 1806. Now, treating the plaintiff as a purchaser of the wheat, it is evident that he had acquired no right to it which he could successfully assert as against an attaching creditor of Armfield. Civil Code, § 3440.

It follows that the judgment and order should be reversed, and the cause remanded for a new trial.

I concur: FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause remanded for a new trial.

HAYNE, C., (*dissenting.*) The case is, perhaps, a close one; but I do not think the case is one of exchange, as supposed by my associates. There was nothing in existence to exchange for the seed wheat. It was expressly agreed that the plaintiff was to take two sacks for one out of the crop, and that if no crop was produced he was to get nothing. If that contingency happened,—that is to say, if no crop was produced,—how could there be an exchange? By the first agreement the parties were tenants in common of the crop. *Bernal v. Hovious*, 17 Cal. 542; *Knox v. Marshall*, 19 Cal. 617. This was conceded on all hands; and on this theory the share of plaintiff under his first agreement was delivered up to him. Now, the second agreement was simply to increase this share. I cannot see anything in the circumstances to indicate that the share coming to plaintiff in return for the seed wheat was to be of a

different *status* from the share coming to him for the use of his land. It seems to me that the judgment was right and should be affirmed.

We concur in the dissenting opinion of HAYNE, C.: PATERSON, J.; MO FARLAND, J.; THORNTON, J.

74 Cal. 418

HAWN v. SEVENTY-SIX LAND & WATER CO. (No. 12,159.)

(Supreme Court of California. December 23, 1887.)

1. PARTNERSHIP—DISSOLUTION—RELEASE BY PARTNER OF PARTNERSHIP CLAIM.

Civil Code Cal. § 2461, provides that "a partner authorized to act in liquidation may collect, compromise, or release any debts due the partnership," etc. In an action by one member of a dissolved copartnership to recover for work and labor, defendant sought relief from liability under a release given by the other partner. The jury were instructed that, after dissolution, one partner could not compromise or release a claim due the firm, so as to bind his copartner, if the other party had knowledge of the dissolution. *Held* error, and not cured by an instruction substantially in the words of the statute above cited.

2. SAME—PLEADING AND PROOF.

Where, in an action by one member of a copartnership for work and labor, the complaint contains averments tending to show that there had been an unauthorized settlement with the other member of the firm, and plaintiff introduces in evidence a release executed by the other member to defendant, plaintiff cannot object that the release has not been pleaded by defendant, who by virtue thereof seeks relief from liability.

Commissioners' decision. In bank. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

Wiggington, Creed & Hawes, for appellant. *S. J. Hinds*, for respondents.

HAYNE, C. Action to recover for work and labor alleged to have been performed for defendant by plaintiff and one Chidester. Defense, that plaintiff and Chidester were partners, and that Chidester, for valuable consideration, gave to the defendant a release of all demands of the firm. Verdict and judgment for plaintiff. Defendant appeals. The release was not pleaded by defendant; but the complaint contains averments which, though somewhat vague, seem to point to the release; and the plaintiff himself proved the partnership, and introduced the release in evidence. Under these circumstances, he should not be allowed to object that it was not pleaded by the defendant. The plaintiff and Chidester were clearly partners. And assuming, in favor of plaintiff, that the evidence tends to show bad faith upon the part of Chidester and the defendant in the matter of the release, we think the case must be reversed for error in the instructions. The court instructed the jury (see first instruction requested by plaintiff)¹ that, after dissolution, one partner could not compromise and release a claim due to the firm, if the other party had notice of the dissolution. This was a palpable error. The plaintiff and Chidester were general partners in the particular enterprise. Civil Code, §§ 2424, 2477, *et seq.* There was no shadow of evidence of the acts necessary to constitute a special partnership. And since the liquidation of the affairs was not committed to one partner by consent, either had authority to act in liquidation. Civil Code, §§ 2459, 2460. "A partner authorized to act in liquidation may collect, compromise, or release any debts due to the partnership, pay

¹The defendant relies upon a written release, which has been introduced in evidence by the plaintiff as a bar to this action. In ascertaining whether it is a bar or not, you will first ascertain from the evidence how and by whom it was signed. Although you may find that it was signed in the name of the firm or joint contractors by one of them, it will not follow, as a matter of course, that both are bound by its terms. And as to whether the parties not signing are still bound depends upon whether, at the time of the act, the partnership was not then at an end; for, under our code of laws, a partner may bind his copartner by an act, while the partnership was pending, which he could not do, and bind his copartner, after the partnership was at an end,—the party dealing with the partnership having notice of the dissolution of the partnership.

or compromise any claims against it, and dispose of the partnership property." Civil Code, § 2461. This power of liquidation existing, it made no difference, for the purpose of this question, whether defendant had notice of the dissolution or not. It does not aid plaintiff's case that, in its second instruction, the court read to the jury the section above quoted. That simply made the instructions hopelessly conflicting. For aught that we can see, the jury may have based their verdict upon the proposition that Chidester could not give a valid release after the dissolution of the partnership, if defendant had notice of the dissolution. There are other objections to the instructions, but it is not necessary to consider them. We therefore advise that the judgment be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for a new trial.

74 Cal. 400

PEOPLE v. GREENE *et al.* (No. 12,344.)

(Supreme Court of California. December 23, 1887.)

1. JUDGMENT—OPERATION AND EFFECT—JURISDICTION—SERVICE BY PUBLICATION.

In an action in which no personal service has been made, and where the judgment roll fails to show that any affidavit stating the grounds for an order for service by publication has ever been filed, or that any such order was ever made by the court as required by Code Civil Proc. Cal. § 412, and where the publisher's affidavit of publication contains no reference to the printed copy of the *alias* summons thereto attached, the judgment rendered therein is absolutely void.

2. SAME—ACTION TO SET ASIDE—LIMITATION.

Code Civil Proc. § 473, limiting the time within which a defendant not personally served may answer to the merits of an action in which judgment has been rendered to one year after the rendition thereof, has no application to a case in which a void judgment has been rendered. Such judgment may be set aside at any time.

In bank. Appeal from superior court, Santa Barbara county; D. L. HATCH, Judge.

C. A. Storke, S. W. Bouton, and Orestes J. Orena, (*Sawyer & Burnett*, of counsel,) for appellants. S. S. Price, Dist. Atty., and Joseph D. Redding, (*Crittenden Thornton*, of counsel,) for respondents.

SEARLS, C. J. This is an action to foreclose the interest of defendants, obtained by virtue of a certificate of purchase for the N. $\frac{1}{2}$ of section 28, township 9 N., range 32 W., San Bernardino meridian, county of Santa Barbara. Judgment was rendered in favor of plaintiff. The appeal is from an order made August 17, 1886, refusing to set aside the judgment.

The complaint in the cause is entitled *People of the State of California vs. W. E. Greene, John Doe, Richard Roe, et al.* It proceeds to aver that the defendant (without naming him) located the N. $\frac{1}{2}$ of section 28, township 9 N., range 32 W., San Bernardino meridian, county of Santa Barbara, on the fifteenth day of October, 1868; that on the sixteenth day of November, 1868, the said defendant purchased said lands and received a certificate of purchase therefor, known and numbered as certificate No. 1,191. The complaint further shows that on the first day of January, 1872, there was due plaintiff, as interest on said certificate of purchase, the sum of \$96, and avers a publication of the delinquent list, with notice, etc., as provided by statute. There is no averment of ownership of this certificate except as above stated, and no allegation that the owner is unknown. A summons issued to "W. E. Greene *et al.*, defendants," dated September 27, 1872, which recited that this action was brought to obtain decree foreclosing the interest of defendants "in certificate of purchase No. 1,291." The summons was returned on the same day

(September 27, 1872) by the sheriff, who certified that "the same has not been served on the defendants for the reason that the defendants named in said summons do not reside in this county, and their place of residence is not known to me." On the same day an *alias* summons issued, which is a copy of the former summons, except that instead of being entitled *People, etc., v. W. E. Green et al., Defendants*, it is entitled *People, etc., v. W. E. Greene and all Unknown Owners*; and with the further difference that it recites that the action is brought to obtain a decree foreclosing the interest of defendants in certificates Nos. 1,290, 1,291, 1,395, and 1,396, etc. The action was brought in the district court, and the summons notified and required the defendants to answer within 10 days of service within the county, (Santa Barbara;) within 20 days of service without the county and within the district; otherwise within 40 days.

The record fails to show any affidavit for publication of summons, or order of the judge or court directing such publication. There is an affidavit of E. B. Boust as follows:

"*State of California, County of Santa Barbara—ss.:* E. B. Boust, being duly sworn, says he is publisher of the Santa Barbara Times, a newspaper published weekly in the town and county of Santa Barbara, state of California; that a summons, a true copy of which was duly published in said newspaper for four consecutive weeks, to-wit, from the second day of October, A. D. 1872, to the second day of November, A. D. 1872.

"E. B. BOUST."

"Subscribed and sworn to before me this thirteenth day of November, A. D. 1872.

"[Seal.] A. S. COOPER, Notary Public.

"Filed November 16, A. D. 1872.

"F. A. THOMPSON, Clerk.

"By F. N. GUTERREZ, Deputy."

To this affidavit a printed copy of the *alias* summons is attached; but the affidavit does not, as may be seen, make any reference thereto.

Judgment by default was taken against defendants November 21, 1872; that is to say, in less than 40 days after service of summons, if due service thereof is shown. In June, 1883, F. A. Hyde moved, on petition showing him to be the owner of certificate No. 1,291 by assignment, to have the judgment set aside, and for leave to answer. His motion was granted August 18, 1883, and an answer was filed by Hyde on the same day, setting up a defense to the action. On the twenty-second day of September, 1883, the court annulled the order of August 18, 1883, setting aside the judgment. This order, so far as appears, was without notice to Hyde or his attorney, and no action was taken in reference to the answer on file. Defendant Hyde again, in August, 1886, upon petition duly verified, (and setting out most of the facts herein stated,) showing that in 1872 he was a resident of the county of Alameda, etc., moved to set aside the judgment, and the motion being denied, brings this appeal.

1. It is apparent from the foregoing statement that the judgment is void for want of jurisdiction by the court of the person of defendants, or of any of them. *People v. Mullan*, 65 Cal. 396, 4 Pac. Rep. 348.

2. A motion to set aside a judgment is a direct, and not a collateral, attack on such judgment. Hence errors which might be the subject of review on appeal therefrom may be considered. *People v. Mullan, supra*.

3. The important question, however, is this: Can the superior court, after the lapse of a period of, say 12 years, from the entry of a judgment, set it aside even if void?

In *Bell v. Thompson*, 19 Cal. 707, it was said: "We think it must be considered as settled in this state that no motion can be entertained by a district court to set aside a judgment on any ground, including that of want of juris-

diction over the person of the defendant in the action in which the judgment was entered, after the expiration of the term at which it was entered, unless its jurisdiction is saved by some motion or proceeding at the time, except in the case provided for by section 68 of the practice act." The case referred to in the practice act is provided for by section 473 of the Code of Civil Procedure. Under the former system of practice in this state, the decisions were numerous and quite uniform to the effect that, upon the expiration of the term of court, all power to alter, change, modify, or annul judgments entered during the term, or prior thereto, was lost, unless saved by some motion or action of the court during the term, except as otherwise provided by statute. Under our present system of jurisprudence, terms of court are abolished; and as the rule cannot apply literally, it is provided by the 473d section, Code Civil Proc., above referred to, that the relief which formerly could be had during the term may be sought within a *reasonable time*, which is defined to be six months, except in cases where personal service of summons had not been had, in which cases the court may grant relief within one year.

In *Hastings v. Cunningham*, 35 Cal. 550, it was held that the rule indicated had no application except to final judgments, and did not apply while the proceedings remained *in fieri*. So, too, it has been held that a judgment may be amended after the expiration of the term, where the record furnished the *data* for such amendment. *Hegeler v. Henckell*, 27 Cal. 495; *Bostwick v. McEvoy*, 62 Cal. 502.

In *Loan Soc. v. Thorne*, 67 Cal. 53, 7 Pac. Rep. 36, a case in which the cause was tried by the court, and written findings were not filed or waived, this court, on appeal, upheld an order setting aside the judgment upon an application made more than six months after its entry, upon the ground that the case was not within the purview of section 473, *supra*.

In *Wharton v. Harlan*, 68 Cal. 422, 9 Pac. Rep. 727, it was held that the court may, after the expiration of six months, set aside a judgment by default, entered by the clerk, when it appears upon the face of the judgment roll that the clerk had no power to enter it. In such a case it was said section 473 of the Code of Civil Procedure has no application.

It is conceded by all of the authorities that a court will interpose to stay the execution of a void judgment. A judgment which is void upon its face, and which requires only an inspection of the judgment roll to demonstrate its want of vitality, is a dead limb upon the judicial tree, which should be lopped off if the power so to do exists. It can bear no fruit to the plaintiff, but is a constant menace to the defendant. It is said a court whose process is abused by an attempt to enforce a void judgment will interfere for its own dignity, and for the protection of its officers, to arrest further action. *Mills v. Dickson*, 6 Rich. Law, 486. The most effectual method of doing this is by extirpating the judgment itself; by removing a form which is without substance. In New York, with a statute similar to section 473 of our Code, the courts have held that the power to vacate a judgment is inherent and is not limited by their Code, which only has reference to ordinary defaults, (*Dinsmore v. Adams*, 48 How. Pr. 274,) and that the limitation does not apply to an unauthorized judgment, nor to a judgment entered without service of process, (*Simonson v. Blake*, 20 How. Pr. 484.) See cases cited in *Wharton v. Harlan*, *supra*. In this last case MCKINSTRY, J., in commenting upon the rule enunciated in *Bell v. Thompson*, *supra*, said: "This technical rule as to action during the same term, never applied to a pretended judgment, in fact void, and could never have applied to statutory judgments entered by the clerk, which may be entered in vacation."

Section 473, Code Civil Proc., is intended to apply to cases where judgment has been taken against a party by mistake, accident, surprise, or excusable neglect; to cases in which the moving party must move upon evidence *de hors* the record; to cases in which the relief to be granted is largely in the

sound discretion of the court, and has no application to a pretended judgment which is shown by the judgment roll to be void for want of jurisdiction, either of the person of the defendant, or of the subject-matter. In this instance, it is true, the applicant moved upon a petition duly verified, setting out the facts; but the notice of motion specified that it would be based "upon the ground that the papers on file in said action failed to show that any affidavit was filed therein stating grounds for the making of an order by said court for the publication of the summons in said action; or that any order by said court for the publication of said summons was ever made as required by law;" and it was further stated that the "motion would be made on the * * * papers on file," etc. The judgment roll is set out in the transcript, and the certificate of the judge, as well as the stipulation of the attorneys, show that it was used at the hearing. By this roll it appears, as before stated, that there was no personal service on the defendants, or any of them; and as there is no sufficient affidavit that the summons was ever in fact published, the judgment is void, and should have been set aside, and a trial had upon the complaint and answer of Hyde on file, which answer was never stricken out or disposed of.

The order appealed from is reversed, and the court below directed to set aside the judgment in the cause rendered November 27, 1872.

We concur: McFARLAND, J.; SHARPSTEIN, J.; TEMPLE, J.; McKINSTRY, J.; PATERSON, J.

PEOPLE v. GREENE *et al.* (No. 12,343.)

(*Supreme Court of California.* December 23, 1887.)

In bank. Appeal from superior court, Santa Barbara county; R. B. CANFIELD, Judge. C. A. Storke, S. W. Bouton, and Orestes J. Orena, (*Sawyer & Burnett*, of counsel,) for appellant. Geo. A. Johnson, Atty. Gen., S. S. Price, Dist. Atty., and Joseph D. Redding, (*Crittenden Thornton*, of counsel,) for respondents.

PER CURIAM. In this cause the order appealed from is reversed, and the court below directed to set aside the judgment rendered in the cause against defendants, November 17, 1872, for the reasons given in *People v. Greene*, *ante*, 197, No. 12,344, filed herewith.

74 Cal. 407

PEOPLE v. LEYBA. (No. 20,340.)

(*Supreme Court of California.* December 23, 1887.)

1. ASSAULT AND BATTERY—CRIMINAL PROSECUTION—INDICTMENT AND INFORMATION—INSTRUCTION.

The information alleged that an assault was made "feloniously," and the court instructed the jury as follows: "If you find * * * that the defendant made an assault, *as laid down in the information*, but not with a deadly weapon, you should find him guilty of an assault only. If you find that the assault was made * * * with a weapon likely to produce death or great bodily injury, it will be your duty to find him guilty as charged in the information." *Held*, that the instruction was proper, and that it did not "ignore the felonious intent" in the assault.

2. SAME—QUESTION FOR JURY.

Where the information charges that an assault was made with a deadly weapon, and the evidence relating thereto is conflicting, it is proper for the court to let the jury decide whether or not the weapon used was deadly.

In bank. Appeal from superior court, San Luis Obispo county; D. S. GREGORY, Judge.

Information for an assault with a deadly weapon. The jury rendered a verdict of guilty, and the defendant appealed to this court.

J. M. Wilcoxon, for appellant. Atty. Gen. Geo. A. Johnson, for respondent.

McKINSTRY, J. The information charged an assault with a deadly weapon, "to-wit, a large knife." The prosecuting witness swore the defendant assaulted him, and cut his clothing in several places with a knife five or six inches long. The defendant testified he had no knife when they met, and

that he made no assault, but that the prosecutor struck and wounded *him* with the handle of a whip. The court charged the jury that a deadly weapon was one likely to produce death or great bodily injury; that there are cases where the character of the weapon, whether deadly or otherwise, depends on the manner in which it is used; and, in effect, that it was for the jury to decide whether a weapon was used, and, after considering the evidence as to the manner of its use, whether it was a deadly weapon. And the court further charged, among other things: "If you find from the evidence that the defendant made an assault as laid down in the information, but not with a deadly weapon, you should find him guilty of an assault only. If you find from the evidence that the assault was made by the defendant at the time and place mentioned in the information, and that said assault was made upon the prosecuting witness with a weapon likely to produce death or great bodily injury, it will be your duty to find him guilty as charged in the information."

The defendant contends the court erred in leaving it to the jury whether the weapon was deadly, and erred in the charge above quoted in that it "ignored the felonious intent." The charge as to deadly weapon we think correct, in view of the conflicting testimony; but, if not strictly correct, was favorable to the defendant. If no weapon was used, defendant was not injured by the charge. If the weapon described by the prosecutor was used, the defendant certainly was not injured by the failure of the court to instruct that a knife "five or six inches long" was, as a matter of law, a deadly weapon. Nothing is decided in *People v. Fuqua*, 58 Cal. 246, which conflicts with this view. There, a defendant on trial claimed that the deceased had advanced upon him with a pick-handle, and the court, although specially requested by the jury, refused to instruct them as to what "is termed by law a deadly weapon." As to the portion of the instruction above quoted, the information charges the assault to have been made unlawfully and feloniously; and, fairly read, the jury were told they should find the defendant guilty of the greater offense if he made the assault with a deadly weapon, "as laid down in the information." Each legal proposition in the instructions need not include all the exceptions and limitations derivable from the whole of the instructions. The attempt so to charge would often confuse, instead of enlightening, the jury. It can no more be said that the particular sentences objected to ignore the intent than that they ignore the law of self-defense. The matter of the credibility of the opposing witnesses was fairly submitted to the jury, and the doctrine of reasonable doubt fully explained. Moreover, when an assault is made with a deadly weapon, felonious intent is implied.

Judgment and order affirmed.

We concur: SEARLS, C. J. MCFARLAND, J.; TEMPLE, J.; SHARFSTEIN, J.; PATERSON, J.; THORNTON, J.

74 Cal. 389

PEOPLE v. CHING HING CHANG *et al.* (No. 20,340.)

(*Supreme Court of California.* December 23, 1887.)

1. ROBBERY—EVIDENCE.

On the trial of an indictment for robbery, the prosecuting witness testified that he received the money of which he was afterwards robbed from a relative. On cross-examination he was asked whether his relative got the money from a safe or a trunk. *Held*, that the question was immaterial and irrelevant, and was properly excluded.

2. WITNESS—ATTENDANCE AND TESTIMONY—OBTAINING INFORMATION—DISCRETION OF COURT.

The court refused to instruct a witness to ascertain a certain fact during recess. *Held*, that the refusal was proper, because a witness cannot be compelled to obtain information to answer a question. For the court to direct or request a witness to ascertain some fact during a recess is a matter of discretion, not reviewable in the appellate court.

3. SAME—CREDIBILITY—IMPEACHMENT.

To impeach a witness under Code Civil Proc. Cal. § 2052, on the ground that his previous statements conflict with his present testimony, such previous statements must be shown to the witness, if in writing, before any question can be put concerning it.

4. SAME—INSTRUCTIONS.

An instruction to the jury to "determine the amount of credibility to which the evidence is entitled,—if convincing and carrying with it a belief in its truth, act upon it; if not, you have a right to reject it,"—is proper, being no more than an instruction to believe what is true, and to be uninfluenced by what is false.

Department 2. Appeal from superior court, city and county of San Francisco; D. J. TOOHY, Judge.

Davis Louderback, for appellants. *Atty. Gen. Geo. A. Johnson*, for respondents.

THORNTON, J. Information accusing defendants of robbery. The newly-discovered evidence is of a character that might have been discovered by reasonable diligence in time to have produced it at the trial. It need not, therefore, be further considered. In the progress of the trial several exceptions were reserved to the rulings of the court, which it will be necessary to pass on.

1. Chin Len, the complainant, was called as a witness, and testified that he had collected the money of which he testified he was robbed, from a relative of his named Kee, on Pacific street, where Kee kept a wash-house; and that at the time of the trial this relative had gone to China. The money was collected of Kee on the day of the robbery, with whom he (the witness) had deposited it. In the course of the cross-examination, the defendant's counsel (Mr. Smith) asked the witness where his relative procured the money to pay him, when there occurred what follows: "*The Court*. That is proper, if you know where. *Mr. Smith*. Do you know where your relative procured the money to pay you? *Mr. Coffey*. I object to the question as irrelevant, immaterial, and incompetent. *Witness*. I think he went to his safe or trunk. *Mr. Smith*. Did he,—safe or trunk? *The Court*. It is immaterial. *Mr. Smith*. The object is to show the improbability of his leaving the money there on deposit, unless there was some safe place in the wash-house for it,—that is the object of the testimony." The prosecuting officer (Coffey) objected as before, and the court sustained the objection.

So far as relates to the issue of robbery which took place, according to the testimony, at 836 Washington street, it was entirely immaterial whether the money was taken by Kee when he paid it to witness from a safe or trunk. If counsel desired to show that a trunk or safe was not a safe place of deposit, the inquiry for that purpose would naturally turn on the character of the safe or trunk,—what kind of safe or what kind of trunk it was of which he spoke, —and what were the means of fastening the safe or trunk referred to, so as to keep outsiders from getting into it. But no question of this kind was asked. The only question as indicated by the curt language used was whether the money was taken from a safe or trunk when handed by Kee to the witness. This had no reference to the fact whether the safe or trunk was a safe place of deposit. If the object of counsel was to show such a fact, he should have asked a question appropriate to the purpose. The court might well have concluded from the statement of counsel that if his object was to show that the safe or trunk was not a safe place to deposit money, that the answer to the question put had no tendency to show it. It is clear that if the witness had answered that the money was taken from a safe, and not from a trunk, this would have shown nothing as to its being a place where money could have been safely deposited. The same would be true if he had answered that the money was taken from a trunk, and not from a safe. An apposite question might have been put for the object declared by counsel, and, as none was put, we cannot see that the court erred in its ruling. The court ruled correctly

that the question put related to a matter immaterial to any definite issue in the cause.

2. The defendant's counsel, on cross-examination, asked this question: "Did you testify in the lower court about holding a conversation with these defendants, or either or any of them, upon Washington street, or any other place, prior to meeting them in your room? *Mr. Coffey*. If there is testimony, I think it ought to be read, and I object to it. *The Court*. It would not be material whether he did or not. If you want to test his credibility, ask him what he did testify, and read it to him. *Mr. Smith*. I submit the question." The court sustained the objection, and defendant excepted.

The object of the question was most clearly to impeach the witness. While a witness may be impeached by evidence that he has made at other times statements inconsistent with his testimony, still the law requires, if such statements are in writing, that they shall be shown to the witness before any question is put to him concerning them. Code Civil Proc. § 2052. The language of the section is "must be shown." When the remarks of the court and the prosecuting counsel were made in relation to reading the testimony to the witness, defendant's counsel did not state that the testimony was not in writing. And, as in most cases the testimony before the examining court or magistrate (in this case the police judge) is taken down in writing, (Pen. Code, § 869,) and defendant's counsel did not, when the remarks above referred to were made by the court and counsel, state that they were not in writing, we are of opinion that, under such circumstances, we must presume that the testimony referred to in the question was in writing. The witness then had a right, before being called on to answer the question put, to see the writing. Code Civil Proc. § 2052. The object of requiring the writing to be shown him was that he might have an opportunity of inspecting and examining it, and, if he chose, of reading it.

The witness on the stand was a Chinaman, and was unable to read the testimony. He was at the time testifying through an interpreter. The written testimony was in English, a language unknown to him. The object of showing it to him was that he might make himself acquainted with its contents. To do this, one acquainted with the language in which it was written must read it to him. If this could not be done, then the object of the law requiring the writing to be shown to him would be defeated. Here the court required counsel putting the question to read the testimony to the witness. Counsel, without giving any reason why he declined to read as required, did not read, preferring, as it seems, to stand on the question without reading anything to the witness. The provision of the statute (section 2052, Code Civil Proc.) above referred to was made for the protection of the witness. The court did no more than to enforce such protection. In doing so, he did nothing prejudicial to any substantial right of the defendants. It will be observed that the language of the section above referred to is that if the statements are in writing, they must be shown to the witness "*before any question is put to him concerning them.*" The writing must be shown to the witness that he may have an opportunity for inspection and examination, and acquainting himself with its contents, and he is allowed time for that purpose. *Morrison v. Myers*, 11 Iowa, 538; *Gaffney v. People*, 50 N. Y. 423. We think it follows from the above that where the witness cannot read, or where the writing is in a language to him unknown, he is entitled to have it read to him that he may be able to say whether the writing is his evidence or not. According to the views above stated, we are of the opinion the court committed no error in its ruling on the point before us.

3. The same witness was asked this question by counsel for defendants on cross-examination: "Did you suspect they had any intention of robbing you?" In this the pronoun "they" referred to defendants and the two other persons with them. The witness had testified that he met the defendants and two other

persons on Washington street, near the entrance to the building on that street in which his room was. One of them asked him where he was going. The witness answered that he was going to collect some money on Pacific street. After saying this he started to go upstairs to his room, and four persons followed him upstairs, when he (witness) lay down on a bunk. Pretty soon, after coming up into the room, they said to the witness if he collected some money they would like to borrow a few tens, not saying exactly how much. The witness said to them that he had no money to lend. They then said they wanted the money, and if he would not lend it to them they would take it from him. They insisted that the witness should let them have some money, and finally one of them seized him and they proceeded to rob him. On the cross-examination the witness stated: "They followed immediately after my going to my room; I did not invite them." Just following this, the question above quoted was put to the witness. While the question should have been allowed, yet in view of the evidence of the policeman, Glennon, and O'Sullivan, who came very soon after to the room mentioned in the testimony of the complaining witness, which tended strongly to corroborate the statements of the witness, we cannot say that the error was prejudicial to the defendants. The conduct of the witness tends strongly to show that he entertained no such suspicion until he was seized by one of the defendants in order to effect the robbery, for he entered the room and lay down on his bunk. If he entertained any such suspicion, he certainly would not have assumed a recumbent position and would not have omitted to fasten the door to his room. In this view we do not think the refusal of the court to allow the question was of such a character as to call for a reversal of the order or judgment.

4. There was no error in the refusal of the court to instruct the witness to find out during a recess which occurred in the progress of the trial the number of the wash-house occupied by the Chinaman Kee, of whom he had testified he had collected the money of which he was robbed. We are not aware that it is the duty of the court to give any such instruction. While it is usual for the court to direct or request a witness to ascertain some fact during a recess, and we never knew a request of this character refused, still it is in the discretion of the court so to do, and such a refusal is not reviewable here. It is the duty of a court to compel a witness to answer a proper question. But we are not acquainted with any law which makes it the duty of the court to compel a witness to procure the information necessary to answer it. The counsel might himself have asked the witness to ascertain the number of the house during the recess, and, if he failed to do so, might have shown such failure. Further, we are of opinion that, by employing reasonable diligence, the counsel, during the recess, might have ascertained the number of the house referred to, or have found out that there was no such wash-house on Pacific street at the date spoken of by the witness, and during the same time might have procured witnesses to establish whatever he had discovered to be the fact.

5. Portions of the charge to the jury are assailed as erroneous. The court told the jury: "You should carefully determine the amount of credibility to which their evidence is entitled. If convincing, and carrying with it a belief in its truth, act upon it; if not, you have a right to reject it." This is said to be error. We cannot regard it as such. The first clause is undoubtedly correct. The jury in it were told that it was their duty to *carefully* determine the credibility to which the evidence referred to is entitled. The last clause amounts to this: If, upon examination of the evidence in all its bearings, and in relation to and in connection with the other evidence in the cause, you find it to be unworthy of credit, and false and untrue, you have a right to reject it from your consideration altogether. It is said by counsel for defendants in relation to this direction: "The fact that it is not convincing and carrying with it a belief in its truth does not authorize its rejection. It is

still to be considered under all the circumstances for all it is worth; perhaps it might be sufficient under all the evidence to create a reasonable doubt." When evidence is examined, and the conclusion is arrived at that it is not convincing and carrying with it a belief in its truth, such conclusion is that it is false and untrue. How evidence that is false and untrue can create a reasonable doubt we cannot perceive.

As to the other portions of the charge to which our attention is called, we think it only necessary to say that, taking the charge as a whole, we find nothing in it calling for a reversal by this court. The law bearing on the case was fairly stated to the jury in a way which could not have misled it.

There is no error in the record, and the judgment and order must be affirmed. So ordered.

We concur: SHARPSTEIN, J.; McFARLAND, J.

74 Cal. 397

BAIRD v. BOARD OF SUP'RS OF TULARE CO. (No. 11,725.)

(*Supreme Court of California.* December 29, 1887.)

PUBLIC LANDS—SWAMP LANDS—WARRANTS—POWERS OF SUPERVISORS.

The board of supervisors have no authority to issue warrants on registers' certificates, exchanged for purchase certificates for swamp and overflowed lands sold, but not owned, by the state, as Act Cal. 1872, § 3, has been superseded by Pol. Code Cal. §§ 3571, 3572; the last section of which, as amended in 1878, provides that, upon surrender of the register's certificate, the auditor shall draw his warrant on the county treasurer for the amount named in such certificate.

Commissioners' decision. In bank. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

Petition by Alfred Baird for a writ of mandate commanding the board of supervisors of Tulare county to issue a warrant for a certain amount. Trial by the court, without the intervention of a jury, and judgment for petitioner, from which the supervisors appeal.

W. B. Wallace, for appellants. *Sayle & Harris*, for respondent.

BELCHER, C. C. Alfred Baird, the respondent here, made application to the court below for a writ of mandate, commanding the board of supervisors of Tulare county to issue to him a warrant for \$105, payable out of the swamp-land fund of that county. In the petition it is alleged that prior to March 27, 1872, respondent purchased of the state of California 105 acres of swamp land situate in Tulare county, and paid therefor to the treasurer of that county \$105; that the land proved not to have been the property of the state; and thereafter, on the first day of February, 1873, the register of the state land-office issued to respondent his certificate showing the foregoing facts, and that respondent's claim for the repayment of the money was duly and regularly presented to the board of supervisors in June, 1885, and was by the board rejected. In answer to the petition, the board alleged that it was not authorized to draw any warrant on the treasurer of Tulare county to be paid out of the swamp-land fund of the county. After trial, the court rendered judgment in favor of the petitioner, finding, as a conclusion of law, "that it was the duty of defendant, after being requested by the plaintiff, to have ordered a warrant drawn on the county treasurer of Tulare county for the sum of \$105, payable to plaintiff out of the swamp-land fund of said county."

No brief has been filed on behalf of respondent, but we infer that he rested his claim for relief on the supposed authority of section 3 of the "Act for the relief of purchasers of state lands," approved March 27, 1872, (St. 1871-72, p. 587.) That section reads as follows: "Whenever the state has issued a certificate of purchase for any land sold as swamp and overflowed, and the United States has sold and issued a patent for the same land, and the title of the

United States is held and owned by the purchaser from the state or his assigns, or where the land so purchased from the state shall prove not to have been his property, the amount paid to the state for such land shall be refunded to such purchaser or his assigns, and the board of supervisors of the county in which the land is situated shall draw a warrant on the treasurer of the county for such amount, and the said treasurer shall pay the same out of moneys in the swamp-land fund of the county credited to such purchaser." But that section was superseded by the provision of the Political Code. Section 3571 of that Code reads: "If any land sold is not the property of the state, the holder of the certificate of purchase or patent may receive in exchange therefor from the register a certificate showing the amount paid, and the class of land upon which the payment was made." And section 3572, as amended in 1878, reads: "If the land sold was swamp and overflowed, the county auditor of the county in which the land is situated must, upon the surrender to him of the certificate mentioned in section 3571, draw his warrant, in favor of the person surrendering such certificate, for the amount therein specified, upon the treasurer of the county, who must pay the same out of the swamp and overflowed land fund of the district in which the land is situated." If the respondent had presented his register's certificate to the board of supervisors, and asked for the warrant which he now seeks to obtain, while section 3 of the act of 1872 remained in force, he would have been entitled, upon the facts shown, to have had his claim allowed and the warrant issued to him. But when he presented the certificate in 1885, the law had been changed, and the board had ceased to have any authority in the matter. He should therefore then have presented it to the county auditor, whose duty it had become to draw the warrant without any action of the board.

The judgment should be reversed, and the cause remanded, with directions to the court below to dismiss the petition.

We concur: HAYNE, C.; FOOTE, C.

BY THE COURT: For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded, with directions to the court below to dismiss the petition.

74 Cal. 384

In re MAXWELL'S ESTATE. (No. 11,055.)

(*Supreme Court of California.* December 23, 1887.)

WILLS—CONTEST—LIMITATION OF ACTIONS—EFFECT OF PROBATE.

Code Civil Proc. Cal. § 1333, limits the time for contesting a will to one year after its probate. *Held*, that after that time it is conclusive as against an application to declare a devise void for fraud practiced upon the testator.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN FINN, Judge.

Mrs. Elizabeth C. Tybout, on petition for the distribution of the estate of her deceased brother, Richard T. Maxwell, filed exceptions thereto, and made application to set aside a devise to Miss E. Donnelly, otherwise called Mrs. Maxwell, as procured by fraud upon the testator. A demurrer to her petition having been sustained, and decree of distribution made, Mrs. Tybout appeals.

Joseph R. Brandon, for appellant. *McAllister & Bergin*, for respondent.

TEMPLE, J. Maxwell died June 29, 1883, leaving a will bearing date July 23, 1882. Letters testamentary were issued July 17, 1883. Afterwards, but when does not appear, the executors filed a petition for the distribution of the estate. November 13, 1884, Elizabeth C. Tybout filed her exceptions to the petition. In her exceptions she states that she is the sister and sole heir at law of the testator; that a devise contained in the will in favor of

Miss E. Donnelly was obtained through fraud, and by false and fraudulent representations made by the beneficiary to the effect that she was an unmarried woman, capable of entering into a valid contract of marriage, while she was in fact a married woman, to-wit, the wife of one Charles H. Kane; that the testator was ignorant of this fact, and fully believed the false statements of the beneficiary, who well knew that her representations were false; that on June 27, 1883, the testator, induced by these false representations, married the beneficiary, under the name of Miss E. Donnelly; that afterwards she continued to represent herself to Maxwell as his wife up to the time of his death, and he fully believed the representations; that the pretended contract of marriage, and the belief in the capacity of the beneficiary to perform it, was the sole motive and inducement for making the devise, and afterwards for allowing it to remain unrevoked. Petitioner also shows that she did not discover the fraud in time to contest the will under the statute. Wherefore she prays that, in consequence of the fraud, the devise in the will to Miss E. Donnelly may be regarded and decreed as void, and of no effect, and that the property given or devised to Miss E. Donnelly be distributed to the petitioner as heir at law. This petition, containing the exceptions, was demurred to, and the court held that it stated no ground for relief.

We think the ruling of the court below was correct. The probate of a will and the administration of the estates, of deceased persons, are proceedings *in rem*, binding upon all the world. When the court has obtained jurisdiction by the petition and notices provided by the statute, public policy requires that all persons interested shall be deemed to have knowledge so far as necessary to the validity of the proceedings. No doubt this rule will often work hardship to absent heirs, who may be in fact ignorant of the death of their ancestor. To obviate this to some extent, provision is made in the statutes of most, if not all, the states, for a period after the will has been admitted to probate within which any person interested may appear and contest its validity. In our state, the limitation is one year, and it is enacted (section 1333, Code Civil Proc.) that, if no such contest be made, the probate of the will is conclusive, saving to infants and persons of unsound mind a like period of one year after the disability has been removed. *State v. McGlynn*, 20 Cal. 233; *Broderick Will Case*, 21 Wall. 503. No doubt, these objections might have been raised upon the application to probate the will. Not having been so raised, that document is conclusive evidence as to the intent of the testator.

Whether any relief could be afforded by a court of equity it is not necessary now to decide. It may be admitted that the superior courts, while acting as probate courts, have all equity power necessary to the complete administration of estates, and that, under our system, it would not be necessary to invoke the powers of a court of chancery for any purpose within the administration. But if this can be regarded as an effort to fasten upon the beneficiary a trust in favor of the heir, because she has obtained the property by fraudulently inducing the testator to make a will in her favor, it certainly is not within the scope of those proceedings, and there is no warrant in the statute for such an intervention. The judgment is affirmed.

We concur: MCKINSTRY, J.; PATERSON, J.

74 Cal. 461

BANK OF TEHAMA CO. v. CRUMLEY. (No. 11,397.)

(Supreme Court of California. December 30, 1887.)

TRIAL—ISSUES AND FINDINGS.

On the trial of an action for the recovery of money alleged to have been borrowed by defendant's wife as his agent, the court found that she contracted the debt on her own credit, and for her separate use. *Held*, that that finding precluded the truth of her alleged agency, and rendered a finding to that effect unnecessary.

Commissioners' decision. In bank. Appeal from superior court, Tehama county; CHARLES P. BRAYNARD, Judge.

Action brought by the Bank of Tehama County to recover of W. D. Crumley \$400, alleged to have been loaned defendant's wife as his agent. A jury having been waived, the court found, upon the issues joined, in favor of defendant, and, judgment having been rendered accordingly, plaintiff appeals.

John F. Ellison, for appellant. *J. Chadbourne*, for respondent.

FOOTE, C. This is an action brought by the plaintiff to recover several sums of money, aggregating about \$400, from the defendant; it being alleged that the same was borrowed by the defendant's wife as his agent. The answer denies all the allegations of the complaint, and, to each of the several causes of action stated in the complaint, set up, by way of further defense, the following facts: "* * * That during all the times mentioned in said * * * cause of action, during which the said Sarah E. Crumley is alleged to have been the wife and authorized agent of the defendant, to manage his business and borrow money, she had a large amount of property in her possession and control and management, belonging to her, and her daughter by a former husband, in which property the defendant had no interest; and that the said sum, * * * alleged to have been borrowed for and on account of the defendant, was in fact borrowed by the said Sarah E. Crumley for her own separate use and benefit, in the support and education of her said daughter, and in the management of her said separate property."

The plaintiff claims that the court should have found upon all the material allegations of the complaint, since the answer contained a general denial of them. The special defense set up in the defendant's answer, if true, necessarily precluded the truth of the allegations of the complaint that Mrs. Crumley contracted the debt as her husband's agent. She could not contract the same debt as agent for her husband, and also for her own separate use and benefit. She must necessarily have contracted, either as her husband's agent, or in her separate capacity as a married woman having a separate estate, and contracting as such to charge it. As the court has found, following the allegations of her answer, that she contracted the debt for her own separate use and benefit, it must be presumed to have also found that she did *not* contract the debt as agent for her husband; since facts evinced by necessary inference from facts found, will be treated as found. There are no facts alleged in the complaint which, if they had been found by the court to exist, could have changed the decision and judgment, except the allegation that Mrs. Crumley borrowed the money sued for as agent for her husband; this allegation having been found, as we have seen, *not* to be true, findings upon any other allegation of the complaint would have been immaterial.

We do not agree with the appellant's further contention that the evidence is insufficient to support the decision.

Perceiving no error in the record, we are of opinion that the judgment and order should be affirmed.

I concur: HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

74 Cal. 468

SEPULVEDA v. BAUGH *et al.* (No. 12,316.)

(Supreme Court of California. December 31, 1887.)

MORTGAGE—FORECLOSURE—DECREE—DESCRIPTION OF PROPERTY.

In a decree of foreclosure of a real-estate mortgage, the description of the land to be sold thereunder was of a tract described by metes and bounds, excepting certain parts, which were described only by reference to certain specified records of certain deeds. *Held*, that the necessity for such reference to ascertain the description did not render the decree void and open to collateral attack.

THORNTON, J., dissenting.

In bank. Appeal from superior court, Los Angeles county; A. BRUNSON, Judge.

Action to quiet title, by Rafaela Verdugo de Sepulveda, appellant, against George Baugh, Ernest W. Moore, George Eley, Sarah D. Eley, William Lacy, Giacomo Tononi, Valentine Mand, Maria Le Maire, Addie Murray, Dan McFarland, W. B. Stewart, George H. Utley, John Cavalleras, F. P. Holland,

Alice C. Skinner, J. S. Skinner, M. W. Burt, Thomas R. Curtis, Amanda S. Pollock, Maggie Scott, R. H. Pollock, Kate Shepardson Black, James T. Morgan, Martha F. Morgan, Jesse Hunter, John Murray, Walter Scott, Alexander Marshall, Richard Doe, Honorina Pelanconi, Lorenzo Pelanconi, William Young, Isabel R. de Tononi, and Petra Pelanconi, respondents. Plaintiff mortgaged to Andres Briswalter two tracts of land, one containing 909.40 acres, the other 212.03 acres; the description of both tracts in the mortgage being by metes and bounds, excepting that of certain parts, which were described only by reference to certain recorded deeds, the book and page of the record of each deed being specified in the mortgage. The first mortgage was foreclosed by suit, and both tracts were sold under the decree of foreclosure, in which the description of the land was the same as in the mortgage. Defendants claimed title under the foreclosure decree and sale. Plaintiff claimed that defendants acquired no title, because the description of the land in the decree was uncertain; and, being defeated below, took this appeal.

Henry M. Smith and W. H. Clark, for appellants. *Graves & O'Melveny, Chapman & Hendrick*, and *Bicknell & White*, for respondents. *Anderson, Fitzgerald & Anderson* and *Glassell, Smith & Patton*, amici curiæ.

TEMPLE, J. This case seems very plainly to be within the rule laid down in *Crosby v. Dowd*, 61 Cal. 557. A tract of 909 acres is described by metes and bounds, "excepting, however, those portions of the above-described tract which are described in those certain conveyances executed by the party of the first part hereto, which are recorded, respectively, in book 22 of Deeds, p. 477; book 32 of Deeds, p. 113; book 36 of Deeds, p. 446; and book 48 of Deeds, p. 466, —Records of Los Angeles county; to which deeds and the records thereof reference is hereby made for further description; the remainder of the tract which is hereby conveyed containing about seven hundred and nineteen acres." This description is in the mortgage, complaint on foreclosure, the decree, sheriff's certificate and deed; and nowhere except by the above reference is there any description given of any of the excepted tracts. The record of the foreclosure, therefore, contains no description from which it can be ascertained, without such reference, no matter how familiar one might be with all the descriptive calls given as to any specific portion of the described land, whether or not it was conveyed by the mortgage deed, or whether the decree is operative upon it; nor could he tell whether any portion of the metes and bounds of the 900-acre tract remain as any portion of the metes and bounds of the 700-acre tract.

This case is attempted to be differentiated from *Crosby v. Dowd* in this: In *Crosby v. Dowd* the only description of the property in the complaint or decree was a reference to three deeds in the recorder's office. Here the mortgage, complaint, decree, certificate of sale, and sheriff's deed alike described a large tract of land by metes and bounds, excepting therefrom certain sold portions as above stated. That is, in the former case reference is made to the record for a description of the land mortgaged, while in the case at bar reference is made to the records for a description of certain portions of the described tract which are excepted from the effect of the mortgage and decree. A mere statement of this contention would seem to go a long way towards answering it. There is evidently the same indeterminateness in regard to this description as in the other, and the sheriff would be no better able to find the land or to determine what lands he should put a purchaser in possession of. And there is the same possibility that when the deeds were examined, they would be required to be construed by a court to determine what lands were included. Nor can it be construed as to the intent of the mortgagor in the larger tract better than in *Crosby v. Dowd*, which was described as a portion of the Santa Rita rancho. By express statement, she did not mortgage her interest in the entire tract; and the judgment does not profess to operate upon her interest

in the entire tract. The judgment record, therefore, is not complete, but other documents not in the record must be referred to to ascertain what is the subject-matter upon which the decree operates.

But I am of the opinion that *Crosby v. Dowd* ought not to be allowed to stand. I think I have examined all the cases cited in support of the decision by counsel or by the court, and I fail to find any authority for holding the judgment void upon a collateral attack. It may be admitted that such a decree is erroneous, and will be corrected if the attention of the court is called to the defect by demurrer or proper motion, or by appeal. Such an amendment would be in the interests of justice and for the interest of both parties,—for the mortgagor, that the property sold with a good description may bring a better price and his debt be paid; for the mortgagee, similarly, that he may collect his money. For these reasons, as well as that the writ may contain specific directions to the officer, who is required at his peril to execute it, the record of the foreclosure should contain a perfect description of the property. If, when a writ is issued, it is found that it fails to describe any property, the sheriff may refuse to execute it, or the court, upon application, may quash it, and restore the party, if he has been dispossessed.

But for what reason is the judgment void? Certainly not for lack of jurisdiction, either as to the subject-matter or the person. What nullity, known and recognized by established rules of law, is found in this judgment? If any, it must be because it is a proceeding to establish a lien, and there is no description of the thing to which the lien attaches. But by established rules of evidence, such a reference is not meaningless, and does furnish a description of the thing. It is admitted that it is sufficient, and does amply describe the thing in the mortgage. But it is said that a deed is evidentiary and may be helped out by other evidence, while a decree is final and determinative. The distinction is illusory; but, admitting the difference, it has no bearing upon this question. The judgment is held void simply because it is meaningless. This distinction admits that it is not meaningless, but declares that it is not sufficiently explicit for the convenience of the court or its officer. Plainly, the judgment is not void for the want of a description which identified the subject upon which the judgment is to operate. But the rule is unsafe, and the distinction illusory.

Here it may be well to call attention to the fact that very few of the cases cited as authority are cases like this, where the objection was that the description contains an express reference to another document, which must be examined to help out the description. Most of them were cases where on its face the description was indefinite or defective, and were actions for the recovery of specific property. The trouble is said to be that the sheriff may not know with certainty what land he is to place the purchaser in possession of. The same uncertainty may, and generally will, exist where metes and bounds are given. The court says, assuming that the records can be found, the descriptive calls may be found indefinite, so as to render it impossible to locate them. So, too, any landmarks called for may, for aught the court can ordinarily know, be impossible of location. The call for a pile of rocks on the bank of a creek may be very uncertain, while the reference to the deed may be definite and clear. But in a very large class of cases where metes and bounds are given it still becomes necessary to refer to deeds and to records to locate the boundaries. What is the practical difference between the case at bar and one in which a description giving metes and bounds describes the boundary as beginning at a stake at the north-east corner of the land conveyed to Smith by Brown, by deed executed so and so, or a line running north to the southern boundary of Brown's land? Or, what is the difference between this and a description as lot 2 in section 2, etc., according to the United States land surveys? The lot could not be found without referring to the plat in the land-office. The same is true of a description of a quarter section of land ac-

cording to the system of United States land surveys. We take judicial notice of the system, but not of the actual surveys; and we know that in many places there are wide departures from the general system. The plat must be referred to to find the particular quartersection. Then land is often described by reference to town plats, sometimes where the plat has not become a public record, and the streets and lots only exist on paper. The plat must be found to locate the land. Farms are sold by reference to subdivision maps of large ranches. Now, is this court to hold that all judgments which describe the land by reference to these things are void? Yet in every one of these cases the descriptions show on their face that some other document is referred to and must be examined to make out the description.

I cannot see how a judgment can be pronounced a nullity for uncertainty of description, unless the court can see that nothing is described. But here the description is not even uncertain or doubtful. It simply does not come up to some ideal standard laid down by the courts as more convenient for them and their officers. The true rule would seem to be that the judgment is not void; that the purchaser must, however, rely upon the description, and, if it be found so defective, when tested by rules of evidence ordinarily applied to the subject, that nothing can be found, he will fail; otherwise he should recover.

I admit that the case of *Crosby v. Dowd* was very maturely considered, and that it should not be overruled unless plainly wrong. However, it is one of those decisions under which no rights can have grown up, and I think the rule mistakenly laid down exceedingly mischievous. A sense of justice will, I think, if the case be not overruled, impose upon this court the labor of differentiating case after case from that.

I think the judgment should be affirmed.

We concur: SEARLS, C. J.; PATERSON, J.; MCFARLAND, J.; SHARPSTEIN, J.

I dissent: THORNTON, J.

74 Cal. 409

WALDRIP *v.* BLACK *et al.* (No. 12,231.)

(*Supreme Court of California.* December 29, 1887.)

1. MORTGAGE—FORECLOSURE—RIGHT TO FORECLOSE—SURETY WHO HAS PAID THE DEBT. Where one has signed a note as surety, and has received from the makers a mortgage to secure him, and pays the note upon their failure so to do, he becomes an equitable assignee of the note, and can enforce its payment, and foreclose the mortgage, to recover the money paid by him, with legal interest.¹
2. SAME—PLEADING—WAIVER OF DEFECTS. In an action to foreclose a mortgage alleged to have been given as security to a surety, the judgment should not be reversed for insufficient allegations of suretyship when no demurrer has been filed pointing out special defects in the complaint.

Commissioners' decision. In bank. Appeal from superior court, San Bernardino county; JAMES A. GIBSON, Judge.

James Waldrip, plaintiff, sued Samuel N. Black and Julia A. Black, defendants, to foreclose a mortgage. Judgment for plaintiff, and Julia A. Black appealed.

Paris, Goodcell & Fox, for appellants. *Hight & Damron*, for respondent.

FOOTE, C. This is an action which was instituted for the purpose of foreclosing a mortgage against S. N. Black and Julia A. Black. The court below gave judgment by default against S. N. Black, and the cause having been

¹A surety on a note stipulating that the title to the property, for the purchase of which it was given by the maker, should remain in the payee until its payment, becomes, upon being required to pay the note, an equitable assignee of the property, and is entitled to its possession. *Myres v. Yaple*, (Mich.) 27 N. W. Rep. 536.

tried upon its merits, rendered judgment as prayed for in the complaint, against Julia A. Black. She alone has appealed from the judgment, and an order denying her a new trial. It appears from the record that the mortgage was executed by the Blacks in favor of Waldrip, to secure him harmless against having to pay a joint note for \$300, which the two Blacks and Waldrip had signed as joint makers in favor of one Logsdon or order, due three months after its date, and bearing interest at 1 per cent. per month until paid. The complaint alleges, although Waldrip was an apparent maker, that he was in fact a mere surety for the Blacks; and after the note became due, the Blacks having suffered it to remain unpaid, except the sum of \$9, that Waldrip paid to Logsdon, the payee, the full amount due upon the note, and had it indorsed to himself; and that the mortgage was given to secure him in the reimbursement for such a payment, if he should be obliged to make it. That pleading also contained a copy of the note and mortgage upon which the suit was brought, but the answer of Julia A. Black thereto was not verified; hence the genuineness and due execution of those instruments were admitted. Section 447, Code Civil Proc. The language of the mortgage, as set out in the complaint, although not as definite as might be desired, is sufficient to show, in the absence of any proof to the contrary, that the note was signed by Waldrip as a surety merely; and, no demurrer having been filed pointing out any special defects of the complaint, the judgment should not be reversed for the want of a sufficient allegation of the plaintiff's suretyship. *Chase v. McEvoy*, 58 Cal. 349.

The genuineness of the mortgage is not controverted, and its recitals are to be held as true. Section 1963, subd. 2, Code Civil Proc. It is clear, therefore, that the plaintiff signed the note as surety only, and that the mortgage was executed to save him harmless, and to reimburse him for any payment for and on account of the note he might be compelled to make. The indorsement upon the note to the effect that it was indorsed by the payee, Logsdon, to Waldrip, for value received, together with its possession by Waldrip, and all the other circumstances surrounding the transaction, at least entitled the court to presume, there being no evidence to the contrary, that Waldrip, the surety, had paid the apparent value of the note to Logsdon, and was the owner of it. This being so, the Blacks, for whom he had become surety, were bound to reimburse Waldrip for what he had been obliged to pay on account of their failure to pay the note as they promised to do. Having never been, in reality, as to the Blacks, a maker of the note, but a mere surety, upon his being compelled to make payment to Logsdon of what was due upon it, he became the equitable assignee of the note, it being the principal undertaking, and entitled to enforce its payment according to its tenor and effect, as the holder thereof, as well as to foreclose the mortgage, which was the collateral security. 1 Pom. Eq. Jur. § 419, note 1; *Cottrel's Appeal*, 23 Pa. St. 294; *Lidderdale v. Robinson*, 2 Brock. 159. Chief Justice MARSHALL, in the case last mentioned, tersely, yet most forcibly, says: "When a person has paid money for which others were responsible, the equitable claim which such payment gives him on those who were so responsible shall be clothed with the legal garb with which the contract he has discharged was invested, and he shall be substituted, to every equitable extent and purpose, in the place of the creditor whose claim he has discharged." See, also, *Ellsworth v. Lockwood*, 42 N. Y. 93, middle of page, and numerous cases there cited. We are of opinion that the mortgage sought to be foreclosed was not void for uncertainty.

But it does not necessarily follow, from the proposition of law just cited as authority, that the person who has paid his money, for which others are responsible, should in this case, although "clothed with the legal garb with which the contract he has discharged was invested," be allowed to be reimbursed to any greater extent than the amount, principal and interest, he has been obliged to pay out, together with legal interest upon the gross sum so

paid out from the time of its payment. In other words, it does not follow, in this case, that because the surety can recover, according to the terms of the note, the principal and interest he actually paid out, that he can also recover, from and after the time of his payment of that sum, 1 per cent. per month interest as provided in the note; he is simply entitled to recover the legal rate of interest upon the whole sum of money he has paid out from the date of that payment.

It would appear, therefore, that the judgment should be so modified as that it be reduced by the sum of \$17.13, which is the excess of interest allowed by the court over and above what was legally due on the thirty-first day of December, 1886, the date of the rendition of that judgment. In all other respects the judgment and order should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion, let the judgment be modified as above indicated, and, as modified, the judgment and order are affirmed.

PEOPLE v. CITY AND COUNTY OF SAN FRANCISCO. (No. 11,456.)

(*Supreme Court of California.* December 24, 1887.)

In bank. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

On petition for rehearing. For original opinion, see 15 Pac. Rep. 747.

Phillip G. Galpin and E. C. Marshall, Atty. Gen., for appellant. John Lord Love, City and Co. Atty., and Garber, Thornton & Bishop, for respondents.

BY THE COURT. While the petitioners evidently misapprehend the scope and effect of the decision herein, the questions involved, viz., whether the decree of confirmation and the patent can be read together, and, if they can, whether any existing natural and permanent boundary line included in the former would prevail over the line of the survey, wherever the latter is counter to or in conflict with existing and well-defined natural lines, are questions of great importance, and worthy of further consideration. Rehearing is therefore granted.

74 Cal. 430

JOHNSON v. MALLOY. (No. 12,439.)

(*Supreme Court of California.* December 27, 1887.)

TAXATION—ASSESSMENT AND LEVY—CORRECTION—POWER AFTER ASSESSOR HAS GONE OUT OF OFFICE.

After the duties of an assessor have ceased, no judgment of a court can clothe him with authority to amend, alter, or modify his assessment of property.

In bank. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

This cause was presented to the court upon an agreed statement of facts by John Johnson, plaintiff, and Thomas Malloy, defendant, asking the court to pass upon the legality of the assessment for taxation of certain lands in said county. Judgment for plaintiff. Defendant appeals. The remaining facts appear in the opinion.

S. P. Hall, for appellant. John B. Mhoon, for respondent.

PER CURIAM. This cause was presented to the court below upon an agreed statement of facts, from which it appears that plaintiff owns a tract of land which defendant, the assessor of Alameda county, on the seventh day of March, 1887, assessed for the purpose of taxation at the sum of \$15,150, the full cash value thereof, and refused to deduct therefrom a mortgage of \$13,000 due the "regents of the University of California," upon the ground that the sum secured by said mortgage was, as property of the regents aforesaid, exempt from taxation and not assessable. This action was commenced on or about No-

vember 16, 1887, and on the twenty-second day of November judgment was rendered in favor of plaintiff, and against the defendant, without costs. It was further adjudged and decreed that the value of the mortgage can be deducted from the assessment; that the assessment made by defendant, without deducting the value of the mortgage thereon, is not a valid and legal assessment, etc. Defendant appeals from the judgment.

The question presented to the court below, upon the agreed statement, was not one that could be properly determined in the form which it was made to assume. The duties of the assessor in the premises had ceased, and no judgment of the court could clothe him with authority to amend, alter, or modify his assessment of the property in question. No agreement of parties can be invoked to call for the decision of what to them, or either of them, is merely a moot question, and courts should not render judgments which cannot be enforced by any process known to the law.

The judgment is reversed, and the court below directed to dismiss the action.

74 Cal. 421

In re RAYNOR. (No. 11,429.)

(*Supreme Court of California.* December 27, 1887.)

1. GUARDIAN AND WARD—APPOINTMENT—JURISDICTION.

Under Code Civil Proc. Cal. § 1747, providing for the appointment of guardians, three years' residence in a county by a minor will give the superior court of such county jurisdiction to appoint a guardian for the minor.

2. SAME—ORDER OF REMOVAL—REVERSAL ON APPEAL.

Unless a guardian appears to have been removed on one of the grounds specified in Code Civil Proc. Cal. § 1801, the order of removal will be reversed on appeal.

Department 2. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

B. W. Owens was appointed guardian of Harry O. Raynor by the superior court of the city and county of San Francisco. Owens afterwards removed to Alameda county, where he died three years later, and one E. H. Clarke was appointed guardian in his place by the Alameda superior court. William M. Raynor then filed a petition in the Alameda superior court for the revocation of Clarke's appointment. At the hearing of the petition, the court decided that the superior court of San Francisco had exclusive jurisdiction in the matter, and revoked its former order appointing Clarke, on the ground that it had acted without jurisdiction. From this order Clarke appeals.

Lloyd & Wood, for appellant. *Pillsbury & Blanding*, for respondent.

SHARPSTEIN, J. This appeal is from an order of the superior court of Alameda county revoking the appointment of E. H. Clarke as guardian of said minor. The record shows that on March 6, 1880, the superior court of the city and county of San Francisco duly appointed one B. W. Owens guardian of the person and estate of said minor, and said Owens remained such guardian until February, 1883, when he was removed therefrom by an order of said court; but he continued to exercise the functions of guardian of said minor until October, 1884, when he (said Owens) died. Prior to his death, to-wit, on the first of April, 1883, said Owens removed from the city and county of San Francisco to the town of Alameda, in the county of Alameda, where he fixed and established his residence, and continued to reside until he died. Said minor went with Owens from San Francisco to Alameda, and resided in the family of said Owens, at Alameda, so long as said Owens lived. After the death of Owens, said minor lived in the family of appellant in the house occupied by Owens before and at the time of his death. Immediately

after the death of Owens, appellant applied for and obtained from the superior court of Alameda county letters of guardianship of said minor. Afterwards, on the twenty-fourth of November, 1884, William M. Raynor filed a petition in the superior court of Alameda county praying to have the order appointing said Clarke guardian, as aforesaid, revoked, on three grounds: (1) That said Clarke is not a relation of said minor, and is an unsuitable person to be appointed as such guardian, in that said Clarke has not the personal integrity and moral character to fit him for such guardian; (2) that ever since the death of the father of said minor, and at the time of the appointment of said Clarke, said minor was under the jurisdiction, care, and control of the superior court of the city and county of San Francisco; (3) that the petitioner had applied to the superior court of the city and county of San Francisco to be appointed guardian of said minor.

To that petition Clarke filed an answer, in which, among other things, he denied the allegation of his want of personal integrity and moral character to qualify him for the guardianship of said minor. The petitioner offered evidence tending to show that Clarke was not a suitable person for such guardianship, and rested. Thereupon Clarke introduced evidence showing that the minor was being carefully and properly cared for, educated and reared, and tending to show that Clarke was a suitable person to be guardian of said minor, and rested. The petitioner then called witnesses in rebuttal, and was proceeding to examine them, when the judge announced that he would hold and decide that the superior court of the city and county of San Francisco, having once acquired jurisdiction of the matter of the guardianship of the person of said minor, never lost it, and that the superior court of Alameda county never acquired jurisdiction of the matter; and made an order revoking the letters before issued to said Clarke, on the ground that the court, in granting said letters, acted without jurisdiction.

Appellant insists that it was clearly within the jurisdiction of the court to grant said letters, and that the order revoking them is erroneous. The superior court of the county of which the minor was an inhabitant or resident had jurisdiction to appoint a guardian. Code Civil Proc. § 1747. It appears by the record that said minor had been for more than three years an inhabitant of Alameda county, and had not during that period had any other home, or been absent or away from said county. That, in our opinion, constituted him an inhabitant or resident of Alameda county, within the meaning of the provision of the Code above cited. We think the order cannot be upheld upon that ground.

But, while that is the only ground upon which the court based its order, it is not the only ground upon which the removal of Clarke was prayed. In addition to that of the invalidity of his appointment, it is alleged in the petition for his removal that he is an unsuitable person for the guardianship of said minor, which was put in issue by the denial of Clarke, and upon that issue evidence was introduced on both sides, none of which is incorporated in the bill of exceptions. We infer, however, that it was conflicting, and, if it appeared that the court had found that it preponderated on either side, we might not have disturbed the finding. But it plainly appears that the evidence upon that issue was not considered by the court, and we have no means of ascertaining on which side it preponderated, or on which side the court thought it preponderated. The rule which has been applied to orders granting new trials, that if, for any cause, the verdict and judgment ought to have been set aside and a new trial granted, the order should be allowed to stand, whether the reason assigned for it was right or wrong, is not applicable in this case. Here, no cause for removal of Clarke appears in the record, and the court cannot assume that he was removed for a cause not appearing in it. The Code specifies the causes for which guardians may be removed. Code Civil Proc. § 1801. The removal in this case was not made for any of the specified causes,

but for a cause not specified, and in our opinion wholly insufficient. Therefore the order must be reversed.

We concur: MCFARLAND, J.; THORNTON, J.

74 Cal. 425

BENNETT *et al.* v. GREEN. (No. 12,314.

(*Supreme Court of California.* December 27, 1887.)

1. EVIDENCE—DOCUMENTARY—DEED—CERTIFIED COPY—IDENTIFICATION OF GRANTOR.

The plaintiff, in an action to quiet title, introduced in evidence a certified copy of a deed, purporting to be signed by P. D. Green, the defendant, and conveying land then owned by him. In the body of the deed the grantor was described as *D. P. Green*. The subscribing witness' affidavit was that he saw *D. P. Green*, the person described in the deed, sign the same. No objection was made to the copy because the original was unaccounted for. *Held*, that enough had been shown to make the copy admissible, and throw on the defendant the burden of proving that he did not execute the deed.

2. QUIETING TITLE—DENIAL BY GRANTOR OF EXECUTION OF DEED—BAR BY LAPSE OF TIME.

In an action to quiet title to land, the plaintiffs proved possession for 30 years before suit brought, in themselves and their predecessors, under a deed purporting to be executed by defendant. *Held*, that the statute of limitations barred defendant's claim that the deed was not executed by him.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; A. M. HUTTON, Judge.

Clara E. Bennett and others brought an action against P. D. Green to quiet the title to certain real estate owned by them. It appeared on the trial that the plaintiffs, and those under whom they claimed, had been in possession for about 30 years, under a deed purporting to have been executed by the defendant, who was then the owner of the land in question. The case was tried by the court, and judgment given for the plaintiffs. The defendant appeals.

G. Gordon Adams, for appellant. *R. M. Widney*, for appellee.

BELCHER, C. C. This is an action to quiet the plaintiffs' title to certain subdivisions of a lot of land in the city of Los Angeles, known as lot 8, in block 22, of Hancock's survey of 35-acre City Donation Lots. The plaintiffs claim title in fee to the disputed parcels of land, deraigned through sundry mesne conveyances from the defendant, and under the statute of limitations. In the court below the findings and judgment were in favor of plaintiffs. The defendant moved for a new trial, and has appealed from the judgment, and from the order denying his motion.

To establish their title, the plaintiffs introduced in evidence a deed from the city of Los Angeles, dated November 2, 1855, conveying to the defendant, P. D. Green, lot 8, and stating that the original certificate of possession was issued to William Foreman on the first of August, 1855, and was by him transferred to Adam Bland, and was by Bland transferred to defendant. They also introduced in evidence a patent from the United States, dated August 9, 1866, granting to the city of Los Angeles pueblo lands, and it was admitted that lot 8 was within the boundaries of the land so granted. The plaintiffs then offered in evidence the copy of a deed which was taken from the records of Los Angeles county, and was properly certified by the county recorder. It purported to be the copy of a deed dated February 6, 1869, signed by P. D. Green, and conveying lot 8 to one Edward McVickar. In the body of the deed the grantor was named D. P. Green, and proof of its execution was made by a subscribing witness. In his affidavit the witness said "that he was present and saw D. P. Green, known to him to be the same person described in, and who executed, the annexed instrument as a party thereto, sign, seal, and deliver the same. And that he, the deponent, thereupon signed his name as a subscrib-

ing witness thereto." The defendant objected to the copy being received in evidence, on the ground that it was "incompetent evidence to prove the contents of the deed, or the execution of it, or to show title, because it did not purport to have been acknowledged by the party who signed it, and showed on its face that it had not been acknowledged by the party who it is claimed signed it, and the witness who acknowledged it states that he saw D. P. Green sign, seal, and deliver it, and that it is not a copy of an instrument which has been properly acknowledged." The court reserved its ruling until the testimony was all in, and then overruled the objection, and admitted the copy in evidence, the defendant reserving an exception.

The plaintiffs further proved that McVickar conveyed the lot to John Doland on the sixteenth of April, 1869, and Doland conveyed it to Samuel Dana on the nineteenth of February, 1870; that Dana died in 1870, and thereafter the lot was known as the "Dana Tract;" that the lot was fenced as early as 1872 or 1873, and remained inclosed until about 1883; that shortly after it was inclosed the land was rented, by an agent representing the Dana estate, to Chinamen, and was used by them for the purpose of raising vegetables for about 10 years; that on the nineteenth of June, 1883, the lot was conveyed by H. C. Hyde, guardian of the minor heirs of Dana, to William P. Gardiner, the grantor of plaintiffs; and that, from the years 1875-76 to 1883-84, the property was assessed to the estate of S. Dana or the Dana minors, and the taxes were paid. The plaintiffs also read in evidence the deposition of Adam Bland, in which the witness stated, in effect, that he sold the land in controversy to the defendant about 30 years before, and that during the years 1885 and 1886 he had frequent conversations with defendant about the land so sold, and in one or more of those conversations heard defendant say that, if he had kept the land till then, it would have made him rich. The defendant moved to strike out the deposition, "because it only contained an attempt to show what defendant stated about disposing of the land, without laying any foundation for such testimony by making some proof of the loss and execution of the deed purporting to be signed by P. D. Green." The court overruled the objection, and the defendant reserved an exception. The only testimony introduced by defendant was that of three witnesses, one of whom had known him since 1868, one for about 14 years, and one for a time not stated. Each of these witnesses testified that he had done business with defendant, and had received and seen letters written by him, and that, so far as he knew, defendant had always written his surname "Greene."

1. With these facts before the court, it is insisted for appellant that it was error to admit the copy of the deed of February 6, 1869, in evidence, and also to deny the motion to strike out the deposition of Bland. We think the rulings were proper. A deed may be recorded when its execution has been acknowledged by the party executing it, or proved by a subscribing witness, (section 1161, Civil Code,) and a certified copy of the record of a deed, thus acknowledged or proved, may be read in evidence, with the like effect as the original, on proof by affidavit or otherwise that the original is not in the possession or under the control of the party producing the certified copy, (section 1951, Code Civil Proc.) No objection was taken that sufficient proof had not been made that the original was not in the possession or under the control of the plaintiffs, and that objection cannot now be considered. The only objection taken rests upon the transposition of the grantor's initials in the body of the deed and in the certificate of proof. But the deed appears to have been signed by the defendant, and to convey land which he then owned, and the certificate identifies him as the party described in it. We think this was sufficient to make the copy admissible, and to throw upon the defendant the burden of showing that he did not in fact execute the deed. As he failed to offer any such proof, we assume that he did execute and deliver it, and that the title to the property described passed by it to the grantee therein named.

2. But, however this may be, we think there was evidence sufficient to justify the finding that plaintiffs had title under the statute of limitations.

The judgment and order should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

74 Cal. 338

In re GARBER'S ESTATE. (No. 11,430.)

(*Supreme Court of California.* December 17, 1887.)

1. EXECUTORS AND ADMINISTRATORS—ADMINISTRATOR WITH WILL ANNEXED—APPOINTMENT.

Code Civil Proc. Cal. § 1350, provides that where an executor fails to qualify, letters shall be granted with will annexed, as in cases of intestacy. Section 1365 provides to whom administration shall be granted in the case of an intestate estate. An executor of one dying testate in Virginia renounced his right as executor in California, and, the testate having no wife, an administrator was appointed at his request. *Held*, that as he would not have been eligible, under section 1365, if deceased had been intestate, he could not be appointed on the executor's renunciation.

2. SAME—QUALIFICATIONS—SURVIVING PARTNER.

Under Code Civil Proc. Cal. § 1365, the last clause providing that if the decedent was the member of a partnership at the time of his decease *the surviving partner must in no case be appointed administrator of his estate*, one who had formerly been a partner, and between whom and the deceased there were unsettled partnership matters, is ineligible.

Department 2. Appeal from superior court, Alameda county; N. HAMILTON, Judge.

In the matter of the estate of Michael C. Garber, deceased, Anson Barstow was appointed administrator with the will annexed, and Louis Gottshall, public administrator, appealed from the order.

E. C. Robinson, for appellant. *Rhodes & Barstow*, for respondent.

SHARPSTEIN, J. On the thirteenth day of June, 1885, Michael C. Garber died testate in the state of Virginia, leaving an estate in the county of Alameda, in this state, where he formerly resided and did business in partnership with Anson Barstow, respondent herein. The will of the testator was admitted to probate in the state of Virginia, and letters testamentary duly granted and issued to Arista Hoge, the executor named in the will. On the second of September, 1885, said will and the probate thereof, duly authenticated, were filed in the superior court of Alameda county, together with a renunciation by said Hoge of his right to qualify as executor of said will in said county of Alameda, and a request that said Anson Barstow should be appointed administrator with the will annexed. And said Barstow at the same time filed his petition to be appointed administrator of said estate with the will annexed. Appellant, who was at that time public administrator, filed a petition for letters of administration of said estate, and also objections to the appointment of said Barstow, on the ground that appellant was entitled as public administrator to letters of administration in preference to Barstow. The matter was heard by the court, and the application of said Barstow was granted, and letters of administration with the will annexed were ordered to be issued to him. From that order this appeal is prosecuted by the public administrator, who contends that, upon the renunciation of the executor, letters of administration with the will annexed should have been issued as designated and provided for the grant of letters in cases of intestacy. Code Civil Proc. § 1350. "Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, * * * and they are, respectively, entitled thereto in the following order: (1) The surviving husband or wife, or some competent person whom he or

she may request to have appointed; (2) the children; (3) the father or mother; (4) the brothers; (5) the sisters; (6) the grandchildren; (7) the next of kin entitled to share in the distribution of the estate; (8) the public administrator; (9) the creditors; (10) any person legally competent."

It does not appear that decedent left a wife. Therefore there was no one who had a right to request the appointment of Barstow. Code Civil Proc. § 1365. If decedent had died intestate, we think it would be conceded that the order appealed from is erroneous. And after the renunciation of the executor, letters of administration with the will annexed should have been issued as designated and provided for the grant of letters in cases of intestacy. That is the language of the Code, and we cannot, without disregarding it, hold that a person who could not have been appointed administrator if decedent had died intestate, can be appointed administrator with the will annexed when, as in this case, the executor renounces his right to apply for letters.

It appears by the record that Barstow, to whom letters were granted, and decedent were at one time partners, and that there were unsettled matters growing out of the relation at the time of the death of the decedent. That, we think, rendered Barstow ineligible under the last clause of section 1365 of the Code of Civil Procedure. Order reversed.

We concur: MCFARLAND, J.; THORNTON, J.

2 Cal. Unrep. 822

Ex parte HUTCHINGS. (No. 20,368.)

(Supreme Court of California. December 15, 1887.)

INDECENT EXPOSURE—INDICTMENT—DESCRIPTION OF OFFENSE.

A complaint under Pen. Code, Cal. § 311, which declares it an offense to "willfully and lewdly procure, counsel, or assist" any one to make an indecent exposure of the person, charged that defendant "willfully, unlawfully, and lewdly solicited" an indecent exposure. *Held*, that a conviction on such complaint will be sustained, on an application for discharge on *habeas corpus*.¹

In bank. Application for writ of *habeas corpus*.

This is a proceeding against one Ollie Hutchings for a misdemeanor. The complaint was drawn under Pen. Code Cal. § 311, declaring that "any person who willfully and lewdly procures, counsels, or assists any person to expose himself" indecently shall be guilty of a misdemeanor, and charges that the defendant "did willfully, unlawfully, and lewdly solicit * * * a female to expose herself * * * in such a manner as is offensive to decency." The defendant was convicted of the offense charged in the complaint, and she applies to this court for discharge upon a writ of *habeas corpus*.

G. H. Perry, for petitioner. *J. V. Coffey*, Pros. Atty., for the People.

PER CURIAM. The application of Ollie Hutchings to be discharged from custody on a writ of *habeas corpus* having been heretofore argued, submitted, and taken under advisement by the court, and now, at this day, the court being advised in the premises, it is ordered and adjudged that the application of petitioner be, and the same is hereby, denied, and that she be remanded.

¹An indictment for a statutory offense, which charges the offense in words equivalent to those employed in the statute, is sufficient. *U. S. v. Wilson*, 29 Fed. Rep. 286; *Franklin v. State*, (Ind.) 8 N. E. Rep. 695; *Graeter v. State*, (Ind.) 4 N. E. Rep. 461; *State v. McGaffin*, (Kan.) 13 Pac. Rep. 560, and note; *People v. Edson*, (Cal.) 10 Pac. Rep. 192; *State v. Sparks*, (W. Va.) 3 S. E. Rep. 40.

See, also, *People v. West*, (N. Y.) 12 N. E. Rep. 610, and note; *State v. Brady*, (La.) 2 South. Rep. 557; *State v. Tisdale*, Id. 406, and note.

74 Cal. 432

SCHWARTZ *et al.* v. KNIGHT *et al.* (No. 11,110.)

(Supreme Court of California. December 28, 1887.)

MECHANICS' LIENS—MATERIAL-MEN—FILING NOTICE BEFORE COMPLETION OF BUILDING.
Under Code Civil Proc. Cal. §1187, requiring material-men to file their notice within a certain time after the completion of the building, a lien filed before the building was completed is void, unless it appears that the original purpose was to build only in part, or that the original purpose to finish was abandoned.

In bank. Appeal from superior court, San Luis Obispo county; D. S. GREGORY, Judge.

Action by Louis Schwartz and William L. Beebee, partners as Schwartz & Beebee, against William Knight and Sarah, his wife, to enforce a mechanic's lien on certain real estate for materials furnished to buildings erected thereon. There was a judgment for the plaintiffs, and the defendants appealed.

F. Adams and *V. A. Gregg*, for appellants. *J. M. Wilcoxon*, for respondents.

McKINSTRY, J. The appeal is from the judgment by the defendants, who insist it should be reversed because it appears from the findings that plaintiffs did not file their notice of lien until 100 days after they had furnished materials for the house. But the plaintiffs were not "original" contractors within the meaning of section 1187, Code Civil Proc. *Sparks v. Butte Co., etc.*, 55 Cal. 392. As they were not original contractors the law required them to file their lien within 30 days after the completion of the buildings, (Code Civil Proc. § 1187,) and the filing of a lien prior to its completion was premature. *Perry v. Brinard*, 8 Pac. Rep. 882; *Roylance v. San Luis Hotel Co.*, 15 Pac. Rep. 777.

The Code does not mean that the building, if, as in this case, it was intended to be a dwelling-house, must be completed in all respects as contemplated by the plans and specifications, or even that it shall have become habitable as a dwelling. Ordinarily the lien cannot be filed until a building is so completed. But when it is made to appear that it was the original purpose of the owner to erect and build it in part only, or that the owner having proceeded to erect the house in part abandoned his design of finishing it, the building should be held to be completed, within the meaning of section 1187, from the time it was so built in part. The purpose of the owner may be inferred from his acts or omissions, but the ultimate fact to be determined is his original or substituted purpose to leave the building unfinished. The owner of property on which a building has been commenced cannot deprive the material-man or laborer of his lien by refusing or omitting to finish the building. In *Harmon v. Ashmead*, 68 Cal. 322, 9 Pac. Rep. 183, the complaint alleged that at the date of the commencement of the action the building had not been completed; that the defendant did not intend to complete it; and that he had notified the plaintiffs to that effect. The lien was decreed. The question is but incidentally referred to, but was included in the judgment recognizing and enforcing the lien of a material-men, in *Germania, etc., v. Wagner*, 61 Cal. 349. In that case the building was not completed, "but work thereon ceased July 16, 1881, and has never been resumed."

But to uphold a lien filed before the actual completion of a building it should distinctly appear that the original purpose was to build it in part, or that the original purpose to finish it was abandoned. The present action was commenced June 20, 1884. The appeal is on the findings alone, and the court below found that the work of the *carpenters* employed in the construction of the building was completed in the month of January, 1884, but that the said building "was not then and is not now completed." There is no direct finding that between the last of January and the twentieth June no work was done on the house by masons, plasterers, plumbers, painters, or others than carpenters;

nor any finding that work of some kind was not actually progressing when this suit was brought. The finding should be at least of facts from which it might be clearly inferred that it never was the intention of the defendant to complete the house, or that she had abandoned such intention. After finding that the carpenters completed their work in January, and the dwelling-house was not completed at the commencement of the action, the court found "that neither of the plaintiffs at the time of furnishing the materials knew that it was not the intention of the defendant Sarah to complete said building and leave it in an unfinished state." This is not a finding that such was her intention or that the completion was abandoned by her.

Judgment reversed, and cause remanded for a new trial.

We concur: SEARLS, C. J.; MCFARLAND, J.; TEMPLE, J.; PATERSON, J.

74 Cal. 435

O'CONNOR v. IRVINE *et al.* (No. 9,704.)

(Supreme Court of California. December 28, 1887.)

1. TRUSTS—RESULTING TRUSTS—PURCHASE BY AGENT WITH MONEY OF PRINCIPAL.

The owner of a mining claim sold for taxes requested another to buy it in, and furnished money therefor. The agent purchased in his own name. *Held*, that these transactions created a resulting trust in the owner's favor, although the agent made no express promise to act as such.¹

2. SAME—RES ADJUDICATA.

When land is purchased at a tax sale by the owner's agent, ejectment by the owner against such agent to establish the validity of the tax title will not bar a suit between the same parties to declare a resulting trust in favor of such owner.

3. PARTIES—DEFECT OF PARTIES IN INTEREST.

Code Civil Proc. Cal. § 389, provides that when a complete determination of the cause cannot be had without the presence of other parties, the court must order them to be brought in. In an action to declare a resulting trust as to stock in a corporation it appeared that one not a party to the action had an interest in the stock. *Held*, that it was the duty of the court on its motion to order such party to be brought in, and a failure so to do was error.

4. SAME—REAL PARTY IN INTEREST—HOLDER OF LEGAL TITLE.

Where the plaintiff in an action holds the legal title to the demand, he is a real party in interest under the California Code.

5. EQUITY—ACCOUNTING—WHEN ORDERED.

The plaintiff in an action to declare a resulting trust in stock in a corporation asked for an account of the profits, assessments, etc., but the evidence failed to show that there was anything due to defendant on the stock. *Held*, that the account was unnecessary.

In bank. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Jas. G. Fair and one Selover owned a certain interest in a mining claim. The claim was sold for taxes, and Fair employed Wm. Irvine, the defendant, to buy in the property, and furnished him with the money necessary therefor. The purchase was made accordingly, and afterwards Fair brought ejectment against Irvine, and suffered a judgment against himself to establish the validity of the tax title. Irvine and others formed the Morgan Mining Company, to which Irvine transferred the interest in the mining claim held by him in consideration of 10,000 shares (one-half) of the capital stock of said company. Fair then sold his interest in the mining claim to Cornelius O'Connor, the

¹When a conveyance is made to one person, the consideration for which moves from another, a trust results in favor of the latter. *Bigley v. Jones*, (Pa.) 7 Atl. Rep. 54; *Donlin v. Bradley*, (Ill.) 10 N. E. Rep. 11; *Harris v. McIntyre*, (Ill.) 8 N. E. Rep. 182; *Springer v. Young*, (Or.) 12 Pac. Rep. 400; *Smith v. Brown*, (Tex.) 1 S. W. Rep. 573; *Bedford v. Graves*, (Ky.) 1 S. W. Rep., note, 537; *Ward v. Matthews*, (Cal.) 14 Pac. Rep. 604; *Carter v. Challin*, (Ala.) 3 South. Rep. —. And such trust results, even though the consideration has been in fact advanced by the grantee for the other person, the grantee holding the title as security for such advances. *Barroilhet v. Anspacher*, (Cal.) 8 Pac. Rep. 804; *Walton v. Karnes*, (Cal.) 7 Pac. Rep. 676. But see, to the contrary, *in re Wood*, 5 Fed. Rep. 443; *Bear v. Koenigstein*, (Neb.) 20 N. W. Rep. 104.

plaintiff, who brought this action against Irvine and the Morgan Mining Company to recover the 10,000 shares of stock into which the claim had been converted. Selover was not made a party. A decree was entered ordering the 10,000 shares of stock to be transferred to the plaintiff, as prayed for in his complaint. From this decree the defendants appeal.

Geo. W. Towle, for appellants. *McAllister & Bergin*, for respondent.

PATERSON, J. 1. The evidence shows that the defendant acted as the agent of Fair and Selover in purchasing the property, and in holding it, and that he so considered himself up to a certain period, when, having had some misunderstanding with Fair, he resolved to assume the right of ownership in the property. Fair furnished the money with which the purchase was made. It was not necessary for the plaintiff to show the defendant agreed in formal or express language that he would make the purchase for Fair and others and hold it for their benefit. It is sufficient if it was mutually understood between the parties that he was so acting in their behalf. What was said and done by the parties, so far as the evidence shows, is capable of only one interpretation, and establishes a perfect understanding between the parties as above stated. Under such circumstances, although the language used may not of itself show an express promise, it is the duty of the party whose services are sought, if he does not mean to act in accordance with the evident expectation of the parties with whom he is dealing, to expressly declare that he will not, otherwise his silent acquiescence is a fraud. *O'Hara Will Case*, 95 N. Y. 403; *Millard v. Hathaway*, 27 Cal. 119; *Sandfoss v. Jones*, 35 Cal. 486. It is true, as claimed by appellant, the party alleging the trust must show that the money was paid at or before the execution of the conveyance, or that an absolute obligation to pay has been incurred by him as a part of the original transaction of purchase. 2 Pom. Eq. Jur. 1037; *Case v. Coddington*, 38 Cal. 193. But we do not see how this principle can aid appellant in this case. On December 28, 1869, the sheriff sold the property to defendant Irvine, who paid him \$115.19 therefor, and received the sheriff's certificate of sale. This money was paid to defendant by Sinton, acting as the agent of Fair and others, in February, 1870. There was no conveyance, within the meaning of the authorities cited, until the time of redemption had expired, and the sheriff delivered to him the deed to the property. The evidence shows that defendant rendered an account for the money advanced, and received the amount thereof prior to the execution and delivery of the sheriff's deed. It would appear, therefore, that he ought not now to be heard to say that it was not a loan, and if it was a loan, the facts created a resulting trust. See authorities above cited; also *Page v. Page*, 8 N. H. 187; *Siemon v. Schurck*, 29 N. Y. 598; *Foote v. Bryant*, 47 N. Y. 544; *Soggins v. Heard*, 31 Miss. 426; *Morey v. Herrick*, 18 Pa. St. 129. The fact that a patent was issued to defendant Irvine, in March, 1874, upon his application, filed in 1873, cannot in any way affect the equitable right of plaintiff. If there be a trust in favor of another party at the time of the issuance of the patent, a court of equity will control the operation of the legal title for the benefit of the *cestui que trust*. *Bludworth v. Lake*, 33 Cal. 263.

2. The plaintiff is a real party in interest. It is not denied that all of Fair's right in the property, together with his cause of action, were duly assigned to plaintiff. It is sufficient under the Code if he holds the legal title to the demand.

3. The court below found that on the first day of October, 1872, the defendant first repudiated the title of Fair, and claimed to hold adversely to him. This finding is attacked by appellant, who claims that it is not supported by the evidence, which shows acts of hostility and repudiation as early as March, 1871. Inasmuch as the judgment must be reversed, we deem it unnecessary to examine the evidence before us upon this point.

4. No necessity is shown for an accounting unless the prayer of the com-

plaint that an accounting of the profits, assessments, expenses, etc., be had, shows such necessity. The evidence fails to show that there was anything due the defendant.

5. The judgment in the ejectment suit of *Fair v. Irvine* is relied upon by defendant to defeat the claim of plaintiff in this action. Courts will not entertain fictitious actions when their true characters are made to appear; and a judgment rendered in such a case, when its true character is shown, determines nothing. *Lord v. Veazie*, 8 How. 255; *Cleveland v. Chamberlain*, 1 Black, 425. Assuming, however, that the judgment in that action must be treated collaterally as valid, although the action was simulated,—not a real controversy,—what did it determine? Plaintiff is not estopped from invoking his equities in this case. An action of ejectment, and an action to declare a trust are essentially different. To prevail in the former the plaintiff must, as against the defendant, be the holder of the legal title, whether such legal title be evidenced by a deraignment from the paramount source of title, or simply by prior possession; but in the latter the whole case depends upon the theory that the legal title is in the defendant. The rule is expressed in the Code. Section 1908, subd. 2, Code Civil Proc., is to the effect that a judgment is conclusive between the parties in respect to the matter directly adjudged; and section 1911 provides that, “that only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein, or necessary thereto.” Equitable rights are not necessarily included in an action of ejectment, and their determination, when not pleaded, is not necessary to a determination of the issues in such action.

6. The evidence shows that Irvine is a trustee for both *Fair and Selover*. Although Fair furnished the money Irvine was the agent of both. This, we think, is clearly shown by the evidence. Defendant moved for a nonsuit on the grounds, among others, that there was a fatal variance between the allegations and the proof; that Selover’s interest has never been assigned; that the quantity of interest of Fair and Selover has not been shown, and Irvine should not be required to convey the whole interest to plaintiff, who is assignee of only Fair’s interest. The court, in a written opinion referring to this matter, says: “The defendant asked leave to amend his answer at the close of the trial, so as to set up the objection as to non-joinder of Selover; but the court refused to allow such amendment, it appearing that the defendant was fully informed, or should have been, of this matter by reason of the evidence given on the trial of the case of *Dunham v. Irvine*, tried some years ago in the United States circuit court in this city. To have allowed such amendment under the circumstances would have been unjust to the plaintiff, as it would have necessitated a continuance of the cause after an expensive trial.”

The general rule is that an objection on the ground of defect or misjoinder of the parties plaintiff must be taken advantage of by demurrer, if it appear on the face of the complaint, and if it does not so appear, then by answer, or the objection will be waived; but there are exceptions. The Code provides that, “of the parties to the action those who are united in interest must be joined as plaintiffs or defendants; but, if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint,” (section 382, Code Civil Proc.) and “the court may determine any controversy between parties before it when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in,” (section 389, Code Civil Proc.) The decree in this case declares Irvine to be a trustee for plaintiff of the whole 10,000 shares of the capital stock of the Morgan Mining Company, and directs that he assign and transfer the same to plaintiff, and restrains perpetually the company defend-

ant from making any transfer on its books of said stock, or any part or portion thereof, to any one but plaintiff herein, and directs the company to allow plaintiff all rights and privileges "by law incident to the full legal and equitable ownership of said 10,000 shares of stock."

In the absence of Selover as a party, a complete determination of the controversy, we think, cannot be had without prejudice to his, Selover's rights. The decree, if enforced, might result in a sale to innocent purchasers of Selover's interest, and, as was said in *Reyes v. Sanford*, 5 Cal. 116, "would have no other effect than to renew litigation by producing more suits in order to settle and determine finally the rights of all parties." A court of equity will not permit litigation by piecemeal. The whole subject-matter and all the parties should be before it, and their respective claims determined once and forever. Generally, in suits between *cestuis que trust* and trustees, all the parties interested should be before the court. Barb. Parties, 439, 442, 444. If the necessary parties to a full determination are not before the court it is the duty of the court on its own motion to order them brought in; and this, although the defendants in the action have omitted to raise an objection of defect of parties by demurrer or answer. The failure of the court so to do is fatal to the judgment. *Osterhoudt v. Board Sup'rs*, 98 N. Y. 239; *Settembre v. Putnam*, 30 Cal. 498; *Gates v. Lane*, 44 Cal. 396; Barb. Parties, 319.

Selover is a party primarily interested in the stock disposed of by the judgment before us. The amount of his interest therein is not shown. Necessarily, therefore, he would be prejudiced by the execution of this judgment, and must be made a party in order that a complete determination of the controversy may be had. We see no way to avoid a new trial in order to determine the controversy finally and without prejudice to the rights of Selover.

Judgment and order reversed, and cause remanded for further proceedings in accordance with the views herein expressed, and for a new trial.

We concur: SEARLS, C. J.; TEMPLE, J.; MCFARLAND, J.; THORNTON J.

74 Cal. 475

EDWARDS v. COUNTY OF FRESNO. (No. 11,826.)

(*Supreme Court of California.* December 31, 1887.)

DISTRICT AND PROSECUTING ATTORNEYS—FEES.

Acts Cal. 1869-70, p. 170, provide for a salary for the district attorney of Fresno county, and for a fee of \$15 for all district attorneys for each conviction in cases of misdemeanor; to be a county charge in Fresno county if the defendant therein is unable to pay it. Pol. Code, §§ 4256-4258, prescribe the duties of district attorneys, and that, when not engaged, they shall attend before magistrates when required in cases of arrest. The attorney for Fresno county sued for fees for convictions in cases that he did not prosecute, nor attempt to collect the fees from the defendants therein, by execution or otherwise. *Held*, that the county was not liable. THORNTON and TEMPLE, JJ., dissenting; PATERSON, J., expressing no opinion.

Commissioners' decision. In bank. Appeal from superior court, Fresno county; R. E. ORRICK, Judge.

E. D. Edwards, district attorney of Fresno county, plaintiff, sued the county of Fresno for fees. Judgment for plaintiff, and defendant appealed.

D. S. Terry, for appellant. E. D. Edwards, *in propria persona*, for respondent.

FOOTE, C. The plaintiff as district attorney for the county of Fresno presented for allowance to the board of supervisors of that county a bill for fees alleged to be due him by the county. The bill was disallowed, and the plaintiff instituted the present action to recover the sum claimed. He obtained judgment as prayed for, and from that the county has appealed.

From the agreed statement of facts it appears that the plaintiff did not institute the proceedings in any of the cases, which were all brought in the jus-

tices' courts of the county, and that where he claimed fees for convictions in the bill he presented and the complaint he filed herein, he did not appear and prosecute said cases in person or by deputy, and did not attempt to collect said fees out of said persons so alleged to have been convicted, and did not cause to have issued any execution against any of said persons so convicted for said fees. Notwithstanding these facts, the district attorney claims that by law the county is indebted to him in the sum of \$15 for each of the convictions so had in the magistrates' courts.

The statutes which have any bearing upon the subject are to be found in the acts of 1869-70 and the Political Code, and so much of them as are pertinent read as follows: "The district attorney shall receive for his services, to be paid quarterly in the * * * counties of Fresno, * * * the sum of \$1,000. * * * In addition to the salary herein provided, the district attorneys for each of the counties of this state shall be entitled to charge and receive * * * for each conviction in cases of misdemeanor \$15. In all convictions the fees herein allowed shall be assessed against the defendant, and shall not become a county charge; provided, that in the counties of * * * Fresno * * * the fees herein allowed shall become a county charge in case of the inability of the defendant to pay the same." St. 1869-70, p. 170. "The district attorney is the public prosecutor, and must * * * institute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of public offenses, when he has information that any such offenses have been committed; and for that purpose, when not engaged in criminal proceedings in the district and county courts, must attend upon the magistrates in cases of arrest when required by them," etc. Section 4256, Pol. Code. Other duties of the district attorney are further prescribed in that section, and in 4257 and 4258, Pol. Code.

It will be perceived that the district attorney for Fresno county was by law to be paid for his *services* a salary, and in certain cases fees for convictions. We can discover nothing in our laws relating to the district attorney, his duties or fees, which permits us to think that the legislature intended the plaintiff here should be entitled to charge and receive the sum of \$15, or any other sum, from the county of Fresno for convictions where he never instituted any proceedings at all, never appeared before the magistrates where the convictions were had, or rendered any *service* whatever either by himself or deputy. The pervading idea that runs through the whole law pertaining to the compensation allowed district attorneys, is for services rendered as such. Where the law allows him a fee for *each conviction*, it would seem as if a conviction was meant in which the district attorney or his deputy took some part, either by the institution of the proceedings, by being present or aiding at the trial, or in some other way performing some service as district attorney. In the present instance the record shows no connection by the district attorney with the convictions for which fees are claimed, except the presentation of his bill to the board of supervisors, and the action brought to recover his alleged fees.

For these reasons we are of opinion that the judgment should be reversed, and judgment rendered for the defendant on the agreed facts set out in the record.

I concur: BELCHER, C. C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the court below directed to render judgment for the defendant on the agreed facts set out in the record.

THORNTON, J., and TEMPLE, J., dissenting; PATERSON, J., expressing no opinion.

74 Cal. 448

PHELAN *et al.* v. POYORENO *et al.* (No. 11,373.)

(*Supreme Court of California.* December 29, 1887.)

1. PUBLIC LANDS—MEXICAN GRANT—VALIDITY—PATENT.

Where, before the treaty of Guadalupe Hidalgo, whereby the public domain of California was ceded to the United States, a perfect conveyance was made of land by the Mexican government, it cannot be defeated by the subsequent action of the board of commissioners organized under the act of congress of March 3, 1851, for the purpose of determining the validity of claims to land in California, or by the subsequent patent from the United States.

2. SAME—CHAIN OF TITLE.

A record containing the petition, with a *diseno*, an order of reference, an *informe* by the proper officer, a decree of concession, a *titulo*, the approval of the departmental assembly, the order for survey and juridical possession, with the report of the proper officer that such survey was made and possession given, presents every link essential to a chain of title under the Mexican law.

3. SAME—NAME OF GRANTEE.

In the petition for the land the petitioner, Juan Crispin Perez, is twice called "Juan Perez," but in the decree of the governor, in the *titulo* or patent, and subsequent proceedings, he is called "Juan Crispin Perez," with such reference to the petition and preceding document that there can be no doubt as to his identity. *Held* that, as the identity of the petitioner sufficiently appears, the variance is immaterial.

4. SAME—DESCRIPTION.

A grant in which the property is described as "the lands known as 'Paso de Bartolo Viejo'" is sufficient, if the land is known and can be identified by the name given.

In bank. Appeal from superior court, Los Angeles county; A. BRUNSON, Judge.

On rehearing. Action to quiet title, by Thomas Phelan and others, respondents here, against Eduardo Poyoreno and others, appellants here. The remaining facts are stated in the former opinion in this case, 13 Pac. Rep. 681.

Gardiner & Stephenson, for appellants. *Bicknell & White*, (*Chase Gitchell*, of counsel,) for respondents.

PER CURIAM. This cause was decided April 25, 1887, (13 Pac. Rep. 681.) A rehearing was subsequently ordered, and we have again reviewed the case. Upon such review we find no sufficient cause to alter or modify the conclusion reached in the former decision.

The judgment and order appealed from are reversed, for the reasons given in the former opinion on file, and the cause remanded for a new trial.

74 Cal. 457

BOTILLER *et al.* v. DOMINGUEZ. (No. 11,336.)

(*Supreme Court of California.* December 29, 1887.)

1. PUBLIC LANDS—MEXICAN GRANTS—PERFECTING TITLE—ORDER OF PROCEDURE.

The fact that, in proceedings had prior to the treaty of Guadalupe Hidalgo to obtain title to land under the Mexican law, the order for juridical possession preceded the approval of the grant by the departmental assembly, does not render the proceedings fatally defective.

In bank. Appeal from superior court, Los Angeles county; A. BRUNSON, Judge.

On rehearing. Action of ejectment by Dominga Dominguez, respondent here, against Brigido Botiller and others, appellants here, for land claimed by plaintiff under a Mexican grant prior to the treaty of Guadalupe Hidalgo. Appellant, who had been defeated on the previous hearing, claimed that respondent's title was invalid because of an alleged failure of her predecessor in title to take the requisite steps to perfect his title under the Mexican law, in that the predecessor obtained his order for juridical possession before the approval of the departmental assembly. The remaining facts are stated in *Botiller v. Dominguez*, 13 Pac. Rep. 685, and in *Phelan v. Poyoreno*, Id. 681.

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H. K. S. O'Melveny and Chase Gitchell, for appellants. *Howard & Roberts* and *A. L. Rhodes*, for respondent.

PER CURIAM. The judgment and order appealed from in this cause are affirmed, upon the doctrine enunciated and for the reasons given in *Phelan v. Poyoreno*, 13 Pac. Rep. 681.

We do not regard the fact that juridical possession was given before the approval of the grant by the departmental assembly sufficient to change the *status* of the case, or differentiate it from the case above mentioned.

74 Cal. 444

GASSEN *et al.* v. HENDRICK *et al.* (No. 12,305.)

(Supreme Court of California. December 29, 1887.)

1. VENDOR AND VENDEE—BONA FIDE PURCHASER—VALUABLE CONSIDERATION—PRE-EXISTING INDEBTEDNESS.

A deed in consideration of a pre-existing indebtedness is a conveyance for a valuable consideration, under Civil Code Cal. § 1214, which provides that every conveyance of real estate other than a lease for a term not exceeding a year is void as against a subsequent purchaser in good faith, and for a valuable consideration, whose conveyance is first duly recorded.

2. SAME—NOTICE—PROOF—REVIEW ON APPEAL.

Where a question of notice of a prior deed had arisen between two purchasers, held that, even conceding that a party claiming under the later deed must prove the negative—that he had no notice—yet where some evidence appears to show this, and none appeared showing that he had notice, the finding of the court that he had no notice should be sustained on appeal.

3. DEPOSITION—FAILURE TO ANSWER INTERROGATORIES—OBJECTIONS.

An objection to the introduction of a deposition, on the ground that the witness had refused to answer cross-interrogatories concerning material matters, and that the deposition is not full or complete, is too general, and is not ground for a new trial if overruled, when it appears that full answers were given to all interrogatories but one. The particular interrogatory must be pointed out which it is claimed a witness has not answered.

In bank. Appeal from superior court, San Diego county; JOHN D. WORKS, Judge.

Action brought by A. G. Gassen and J. H. Marshall against E. W. Hendrick as administrator of the estate of Cecelia Carr, deceased, George Carr, Charles Carr, William B. Black, A. Lorette, E. Gregory, James Meagher, and P. P. Carnes, to establish their title in, and obtain partition of, certain real property. Judgment for defendants, and plaintiffs appeal.

J. R. Jones, Jones & Van Dyke, and *Levi Chase*, for appellants. *N. H. Conklin* and *Hendrick & Younkin*, for respondents. *John R. Jones*, for defendant E. Gregory. *M. A. Luce*, for defendant Geo. B. Hensley.

MCKINSTRY, J. On the third day of June, 1871, Clarence L. Carr made a deed to Thomas H. Bush of one undivided half of a certain 20-acre tract of land. The deed was not recorded until the eighth day of July, 1885. On the tenth day of August, 1878, the said Clarence L. Carr signed a deed of the whole tract, with other lands, to Elizabeth R. Carr, his mother, for the recited consideration of \$800. This last deed was acknowledged, and was duly recorded August 15, 1878. It is contended by appellants: *First*, that, as the deed to Elizabeth R. Carr was in consideration of a pre-existing indebtedness, she was not a purchaser for a valuable consideration. *Second*, that it was not made to appear by those claiming under Elizabeth R. Carr that she was a purchaser "in good faith." *Third*, that the deed from Clarence L. to Elizabeth was not proved to have been delivered.

1. A conveyance in consideration of the cancellation of pre-existing indebtedness is a conveyance for a valuable consideration, within the meaning of section 1214 of the Civil Code. *Frey v. Clifford*, 44 Cal. 335; *Schluter v. Harvey*, 65 Cal. 158, 3 Pac. Rep. 659.

2. Even if it be conceded (for the purpose of this decision) that the burden of proving *prima facie* the negative—that she or they had no notice of the prior deed to Bush—was on those claiming under Elizabeth R. Carr, still there was evidence of facts tending to establish that she had no notice, which, in the absence of direct evidence of notice, was sufficient to justify the finding of the court that she was a purchaser in good faith.

3. The court below found that the deed from Clarence L. to Elizabeth R. Carr was executed on the day it bears date. The statement on motion for a new trial contains no specification that the evidence is insufficient to sustain the finding of the execution or delivery of the deed.

The plaintiffs (appellants) objected generally to the reading in evidence of the deposition of Alice E. Carr on the ground “that the witness has refused to answer the interrogatories put on behalf of the plaintiffs herein, and concerning material matter affecting the rights of the parties to this suit, and that the deposition is not full or complete or responsive to the question put to the witness by plaintiffs in the commission upon which the evidence was taken.” And upon like grounds the plaintiffs subsequently moved to strike out the deposition.

It is insisted that the deposition should have been stricken out and not considered by the court. The objection was to the whole deposition on the ground that the witness had refused to answer the interrogatories put to her on behalf of the plaintiffs. The deposition shows that all the interrogatories of plaintiffs were directly and fully answered by the witness, unless the answer to cross-interrogatory No. 27 is an exception. The objection to the deposition was too general. In *Valton v. Assurance Co.*, 20 N. Y. 34, the court of appeals said: “The objection of the defendants’ counsel to the introduction of the deposition was properly overruled. The ground of objection was that the first and ninth cross-interrogatories were answered only in part. These interrogatories each embraced a large number of questions, and there was an answer given to each of the interrogatories, although some questions contained in each were not answered. The objection was too general. The counsel should, under such circumstances, call the attention of the judge to the particular question unanswered, and make his exception equally specific. It is not the duty of a judge upon the trial of an issue to examine an interrogatory containing a great number of questions for the purpose of learning every question embraced in it, and then to examine the answer to the interrogatory to ascertain whether each question is fully answered. As well might a general objection be taken to a deposition upon the ground that all the interrogatories were not answered, without specifying any one.”

In the case before us the objection extended to the interrogatories of plaintiffs, and concerning material matter, etc. It was the right of the judge below to have his attention called to the particular interrogatory which the witness had “refused to answer,” or her answer to which was evasive or not fully responsive. Judgment and order affirmed.

We concur: SEARLS, C. J.; McFARLAND, J.; TEMPLE, J.; THORNTON, J.; SHARFSTEIN, J.; PATERSON, J.

74 Cal. 459

SCHROEDER v. SCHMIDT. (No. 9,812.)

(Supreme Court of California. December 30, 1887.)

1. NONSUIT—OBJECTION TO ORDER GRANTING REVIEW ON APPEAL.

An error in granting a nonsuit is one of law, and must be so specified and excepted to or it will not be reviewed. It cannot be reviewed on an objection that the evidence is insufficient to sustain the decision.

2. SALE—BILL OF SALE—DESCRIPTION OF PROPERTY—PAROL EVIDENCE.

Parol evidence as to what property was covered by a certain bill of sale, the bill itself being introduced and the property being therein described, is inadmissible.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; M. A. EDMONDS, Judge.

An action to recover the value of a building and the value of the use and occupation thereof, which plaintiff alleged had been assigned by him to defendant by inducement of the latter, and without consideration, while plaintiff was deranged in his mind. The sale was made by a bill in writing, and plaintiff offered to prove orally that a bill of sale introduced in evidence did not cover certain property, the sale of which it was claimed said bill affirmed. Plaintiff was nonsuited, and appealed.

John F. Burris, for appellant. *Edw. W. Blaney*, for respondent.

HAYNE, C. The plaintiff was nonsuited at the trial. He took no exception to the ruling, and the statement does not specify it as error. An error in granting a nonsuit is an error in law, and should be excepted to and specified as such. *Donahue v. Gallavan*, 43 Cal. 576; *Cravens v. Dewey*, 13 Cal. 42. It cannot be reviewed on the ground that the evidence is insufficient to sustain the decision. This is a ground for the review of questions of fact, not of law.

There was no error in the ruling on the plaintiff's offer to prove what was intended by the bill of sale, or what was included in it. Such evidence was not admissible to contradict or add to the writing. And if it be said that the object was to show the situation of the property so as to explain the writing, the answer is that the offer was too vague, and the ruling was proper on that ground alone. *Smith v. East Branch Co.*, 54 Cal. 164.

We therefore advise that the order denying a new trial be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order denying a new trial is affirmed.

McFARLAND, J., (*concurring*.) I concur in the judgment because no error appears which would warrant us in disturbing the judgment of the court below. But I am not prepared to say that, on an appeal from an order denying a new trial, a final judgment, though following an order granting a nonsuit, may not be reviewed on a bill of exceptions containing the evidence and the rulings at the trial, even if there was no formal exception to the order granting the nonsuit.

74 Cal. 482

PEOPLE v. THORNTON *et al.* (No. 20,346.)

(*Supreme Court of California*, January 3, 1888.)

1. CRIMINAL LAW—MISCONDUCT OF JURY—SEPARATION.

After retiring for deliberation, the jury in a criminal case went to a restaurant. While there, three jurors went to the bar, about 25 feet from where the others sat, for drinks. *Held* that, under Pen. Code Cal. § 1181, subd. 3, regulating new trials, such separation is ground for a new trial.

2. SAME—RECEIVING EVIDENCE OUT OF COURT.

In the trial of an indictment for libel, after retiring to deliberate on their verdict, the jury found and read portions of a pamphlet containing the alleged libel. The pamphlet had been admitted in evidence, and partly read to the jury. *Held*, that the jury had "received evidence out of court," and under Pen. Code Cal. § 1181, subd. 2, a new trial should be granted.

3. LIBEL AND SLANDER—CRIMINAL PROCEEDINGS—HEARSAY EVIDENCE.

In the trial of an indictment for libel, a witness testified to having heard the printer of the alleged libel say that the defendant "had given him only twenty minutes to do the job in." *Held*, that such declaration was hearsay, and inadmissible.

McKINSTRY, McFARLAND, and THORNTON, JJ., dissenting.

In bank. Appeal from superior court, Los Angeles county; WILLIAM A. CHENEY, Judge.

Information for libel against A. M. Thornton and B. A. Stephens. The jury having found a verdict of guilty, the defendants moved for a new trial, which was overruled, and thereupon they appealed to this court.

G. Gordon Adams, C. C. Stephens, and W. R. Finlayson, for appellants.
Atty. Gen. Geo. A. Johnson, for the People.

SHARPSTEIN, J. The defendants were tried on an information for libel. They were convicted; moved for a new trial, which was denied; and from the judgment, and an order denying a new trial, have appealed. One of the grounds on which they moved for a new trial is that "the jury separated, without leave of the court, after retiring to deliberate upon their verdict."

1. The record shows that the jury retired to their room about 10 P. M. to deliberate upon their verdict; and after remaining there two hours or more, and before agreeing upon a verdict, they left their room, accompanied by the officer having them in charge, and went across the street from the court-house to a restaurant, and ordered supper. While that was being prepared, three of the jurors went to a bar not more than 25 feet distant from the officer and the other jurors, and ordered some drinks, which were given to them. After that they rejoined the officer and the other jurors. They then partook of the supper prepared for them, and returned to the court-house, but, instead of going into the jury-room, went into the court-room, and there continued their deliberations until they agreed upon a verdict of guilty.

Did that constitute separation, within the meaning of subdivision 3, § 1181, Pen. Code? This question is not a new one in this court. In *People v. Brannigan*, 21 Cal. 337, the court, FIELD, C. J., delivering the opinion, said: "The statute regulating proceedings in criminal cases provides that when the jury do not agree, after a case has been submitted to them, without retiring for deliberation, one or more officers shall be sworn 'to keep them together in some private and convenient place, and not to permit any person to speak to them, nor to speak to them themselves, unless it be to ask them whether they have agreed upon a verdict, and to return them into court when they have so agreed.' And it empowers the court to grant a new trial 'when the jury have separated, without leave of the court, after retiring to deliberate upon their verdict, or been guilty of any misconduct tending to prevent a fair and due consideration of the case.' The object of the first provision is to remove the jury from all improper influences in their deliberations; and the object of the second provision is to permit a remedy where the jury have been subjected to such influences, or been themselves guilty of misconduct tending to affect the purity of their verdict." In that case it appeared that while the jury had the case under consideration, and before they had agreed upon a verdict, they were taken by the officer who had them in charge to a hotel opposite the room in which they were deliberating, to get their dinner, and while there the proprietor of the hotel spoke to some of the jurors, and told them to convict the defendant. This the court says was a mere passing remark of the proprietor of the hotel, which, however improper, did not constitute misconduct of the jury. As we construe the opinion of the court, the judgment was reversed, and the cause remanded for a new trial, on the sole ground of a separation of the jury, without leave of the court, after retiring to deliberate upon their verdict. There has been no change of the law relating to this subject since the decision of *People v. Brannigan* was rendered. The statute upon which that decision was based has since been incorporated into and become a part of the Penal Code. In a much earlier case, *People v. Backus*, 5 Cal. 275, it appeared that one of the jurors absented himself from the jury-room for the period of two hours, without leave of the court. The court held the correct rule to be that, if the separation was such that the juror might have been improperly influenced by others, the verdict should be set aside, and that the affidavit of the juror could not be admitted to purge his conduct from the im-

putation of corruption or impropriety. The facts which were held in *People v. Brannigan*, *supra*, to constitute a separation of the jury, are strikingly similar to those in the case now before us. We do not feel inclined to disturb the rule of that case, which, if applied here, is decisive of the question before us. A new trial on this ground should have been granted, and the order denying it must be reversed.

2. While deliberating in the court-room, one of the jurors picked up a pamphlet entitled "Life of Horace Bell," and read portions of it to the other jurors. Appellants insist that by doing so the jury received evidence out of court. It appears by the record that the pamphlet was admitted in evidence, and, by consent, considered read in evidence, that it might be referred to in the arguments of counsel. It does not appear that it was read to the jury before they retired. The Code provides that, upon retiring for deliberation, the jury may take with them all papers (except depositions) which have been received as evidence in the cause. Pen. Code, § 1181, subd. 2. A defendant is entitled to a new trial "when the jury has received any evidence out of court other than that resulting from a view of the premises." Id. subd. 3. The charge of libel is based upon a single paragraph, embracing two or three lines only of the pamphlet, which consists of many pages of libelous matter. It is stated in one of the affidavits used on the motion for a new trial that one of defendants' counsel, in his argument to the jury, read some portions of the pamphlet. How much or what portions is not stated. The pamphlet was received in evidence as a whole, while parts of it only were read in the presence of the jury before they retired. If the portions read in the presence of the jury after they had retired were not read in their presence before they retired, we think they may have received evidence out of court, as the paragraph upon which the charge of libel is based is one of the mildest of an innumerable number of libels contained in the pamphlet. No part of it could be read without reading a libel of a very damaging character. The propriety of permitting the jury, on retiring for deliberation, to take with them said pamphlet was not considered by the court or counsel. The jury did not take it with them; they found it after they had retired. By listening to the reading of it, we think they must have received evidence out of court which on retiring for deliberation they *did not* take with them. That, in our opinion, entitles the defendants to a new trial.

The questions thus far considered illustrate quite forcibly the danger of any departure by juries or officers in charge of them from the course of conduct prescribed by the Code.

The motion of defendants' counsel to have the statement of the witness Sumner, that "the boy said that Stephens had given him only twenty minutes to do the job in," stricken out, should have been granted. It was hearsay evidence, and inadmissible.

The record presents no other material error, but for those above specified the judgment and order denying the motion for a new trial must be reversed. Judgment and order reversed, and cause remanded for a new trial.

We concur: SEARLS, C. J.; TEMPLE, J.

PATERSON, J., (*concurring*.) I concur, on the ground that the jury received evidence out of court. "*Upon retiring for deliberation*, the jury may take with them all papers (except depositions,)" etc. There is significance in the words "upon retiring for deliberation," and a substantial observance of the provision will subserve a wise and just purpose. The court and the attorneys should know what papers are taken by the jury. The defendant certainly has the right to know what documents the jury desire to take with them,—or which they call for during their deliberation,—in order that he

may submit to them for their consideration any other papers which may tend to explain the contents of the papers asked for. The value of this right, and the importance of its enforcement, is apparent in cases like the one at bar, where only portions of the documentary evidence are read to the jury, and commented on. Counsel, of course, assume that only those portions are actually before the jury; and they conduct the defense, and conclude the trial, accordingly.

McKINSTRY, J., (*dissenting*.) I dissent. The statement of the witness which the court refused to strike out was made while he was at work, in the printing-office of one of the defendants, upon the pamphlet containing the alleged libelous matter. The declaration was part of the *res gestæ*. But, even if error, it could not have injured the defendants.

The "Life of Horace Bell" was admitted in evidence, and was, by consent, considered as read. The reading of portions of the pamphlet by one of the jurors to the others was not, in my opinion, the reception of evidence out of court, within the meaning of section 1181, Pen. Code. The evidence had been received in court. Nor can I perceive that it was misconduct in the jurors—such as prevented a fair and due consideration of the case—for them to read portions of a pamphlet which was in evidence "and considered read." If there were other documents in evidence which explained the pamphlet, or changed its effect, that fact should have been shown by the defendants, who moved for a new trial.

Did the jury "separate?" Pen. Code, § 1181. I do not think the affidavits on motion for new trial show a separation. In *People v. Kelly*, 46 Cal. 357, it was held that the facts that the jury, after they retired for deliberation, were conducted by the officer having them in charge to the dining-room of a hotel, where they remained together for three-quarters of an hour; that one of the doors of the room was open, and accessible to strangers; and that the officer in charge was absent from the room for a few minutes during the period named,—were insufficient to constitute misconduct on the part of the jury; there being affidavits that no person in fact conversed with the jurors. But even if it should be conceded that the affidavits show a "separation," in that it appears therefrom that three of the jury went apart from the others a distance of 20 or 25 feet, the rule is firmly established that the separation of the jury is but *prima facie* ground for new trial. Its effect is always subject to be rebutted by proof that no improper influence reached the jurors. The rule is so laid down in *People v. Brannigan*, 21 Cal. 337, cited in the prevailing opinion herein. And it seems to have been so ruled in Arkansas, Connecticut, Virginia, Georgia, Tennessee, North Carolina, Illinois, Indiana, New York, Mississippi, Minnesota, New Hampshire, Massachusetts, Rhode Island, New Jersey, and Wisconsin.

As a general rule, a verdict cannot be impeached by the affidavit of a jurymen, but such affidavit is admissible in support of the verdict. In the case at bar the motion was based on the affidavit of the defendant. Three of the jurymen, including two of the three said to have separated from the others, testified that the three were continuously in the presence and sight of the other jurors, and of the officer in charge, and not more than 20 or 25 feet distant from them. Further, that they did not converse with any person, and did not speak to any person, except to ask the barkeeper for the "drinks" they desired, or, in the language of one of the affidavits, "to nominate their beverages." It does not affirmatively appear that any of them drank of that which could intoxicate, and one of the three paid for what they drank. The evidence was amply sufficient to overcome any inference that the jurymen *might* have been approached or improperly influenced.

Moreover, it has been held that, when the evidence with respect to the misconduct of a jurymen is substantially conflicting, the action of the trial

court in refusing a new trial will not be disturbed. *People v. Anthony*, 56 Cal. 399.

We concur: MCFARLAND, J.; THORNTON, J.

(74 Cal. 489)

HALEY v. HALEY. (No. 11,778.)

(Supreme Court of California. January 5, 1888.)

DIVORCE—GROUNDS—CRUELTY—FILING FALSE AND MALICIOUS AFFIDAVIT.

In an action for divorce by the wife on the ground of cruelty, the cruelty alleged consisted in the filing by the husband, in another action between the same parties, of a "false and malicious" affidavit charging the wife with unchastity. The petition did not aver that the action wherein the affidavit was filed had been terminated in favor of the wife, or had been terminated at all. *Held*, that a demurrer to the petition should have been sustained.¹ MCFARLAND, J., dissenting.

In bank. Appeal from superior court, Los Angeles county; A. BRUNSON, Judge.

Action for divorce by Presentacion Ballestero de Haley against her husband, Salisbury Haley, on the ground of extreme cruelty. The plaintiff was granted a divorce as prayed for, and the defendant appeals to this court.

S. Haley, in pro. per., and *David Lyons*, for appellant. *Hupp & Glowner*, for respondent.

MCKINSTRY, J. The court below should have sustained the demurrer to the complaint. The action is for divorce. The complaint avers the defendant was guilty of extreme cruelty, in that, in another action brought by her against him, he filed an affidavit containing statements of want of chastity on her part prior to their marriage; and in that, in an action brought by him against her, he filed a complaint charging that, prior to the marriage of these parties, she was pregnant by another man. The complaint herein avers that the statements of defendant in the affidavit and complaint referred to were wholly false and malicious. The complaint herein does not directly state the character of the two actions mentioned, or of the issues made by the pleadings in either. It may, however, be inferred from the allegations as a whole that both were actions for divorce,—the one brought by the plaintiff; the other by the defendant herein. The complaint does not show what was the particular motion, application, or proceeding in which the affidavit was filed, nor does it appear therefrom but the statements in the affidavit were relevant and material to the issue presented on the motion, application, or proceeding. There is no averment that either the action brought by the plaintiff in which the affidavit was filed, or the particular proceeding in such action in which the affidavit was filed, has terminated adversely to the present defendant, or terminated at all. And there is no averment that the action brought by the defendant herein against the present plaintiff has come to an end in any way.

1. While the action brought by the wife for a divorce was pending, and the proceeding in such action, in which the affidavit of the husband was filed, was undetermined, could the wife bring the present action, charging as an act of extreme cruelty the making by her husband of the statements contained in the affidavit?

2. While the action for divorce brought by the husband (defendant herein) against his wife (plaintiff herein) was still pending and undetermined, could

¹ Respecting cruelty as a ground for divorce, see *Leach v. Leach*, (Me.) 8 Atl. Rep. 349; *Peck v. Peck*, (Mich.) 33 N. W. Rep. 893; *Minde v. Minde*, (Mich.) 32 N. W. Rep. 868; *Burlage v. Burlage*, Id. 866; *Whitacre v. Whitacre*, (Mich.) 31 N. W. Rep. 327, and note; *Vanduzer v. Vanduzer*, (Iowa.) Id. 936; *Williams v. Williams*, (Tex.) 2 S. W. Rep. 823, and note; *Haley v. Haley*, (Cal.) 14 Pac. Rep. 92; *Peck v. Peck*, (Mich.) 33 N. W. Rep. 893; *Williams v. Williams*, (Fla.) 2 South. Rep. 768.

the latter commence the present action, and rely, as ground for divorce, upon statements, contained in the complaint of the husband, showing fraud by the present plaintiff in the contracting of the marriage? The averments of the complaint in the action brought by the present defendant against the plaintiff herein were proper in themselves, and, if true, may be the basis of a decree for divorce. Whether true or not true may be the issue in that action. The present plaintiff cannot, by alleging that the averments of the defendant to the other suit are false and malicious, transfer to the present action the trial of the issue of their falsity. In the action brought by the defendant, it may be adjudicated that the averments of his complaint are true. The orderly administration of the law demands of us to hold that this action was, at least, commenced prematurely. This appears on the face of the complaint, and the objection could properly be taken by general demurrer. Suppose a divorce should be sought by a wife on the ground of desertion, and the husband should file a "cross-complaint," charging her with adultery; would it be contended that, while the suit was pending, she could commence and maintain another action for divorce upon the ground that the counter-charge was "false and malicious?" To permit the trial by anticipation, in a new action, of an issue in an action already pending, would lead to confusion, and, perhaps, to contradictory adjudications, since the evidence might not be the same at both trials. True, in the present action, the allegation is that the averments of the complaint in the action brought by the husband were not only false, but malicious. In the action brought by the husband, the truth of the averments made by him could alone be in issue; if true, his malice in making them would be an immaterial circumstance. But the averment, in the present complaint, includes the question of the falsity of the husband's allegations. However much malice may have entered into the action of the defendant, the plaintiff could not recover in this action unless she proved his averments in the suit brought by him to be *false*. The objection to the present complaint as to the averments of the defendant in the action brought by him, applies, also, to the allegations of the present complaint with respect to the relevant and pertinent statements of the defendant's affidavit, filed in the action first commenced by her.

It may not be improper to remark that it is at least doubtful whether the Codes provide for a cross-complaint in actions for divorce. "Recrimination is a *showing* by the defendant of any cause of divorce against the plaintiff, *in bar of the plaintiff's cause of divorce*." Civil Code, § 122. An action for divorce is not brought on the "contract" of marriage, but upon certain violations of duties or obligations annexed to the *status* of matrimony, which are enumerated in section 92, Civil Code, as causes for which a divorce may be granted. Recriminatory facts should be pleaded, but it would seem they are pleaded and proved as a defense simply, and in bar of the plaintiff's cause. When in bar of an action for divorce, the defendant pleads the commission by the plaintiff of any of the wrongs mentioned in section 92, Civil Code, and prays for a divorce, does he seek affirmative relief "relating to or depending upon the transaction upon which the action is brought?" If not, section 442, Code Civil Proc., does not apply to actions for divorce. Nor is there any general principle, independent of the Code, which authorizes a cross-complaint in actions for divorce "to prevent multiplicity of suits." The statutes regulate the matter in other cases; and the law does not so especially favor actions for divorce as to make them exceptions to a rule otherwise uniform.

Judgment reversed, and cause remanded, with direction to the court below to sustain the demurrer to the complaint.

We concur: SEARLS, C. J.; TEMPLE, J.; SHARPSTEIN, J.; PATERSON, J.

I concur in the judgment: THORNTON, J.

McFARLAND, J., (*dissenting.*) I dissent. In my opinion a false and malicious charge, of the character stated in the complaint, made by a husband against a wife, cannot be evaded on the ground that it was made in the shape of an affidavit in an action. I think, too, that it fairly appears that the litigation in which the affidavit occurred is ended.

74 Cal. 463

SAN JOSE RANCH CO. v. BROOKS *et al.* (No. 12,321.)

(*Supreme Court of California.* December 30, 1887.)

HIGHWAYS—RESTRAINING OBSTRUCTION—PLEADING—ALLEGATION OF SPECIAL INJURY.

In an action to restrain the obstruction of a public road, the allegations of the petition showed that plaintiff was damaged in the same manner, though possibly somewhat more, than the general public, but there were no allegations of special injury. *Held*, that a demurrer thereto was properly sustained.¹

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; A. W. HUTTON, Judge.

Geo. M. Holton and Chapman & Hendrick, for appellant. *Anderson, Fitzgerald & Anderson and Richard Dunnigan*, for respondents.

FOOTE, C. This action was brought to abate an alleged nuisance, to obtain a perpetual injunction for certain purposes, and for \$1,000 damages. The amended complaint was demurred to as not stating facts sufficient to constitute a cause of action and an answer filed at the same time. A motion was made to dissolve a preliminary injunction which had been granted, and affidavits were filed upon both sides. That motion was submitted to the court upon the amended complaint, answer, and demurrer; afterwards, that tribunal made an order sustaining the demurrer, and dissolving the injunction, and the plaintiff declining to amend, judgment was entered that the action be dismissed, and that the defendants recover their costs. From the judgment and order the plaintiff has appealed.

The facts stated in the complaint upon which the plaintiff based its contention, are that the defendants have obstructed a public highway in such a manner as to prevent the plaintiff having ingress or egress to and from a tract of land which it owns situated at a point in a canyon above the place where the obstruction is placed, and which prevents it from making any use of its land which it desires. There is no special injury averred as accruing to the property of the plaintiff, beyond the statement of such facts as go to show that it perhaps will suffer more inconvenience from the alleged nuisance than the general public, and the injury thus alleged, although it results from the necessity the plaintiff is under, perhaps, to travel the road oftener than that of the general public, is of the same nature as would fall to the lot of any other person who might be obliged to make use of the road. It is held that a private individual may bring an action of the kind here instituted and maintain it, when he is able to show some special damage to him in addition to that received by the public. *Aram v. Schallenberger*, 41 Cal. 450.

Judge SHAW in *Canal v. Newcomb*, 7 Mete. 276, says: "Where one suffers in common with all the public, although, from his proximity to the obstructed way, or otherwise from his more frequent occasion to use it, he may suffer in a greater degree than others, still he cannot have an action, because it would cause such a multiplicity of suits as to be itself an intolerable evil." A similar principle was announced in *Seelly v. Bishop*, 19 Conn. 128. *O'Brien v. Railroad*, 17 Conn. 372, was a case where a private person undertook to enjoin the defendant from constructing its railroad over an arm of the sea al-

¹Respecting the rights of individuals in regard to nuisances which are public in their nature, see *McDonald v. City*, (N. J.) 7 Atl. Rep. 855; *Broome v. Telephone Co.*, Id. 851; *Wheeler v. Bedford*, (Conn.) Id. 23; *Palmer v. Road Co.*, (Ind.) 8 N. E. Rep. 906; *Hogan v. Railway Co.*, (Cal.) 11 Pac. Rep. 876, and note; *De Vaughn v. Minor*, (Ga.) 1 S. E. Rep. 433; *Snyder v. Cabell*, (W. Va.) Id. 241; *Rude v. City*, (Mo.) 6 S. W. Rep. 257.

leged to be navigable, and used by the plaintiff, as well as others, when they chose, for the purpose of passage up and down the cove connected by it with the River Thames, a navigable river, and where it was also alleged that, by means of the construction of the road, the navigation of that cove would be greatly obstructed and rendered almost wholly useless. The relief prayed for was not allowed, for the alleged reason that the injury was the same which might be occasioned to any one who desired to pass up and down the cove.

What other peculiar injury is caused to the plaintiff than would result to any other person whose only mode of ingress or egress to or from his land was by that road, we are not able to perceive. The amount of injury might be largely greater in one case than the other, but the kind of injury would still be the same. The case of *Blanc v. Klumpke*, 29 Cal. 156, cited to us in favor of the appellant's view, that it suffers a peculiar injury, is not in point, because the facts were different from those alleged here. There the obstruction was erected so near, and in such a relative situation to, the plaintiff's lot, located on the water-front of the city of San Francisco, that boats and vessels were prevented from approaching it, and the injury which thereby resulted to the plaintiff, and his particular lot, was not in common with the public. The case of *Schulte v. Transportation Co.*, 50 Cal. 592, was one where the proof showed that the defendant maintained a bulkhead or wall, on the west line of East street, across the entire front of the plaintiff's lot, which wholly precluded all access to the lot from the street. That was held to be a special damage not common to that suffered by the public.

We do not understand from the facts alleged here that where the public road ran over, through, or along the plaintiff's land, it was wholly prevented from getting into that road. But it was the obstruction put into the road at a point not upon or adjoining its land, but between its land and places to and from which it wished to travel on the road, which prevented it using the road or, as it claims, using its land. Therefore, it would appear that the plaintiff would suffer no different injury in not being able to have ingress and egress by the public road, than would any one else who may have owned land, wood, and water rights in the canyon or pocket. *Bigley v. Nunan*, 53 Cal. 404, was not a case where the plaintiff was wholly prevented from getting into the street at his lot by an obstruction, but was a case where he was impeded in passing along the street, as others were, which was an injury that any one else using the street would have encountered. *Shirley v. Bishop*, 67 Cal. 543, 8 Pac. Rep. 82, was a case very similar to that of *Blanc v. Klumpke*, *supra*, where the plaintiff's ferry-rights peculiar to him would have been injuriously obstructed, and we do not think that what is said in the opinion there delivered, or in that of any other case decided by this court, is in conflict with the principles laid down in *Aram v. Schallenberger*, *supra*.

The injury alleged to be suffered by the plaintiff is that it is entirely prevented from passing over the road, for its objects and purposes, which it claims renders its land useless to it. So any one else desiring to travel that road would be entirely prevented from passing over it and obtaining the object he had in view. The objects sought to be attained may be different, but the manner in which their accomplishment is prevented, the way in which injury is inflicted, is the same; all parties are restrained from traveling towards different points, perhaps, and for different purposes, by the same barrier; but that barrier is not so erected as that all other persons can get into the public road at their land and the plaintiff cannot.

For these reasons the judgment and order should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

THORNTON, J., dissenting.

74 Cal. 478

OAKS v. SCHEIFFERLY. (No. 11,453.)

(Supreme Court of California. December 31, 1887.)

1. BONDS—INDEMNITY—WHEN CAUSE OF ACTION ACCRUES.

A cause of action on an indemnity bond given to a sheriff which recites that it is given to indemnify and save him harmless from all damages, expenses, costs, and charges, does not accrue until the sheriff has been compelled to pay such damages, costs, etc.

2. SAME—DEFENSE TO ACTION.

In an action on a bond given to indemnify a sheriff, who has levied upon property under writ of execution, a plea was entered that the party for whom the property was taken, and who furnished the bond and sureties, was not the proper party to whom the sheriff should have paid the funds secured by the levy. *Held*, that such plea was not good, as the object of the bond was to secure to such party the funds arising from the levy.

In bank. Appeal from superior court, San Luis Obispo county; D. S. GREGORY, Judge.

An action by J. W. Oaks upon an indemnity bond given by J. J. Scheifferly and George M. Payne to indemnify him for all damages, etc., suffered by holding certain property levied upon by him under a writ of execution. Judgment for plaintiff, and defendant appeals.

F. Adams and V. A. Gregg, for appellant. *J. M. Wilcoxson and McD. R. Venable*, for respondent.

SHARPSTEIN, J. Preston recovered a judgment against Jones, and caused an execution to issue thereon. The writ was placed in the hands of the respondent herein, who was at that time sheriff of San Luis Obispo county. He levied on wheat and barley, which one Meherin claimed and demanded as his property. Thereupon Preston, as principal, and Scheifferly and Payne, as sureties, executed a bond in the sum of \$700, which, after reciting the above facts, and that Preston, notwithstanding the claim and demand of Meherin to have the property delivered to him, insisted on the retention of the property by the sheriff under said levy, concludes as follows: "Now, therefore, the condition of this obligation is such that if the said R. M. Preston, J. J. Scheifferly, and George M. Payne, their heirs, executors, and administrators, shall well, and truly indemnify and save harmless the said sheriff, his heirs, executors, administrators, and assigns, of and from all damages, expenses, costs, and charges, and against all loss and liability which he, the said sheriff, his heirs, executors, administrators, or assigns, shall sustain or in any way be put to, for or by reason of the levy, taking, sale, or retention by the said sheriff, in his custody under said execution, of the said property claimed as aforesaid, then the above obligation to be void; otherwise to remain in full force and virtue." The respondent then proceeded under the execution and levy, and sold the property as the law directs, and paid the proceeds of the sale to Preston. Meherin sued respondent for the value of the property, and on the eighteenth day of December, 1880, recovered judgment therefor. Respondent appealed from that judgment to this court, which, on the twenty-fifth of May, 1885, affirmed the judgment. The respondent paid the judgment, and on the fourth of September, 1885, commenced this action. These facts appearing upon the face of the complaint, appellants demurred thereto, on the grounds that the same did not state facts sufficient to constitute a cause of action, and that plaintiff's action was commenced more than four years after his cause of action accrued, and his cause of action is barred in virtue of the statute of limitations, by provisions of sections 312, 337, Code Civil Proc. Cal. The demurrer was overruled, and defendant Scheifferly answered, and pleaded, among other things, the bar of the statute of limitations.

Appellant insists that the court erred in overruling his demurrer, because it plainly appears on the face of the complaint that the cause of action accrued

more than four years before the action was commenced. He contends that the cause of action accrued on the eighteenth day of December, 1880, when Meherin recovered his judgment against respondent. This action was commenced September 4, 1885, within a few months after the judgment in *Meherin v. Oaks*¹ had been affirmed and paid. A cause of action accrued on a breach of any of the covenants of the bond, and not before the breach of some of them. This action is clearly founded on the breach of the covenant to "indemnify and save harmless the said sheriff, his executors, administrators, and assigns, of and from all damages, expenses, costs, and charges * * * which he, the said sheriff, his heirs, * * * shall sustain or in anywise be put to for or by reason of the levy, taking, sale, or retention by the said sheriff in his custody under execution of the said property claimed as aforesaid," *i. e.*, by Meherin. There is a further covenant to indemnify and save the said sheriff, etc., harmless "*against all loss and liability*" by reason of the levy. But this action, as we construe the complaint, is not based upon an alleged breach of that clause, although it states facts which show a breach of that as well as of the other. It states facts which show a breach of the covenant to indemnify and save *harmless from all damages, expenses, costs, and charges*, and it is well settled that a cause of action would not accrue for a breach of that covenant until the obligee had been compelled to pay, and had paid, damages. *Lott v. Mitchell*, 32 Cal. 24. *McBeth v. McIntyre*, 57 Cal. 49, holds that a cause of action for a breach of the covenant to indemnify, etc., against *liability* would accrue as soon as a judgment was recovered against the officer for the property levied on, because the indemnity given *was not only against actual damage, etc., but also against "all liability therefor."* In that case a judgment had been recovered against the obligee of the bond, which he had not paid before the bringing of his action, and the defendants insisted that the action could not be maintained until the judgment was paid. But there is not even an intimation in the opinion, that a cause of action on the indemnity against *damages* would not arise for the first time when the judgment was paid. This action is for the recovery of *actual* damages, and could not be maintained if nothing had been paid. As the complaint shows the payment was made within four years before the commencement of the action, it is not barred by the statute of limitations, and the demurrer was properly overruled.

In addition to his plea of the statute of limitations, the defendant pleaded that Meherin had no interest in the property levied on except by chattel mortgage, which the court found to be true. The proceeds of the sale were paid by respondent to Preston. Appellant insists that the proceeds should have been paid to the mortgagee, and that respondent misappropriated the fund arising from the sale. We think the sole object of giving a bond of indemnity was to have the claim of Meherin wholly disregarded. Of that Meherin was the only person who could complain, and he seems to have taken good care of his interests in the premises. The point that respondent, by appealing from the judgment recovered against him and executing a stay-bond, granted an extension to Preston, principal obligee, of the indemnity bond, does not impress us favorably.

The record discloses no material error. Judgment affirmed.

We concur: SEARLS, C. J.; MCKINSTRY, J.; TEMPLE, J.; THORNTON, J.

¹67 Cal. 57, 7 Pac. Rep. 47.

2 Cal. Unrep. 831

WILSON v. HUNT, Judge. (No. 11,407.)

(Supreme Court of California. January 17, 1888.)

MANDAMUS—PEREMPTORY WRIT—FAILURE OF RECORD TO SHOW SERVICE.

Alternative *mandamus* was issued by the chief justice, returnable before department 2 of this court. On application to the court in bank for a peremptory writ, the record showed no evidence of service on respondent, and no return by him. *Held*, that the application must be denied.

In bank. Original proceeding by petition for *mandamus*.
Baum & Gradwohl, for petitioner.

PER CURIAM. This is an application for a writ of *mandamus*, requiring respondent to substitute M. C. Baum as attorney for plaintiff in case of *Wilson et al. v. Tobin et al.* The alternative writ was issued by the late chief justice on the seventh day of September, 1886, returnable before department 2 of this court, September 10, 1886. We find no evidence of service on respondent in the record, and he has, so far as appears, made no return. Petitioner now moves to make the writ absolute.

The application must be denied. If petitioner has, at this date, any rights in the premises, they can be asserted in department 2 of this court.

74 Cal. 508

GRAY v. DIXON. (No. 12,211.)

(Supreme Court of California. January 21, 1888.)

1. PUBLIC LANDS—CONFLICTING TITLES—POSSESSORY ACTION—STATUTES—REPEAL.

Pol. Code Cal. tit. 8, c. 1, relates wholly to lands belonging to the state, but does not attempt to regulate the rights of parties in possession of public lands of the United States; hence Act Cal. April 20, 1852, entitled "An act to provide the mode of maintaining and defending possessory actions on public lands in this state," is not within the provisions of Pol. Code Cal. § 18, which provides that "no statute, law, or rule is continued in force because it is consistent with the provisions of this Code on the same subject, but, in all cases provided for by this Code, all statutes, laws, and rules heretofore in force in this state, whether consistent or not with the provisions of this Code, unless expressly continued in force by it, are repealed and abrogated."

2. SAME—DEFENSE OF OUTSTANDING TITLES IN UNITED STATES.

It is no defense to an action of ejectment brought by a settler on public land under the possessory act of California of 1852, that the title to the land is in the United States; public policy having called for the establishment in California of the rule that, the owner of the true title not objecting or consenting to the possession of either of the parties, the court regards the better right, as between the parties, to be vested in the first possessor.

3. SAME—ERECTION OF IMPROVEMENTS—EVIDENCE.

In an ejectment suit brought by plaintiff, a settler under the possessory act of California of 1852, plaintiff offered to show that he built a house upon the land, and the cost thereof. *Held*, that such evidence was improperly excluded, as plaintiff was required to show a compliance with the act, which required improvements on the land to the value of \$300 within 90 days after the record of entry, and the evidence would have tended to show that the act had been complied with.

4. SAME—EVIDENCE OF OUSTER.

It was also error to exclude evidence showing that defendant had torn down a part of plaintiff's house, as the erection and occupation of the house by plaintiff was an important element in determining the character of his possession, and any interference therewith was important in determining the question of ouster.

In bank. Appeal from superior court, San Bernardino county; HENRY M. WILIS, Judge.

Charles R. Gray, the plaintiff, on the fourth day of December, 1885, settled upon and took possession of a tract of land belonging to the public land of the United States, under the possessory act of California, entitled "An act to provide the mode of maintaining and defending possessory actions on public lands in this state," approved April 20, 1852. In September, 1886, John C. Dixon, the defendant, moved upon the same tract under color of a previous

claim. Gray brought suit in ejectment. Judgment for defendant, Dixon, and plaintiff appeals.

Hargrave & Gray, for appellant. *Curtis, Otis & Conner*, for respondent.

PATERSON, J. From the evidence offered by the plaintiff, it appears that on December 4, 1885, plaintiff built a house upon, and took possession of, the N. $\frac{1}{2}$ of S. W. $\frac{1}{4}$, and N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$, of section 8, township 2 S., range 4 W., S. B. B. and M. On December 24, 1885, he filed in the office of the county recorder an affidavit setting forth the facts required by the act of April 20, 1852, known as the "Possessory Act." Thereafter he caused the lands to be surveyed, and posts to be put in the ground at several points in the exterior boundaries, upon which were nailed sheet-iron strips with the words painted thereon "Charles R. Gray's land." These posts remain where they were placed, but the land has never been fenced. When plaintiff settled on the land it was wholly unoccupied and unimproved surveyed public land of the United States. In the winter of 1885-86, plaintiff plowed, harrowed, and sowed ten acres in one portion of the tract, one acre in another portion, and ten acres in still another portion; from all of which crops were taken in the summer following. He also planted fruit trees and grape-vines upon the land, and dug a well thereon. In the following winter, for the purpose of raising another crop, he plowed a portion of the land cultivated the year prior. The plaintiff testified that he was a citizen of the United States, and owned no other land. On September 7, 1886, the defendant served upon him a written demand, which reads as follows:

"SAN BERNARDINO, September 7, 1886.

"*Mr. Charles R. Gray*—SIR: I hereby notify you to vacate the N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of section 8, township 2, range 4 W., San Bernardino meridian, as I have filed on the same, and wish to occupy it myself.

"JOHN C. DIXON."

Plaintiff did not vacate any land; but on the ninth of September, 1886, defendant hauled lumber upon the land, built a small dwelling-house thereon, and in October following took his family to live upon the land, where they have ever since lived. The defendant plowed and sowed some of the land which plaintiff had cultivated in 1885. The defendant offered no evidence.

It is claimed that the act of April 20, 1852, has been repealed by section 18, Pol. Code, inasmuch as title 8, Pol. Code, "fully provides for the settlement, disposition of, and protection of, the rights of the parties in possession of the public lands of the state of California." Section 18, *supra*, provides that "no statute, law, or rule is continued in force because it is consistent with the provisions of this Code on the same subject, but, in all cases provided for by this Code, all statutes, laws, and rules heretofore in force in this state, whether consistent or not with the provisions of this Code, unless expressly continued in force by it, are repealed and abrogated." Title 8 does fully provide for the protection of the rights of parties in possession of lands belonging to the state, and for the settlement and disposition of such lands, but in no wise attempts to regulate the rights of parties in possession of public lands of the United States. Neither does the act of March 3, 1874, affect the rights of claimants who have not filed pre-emption or homestead applications. The laws referred to apply only to those claims which are connected with the paramount source of title. Our attention has not been called to any act or to any section of the Code which brings the possessory act of 1852 within the provisions of section 18, Pol. Code. It is therefore, we think, applicable to cases of this kind.

Again, it is said that, "even were the act not repealed, it would, we submit, be altogether inoperative in so far as it might affect any lands of the United States. The legislature of this state would certainly not have power to confer upon a settler upon the lands of the United States constructive pos-

session of any parcel of such land." But it is too late now to raise such objection to the act. The general rule that the plaintiff in ejectment must recover upon the strength of his own title, and not upon the weakness of his adversary's, and that it is sufficient in defense of such action to show that the title is in a third person, has always been restricted in this state. Owing to the anomalous condition of things, arising out of our peculiar mining and agricultural interests, the origin of titles, and the delays caused in securing final confirmations of grants of land by those claiming under a former sovereign, it was seen early in the history of the state that confusion must follow if the general rule referred to were enforced. The larger portion of the mining lands within the state belonged to the United States. Mining was the principal industry. Actions for possession of mining claims upon the public lands became numerous, and it was very soon perceived that, if proof of the paramount title of the government would operate to defeat such claims, disaster must follow. It therefore came to be the rule, as stated by Mr. Chief Justice FIELD in *Hubbard v. Barry*, 21 Cal. 325, that, "the owner of the true title not objecting or consenting to the possession of either of the parties, the court regards the better right, as between the parties, to be vested in the first possessor, and grantees claiming through him. The rule rests upon its necessity for the preservation of peace and quiet in a country where titles to tracts of land, measured by leagues, are under consideration by the tribunals of the United States, and there is an indisposition, in numerous instances, on the part of claimants, to assert their legal rights against the occupants until the final action of those tribunals." The reason of this rule has not ceased, neither should the rule itself.

Plaintiff offered to show that he built a house upon the lands, and the cost thereof. Defendant objected, and his objection was sustained. This was error. Plaintiff was required to show a compliance with the statute, which required improvements upon the land to the value of \$200 within 90 days after the date of the record. The evidence would have tended, in connection with other evidence introduced without objection, to show that the act had been complied with, and was admissible also to show the character of plaintiff's possession,—his dominion over the lands adjoining the house.

It was also error to exclude evidence showing that defendant had torn down a part of plaintiff's house. The erection and occupation of the house by plaintiff was an important element in determining the character of his possession, and any interference therewith was important in determining the question of ouster. The possessory act provides (section 6) that "the possession or possessory right of the plaintiff shall be considered as extending to the boundaries embraced by the claim of such plaintiff, so as to enable him or his heir, according to section 3, to have and maintain any action as aforesaid, without being compelled to prove an actual inclosure."

Judgment reversed, and cause remanded for a new trial.

We concur: SEARLS, C. J.; MCKINSTRY, J.; TEMPLE, J.; MCFARLAND, J.; SHARPSTEIN, J.

74 Cal. 512

BARNARD v. WILSON. (No. 12,320.)

(Supreme Court of California. January 21, 1888.)

1. MORTGAGES — FORECLOSURE — RIGHTS OF PURCHASER AGAINST HEIR OF THE VENDEE OF THE LAND.

Defendant mortgaged and then sold land. Plaintiff purchased at the mortgage sale. The probate court afterwards assigned the land to defendant as heir to his vendee. *Held* that, under Code Civil Proc. § 1663, providing that on final settlement of an executor's or administrator's accounts the court shall distribute the estate among those entitled; section 1666, that "such decree is conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal;" section 1678, providing for the substitution of purchasers in the

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place of the heirs, etc., whose interest they hold; and section 1908, declaring judgments of probate courts conclusive as between the parties,—the judgment of the probate court did not affect plaintiff's title, as it related back to the date of the mortgage, and was adverse to that of the estate.

2. SAME—RIGHTS OF MORTGAGOR—PURCHASE OF OUTSTANDING TAX TITLE.

Defendant, having mortgaged and then sold land, again became the owner; and after decree, but before sale under the mortgage, the land was sold for taxes, defendant acquiring the purchaser's interest. Plaintiff afterwards purchased at the mortgage sale. *Held*, that all defendant's rights acquired under such tax sale are for plaintiff's benefit.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; H. K. S. O'MELVENY, Judge.

Action by Sarah H. Barnard against C. N. Wilson to quiet the title to certain real estate in the city of Los Angeles. There was a judgment for defendant, and plaintiff appeals.

Brousseau & Hatch and *Will D. Gould*, for appellant. *Chapman & Hendrick*, for respondent.

BELCHER, C. C. This action was brought to quiet the plaintiff's title to four lots of land in the city of Los Angeles. The case was submitted in the court below upon an agreed statement of facts, and judgment was rendered in favor of the defendant. The plaintiff moved for a new trial, and has appealed from the judgment and order denying her motion.

The material facts of the case are as follows: On the nineteenth day of March, 1875, the defendant, being then the owner of the lots in controversy, mortgaged them to W. C. Barnard, to secure the payment of \$1,375. The mortgage used the words, "has granted, bargained, sold, conveyed, and confirmed, and does hereby grant, bargain, sell, convey, and confirm unto the said party of the second part, his heirs and assigns," etc. On the first day of July, 1876, the defendant, for a valuable consideration, conveyed the lots to Miss M. M. Wheeler; and thereafter, in the month of December following, they intermarried. On the fourteenth day of June, 1879, Mrs. Wilson, formerly Miss Wheeler, died intestate, leaving her husband, the defendant, and one sister her only heirs; and on the twenty-seventh day of the same month the sister, by deed of quitclaim, conveyed all her right, title, and interest in and to the lots to the defendant. On the sixteenth day of October, 1879, an action was commenced against the defendant to foreclose the said mortgage, and such proceedings were thereafter had that on the first day of March, 1880, a decree was signed, foreclosing the mortgage, and ordering a sale of the mortgaged property to satisfy the amount found due, viz., \$1,230; and on the sixteenth day of October, 1882, under and in pursuance of the decree and order of sale, the sheriff sold the property at public auction to the plaintiff, and on the same day issued to her his certificate of sale, and thereafter, on the twenty-seventh day of April, 1883, there having been no redemption, executed and delivered to her his deed conveying to her the property so sold. On the ninth day of July, 1883, letters of administration on the estate of his deceased wife were duly granted to the defendant, and he continued to act as administrator of the estate until the ninth day of February, 1884, when a decree was entered, distributing the whole of the property of the estate, including the lots in controversy, to him. In the year 1880 the lots were assessed and taxes were levied against them for city purposes. The taxes became delinquent on the first day of November, 1880, and, not being paid, the city tax collector, after due notice, sold the lots on the seventeenth day of February, 1881, to pay the taxes, percentages, and costs. O. Barnard was the purchaser at the tax sale, and received from the collector a certificate of sale for each lot. The time to redeem from the sales expired on the eighteenth day of February, 1882, but no redemption was had; and on the third day of March, 1882, Barnard assigned his certificates to the defendant, who held them until the thirteenth day of

July, 1886, and then obtained from the tax collector a deed in proper form and properly executed for each of the lots.

Upon these facts the question for decision is, was the title to the lots in the plaintiff or in the defendant? It is argued for respondent that the decree of the probate court, distributing the lots to him, was in the nature of a judgment *in rem*, which conclusively determined, as against the appellant, that he was the owner of them; that if the appellant claimed to be the owner of the lots she should have appeared before the court and have asked to have them distributed to her, and that, as she failed to do so, she is now estopped from asserting title to them. In support of their argument counsel cite sections 1665, 1666, 1678, 1908, Code Civil Proc.; *Estate of De Castro v. Barry*, 18 Cal. 97; *Freeman v. Rahm*, 58 Cal. 111.

Section 1665 provides that upon the final settlement of the accounts of an executor or administrator, the court must proceed to distribute the residue of the estate "among the persons who by law are entitled thereto." Section 1666 requires the court, in the order or decree, to name the persons and the proportions or parts to which each shall be entitled, and declares that "such order or decree is conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal." Section 1678 provides that upon distribution of the real estate, if any of the original heirs, legatees, or devisees have conveyed their shares to other persons, "such shares must be assigned to the person holding the same in the same manner as they otherwise would have been to such heirs, legatees, or devisees." And section 1908 makes the judgments of courts sitting in probate, in respect to the matter directly adjudged, as conclusive between the parties litigating for the same thing under the same title and in the same capacity as other judgments. *Bath v. Valdez*, 70 Cal. 361, 11 Pac. Rep. 724.

In *Estate of De Castro v. Barry* the only points decided were that the probate court had jurisdiction to make partition of the real estate of the deceased among the alienees of the heirs or devisees, and that where a wife died leaving separate property and a husband and two infant children, and one of the children died, the surviving child, and not the father, inherited the deceased child's share.

In *Freeman v. Rahm*, J. R. Campbell, one of the heirs, made a verbal sale of his interest in the real property of an estate to the plaintiff, and gave to the plaintiff a power of attorney to receive his distributive share of the estate. The share was in fact distributed to Campbell, and no mention of the plaintiff, or of the purchase by him, or of the power of attorney, was made in the decree. After the distribution a creditor commenced an action against Campbell, caused his interest in the property to be attached, and in due time obtained judgment. After the attachment, Campbell conveyed all his interest in the property to the plaintiff. Under an execution issued on the judgment, the sheriff was proceeding to sell the property, and the action was brought by plaintiff to restrain the sale. It was held that if the plaintiff had any rights he was estopped by the decree of distribution from asserting them, but that in fact the power of attorney gave him no right to take distribution to himself, as it did not purport to be, and was not, a transfer of the title.

We are unable to see that either of the sections or cases cited is in point here. The appellant was not an heir, devisee, or legatee of Mrs. Wilson, nor did she claim the property under or through Mrs. Wilson's estate. On the contrary, she asserted and asserts title only under and through the defendant. The mortgage was in fee, and when it was executed and foreclosed the whole title was in the defendant. The fact that between those times the title, subject to the mortgage lien, passed from him and then back to him, is immaterial. "A mortgagor is under obligation, from the nature of the mortgage contract, to preserve the property pledged for the purposes of the original security; and, on grounds of public policy, to insure good faith and fair deal-

ing, he is estopped, independent of covenants of warranty, from denying the existence of the lien which he has attempted to create, or defeating its enforcement against the property on which it was placed; and those claiming under the mortgagor are equally estopped." *Clark v. Baker*, 14 Cal. 613; *Lent v. Morrill*, 25 Cal. 492; *Land Ass'n v. Viera*, 48 Cal. 572; *Orr v. Stewart*, 67 Cal. 275, 7 Pac. Rep. 693. The appellant's title related back to the date of the mortgage, and was adverse to that of the estate. The probate court had, therefore, no jurisdiction to pass upon it; and appellant suffered no prejudice by failing to appear and ask for distribution to herself. "The probate court has jurisdiction to settle the estate of a deceased person, and has no power, save in certain excepted instances, to determine disputes between the heirs or representatives of the deceased and third persons." *Theller v. Such*, 57 Cal. 447; *Bath v. Valdez*, 70 Cal. 350, 11 Pac. Rep. 724.

It is also argued for respondent that, if he did not already have title to the lots, he acquired a good title to them under the tax deeds which he received in 1886. The argument is based upon the fact that the decree of foreclosure was entered before the assessment on which the taxes were levied was made, and before the time for making the assessment had arrived. And it is contended that the relation of mortgagor and mortgagee was terminated by the decree, and that thereafter there was nothing to prevent the respondent from purchasing the property, and acquiring a title which could not be affected by the foreclosure proceedings. There are two sufficient answers to this theory:

1. While it is true that the decree of foreclosure was entered on the first day of March, 1880, and the assessment was made for the fiscal year commencing on the first day of April, 1880, still the sale under the decree was not made until the sixteenth day of October, 1882. Now, the respondent was the owner of the lots when the decree was entered, and continued to be the owner of them until the time of the sale. Being the owner when the assessment was made, and when the taxes were levied and became payable, it was the duty of respondent to pay the taxes; and by neglecting to perform that duty he could gain no advantage to himself. 1 Jones, Mortg. § 680. The rule upon this subject was very clearly and concisely stated in *Moss v. Shear*, 25 Cal. 38, SANDERSON, C. J., delivering the opinion, as follows: "If the defendant was under any legal or moral obligation to pay the taxes, he could not, by neglecting to pay the same and allowing the land to be sold in consequence of such neglect, add to or strengthen his title by purchasing at the sale himself, or by subsequently buying from a stranger who purchased at the sale; otherwise he would be allowed to gain an advantage from his own fraud or negligence in failing to pay the taxes. This the law does not permit, either directly or indirectly."

2. In *Land Ass'n v. Viera*, *supra*, it was held that when a mortgage conveys the estate in fee, a decree enforcing the same is in effect a decree that the estate, vested in the mortgagor at the date of the mortgage, as well as that which shall at any time come to him, be sold; and that the sheriff's deed to the purchaser operates to transfer to such purchaser the estate so directed to be sold. The court said: "The rule that a sheriff's deed delivered upon execution sale imports no warranty of title, but transfers to the purchaser only such estate as was held at the time by the defendant in execution, has no practical application to a sheriff's deed delivered upon foreclosure of a mortgage in fee; for, as we have seen already, the defendant in the latter case must continue to be estopped, by the terms of the mortgage deed itself, to deny that the estate was other or less than an estate in fee in the premises. These terms, importing a conveyance of the fee, are equivalent to a covenant of general warranty of title running with the land." Under this rule, whatever right or title to the lots was acquired by respondent, under the certificates of sale which were assigned to him in March, 1882, or under the deeds which he received in July, 1886, immediately passed to and vested in the appellant.

We conclude, therefore, that upon the facts appearing in the record the appellant was entitled to judgment in the court below, and that the judgment rendered against her, and the order denying her motion for new trial, should be reversed, and the cause remanded for further proceedings.

We concur: HAYNE, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are reversed, and cause remanded for further proceedings in accordance with the views above expressed.

74 Cal. 520

BLACK v. BLACK. (No. 12,004.)

(Supreme Court of California. January 23, 1888.)

1. REPEVIN—DAMAGES—SUFFICIENCY OF EVIDENCE.

In an action to recover a lot of hogs or their value, where the only evidence of value was the undisputed testimony of one witness that "the value of the hogs is four or five dollars a head," *held*, that a judgment fixing the value of each hog at four dollars was not error.

2. SAME—APPRAISAL BY SHERIFF—DELIVERY.

Where the value of specific articles of property has been fixed in a judgment for their possession, it is not the duty of the sheriff to assess their value, when in his possession under the writ; and a delivery by him and acceptance by the judgment creditor, of all that could be found at the time of such delivery, will not work a satisfaction of the whole judgment.

3. HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE—WHAT CONSTITUTES.

In an action by the wife to recover from her husband a lot of hogs alleged to be her separate property, the husband testified "that he had no means of his own when he married plaintiff out of which he ever realized anything; that all the hogs claimed were purchased with the proceeds of his wife's property; that he had made no money outside of profits arising from his cultivation of her lands;" and there being no evidence that the hogs in question were those referred to in a contract between the parties, specifying the property of each, judgment for plaintiff *held* not contrary to the evidence.

4. TRIAL—GENERAL ISSUE—SPECIAL FINDINGS.

An action was brought by the wife against her husband to recover a lot of hogs. The husband offered as an affirmative defense, which was admitted in evidence, a contract in which it was agreed between the parties what should be the individual property of each, and which contained this clause: "All other property, not the separate property of the wife's, to be owned and held exclusively by the husband." *Held*, that this contract was one of the matters to be considered under the general issue of ownership, and a failure to make special findings thereon was not error.

TEMPLE, J., dissents.

In bank. Appeal from superior court, San Bernardino county; JAMES A. GIBSON, Judge.

The parties to this action are husband and wife, living separate from each other; and the plaintiff, Julia A. Black, brought this action to recover the possession from defendant, Samuel N. Black, of 400 head of hogs, the alleged separate property of plaintiff,—the said hogs being the proceeds and increase of property alleged to have been owned by her at and before her marriage with defendant; and, in case possession could not be had, then for the recovery of the value of the said hogs, to-wit, \$2,000. Judgment went for plaintiff for the recovery of 400 hogs, or their value, \$1,600, and costs. From this judgment, and an order denying a new trial, and an order denying his motion for entry of satisfaction of the judgment to the extent of the value of the hogs, defendant appeals.

Hargrave & Gray, for appellant. *Paris & Goodcell* and *Harris & Allen*, for appellee.

PATERSON, J. Defendant appeals from the judgment, and the order denying motion for a new trial, and from an order denying motion to satisfy the judgments. Plaintiff, who is the wife of defendant, but living separate and

apart from him, commenced this action May 12, 1886, to recover the possession of 400 hogs alleged to be her separate property, or, if delivery of possession could not be had, for \$2,000, the value thereof. The court found the facts alleged in the complaint to be true, *i. e.*, that plaintiff was the owner of the 400 head of hogs; that they were on the Jeff Thomas ranch, occupied by defendant; that the brands or marks were as alleged; that defendant had no right, title, or interest in the property; that it was the separate property of plaintiff; that defendant unlawfully withholds possession of the same; that plaintiff made demand, and defendant refused to deliver possession; and, finally, that "the hogs are of the value of \$4 each, the whole number being of the value of \$1,600." The judgment which followed the conclusions of law found by the court adjudged that "plaintiff have and recover of defendant the possession of 400 hogs now on the Thomas ranch, in possession of defendant," (describing the brands,) "or, in case delivery cannot be had, that plaintiff have and recover of defendant the value of said hogs, to-wit, the sum of \$4 per head, or \$1,600 for the whole number; and that plaintiff have costs of the action." The sheriff, under execution, took 96 hogs from defendant, and delivered them to plaintiff, who accepted them. The sheriff then levied the writ on personal property of appellant, and, after a sale thereunder, the writ was returned partially satisfied. He reported that he had delivered to plaintiff "ninety-six hogs, valued at \$4 per head, \$384; amount realized on execution sale, \$426.64. Total, \$310.64." Upon a showing of these facts in affidavits, defendant asked the court for an order that the judgment for \$1,600 be wholly satisfied, except as to the costs. The motion was denied. It is urged by appellant that inasmuch as the allegation of the complaint, and the prayer thereof, were for 400 hogs or \$2,000, the sheriff was bound to deliver all the hogs, or none at all; that, if the sheriff could not return to plaintiff all of the hogs, (400 head,) it was his duty to so state in his return to the writ, and proceed to levy and sell as therein directed; and that the delivery and acceptance of 96 hogs was a satisfaction of the judgment. It is claimed, also, that the finding that each hog is worth \$4 is without the issues, and cannot be treated as a finding.

1. With or without an allegation as to the value of each particular hog, it was proper, we think, for the court, under the evidence, to find as it did. The only evidence of value offered was the testimony of the witness Howard, who testified, without objection, that "the value of the hogs was four or five dollars a head." The finding of the court is a fair inference from this evidence, *i. e.*, that the hogs were respectively of the same value. The only specification in the bill of exceptions on this point is that the evidence is insufficient to prove the value of the hogs to be four dollars per head.

2. There is nothing to show that the sheriff in any manner neglected to perform his duty under the judgment and execution. He did not assess the value of the 96 hogs. The value of each hog was fixed in the judgment. The presumption is that he took and delivered all the hogs described in the judgment that he could find. If the hogs which the sheriff refused to take from the Thomas ranch were some of those specified in the judgment, the fact was not shown to the court. Under defendant's theory of the case, if the sheriff delivers a part of the things recovered, and the judgment creditor accepts the same, the judgment debtor can enforce a satisfaction of the judgment before the sheriff can do anything further under the execution.

3. There was no error in the refusal of the court to find upon the matters alleged in the so-called "separate defense." Those matters are all included in the general issue as to ownership. The writings referred to were read in evidence, and were properly considered under the denials as to ownership and separate property. The court found that the hogs mentioned were the separate property of plaintiff, and the testimony of defendant himself is sufficient to support the finding. There is nothing to show that the hogs in con-

troversy were those referred to in the contract or inventory. The contract made subsequent to the recordation of the inventory gives to the defendant "all other property, not the separate property of Julia A. Black."

4. A demand was alleged, and not denied.

Judgment and orders affirmed.

We concur: SEARLS, C. J.; MCFARLAND, J.; THORNTON, J.; SHARPSTEIN, J.; MCKINSTRY, J.

I dissent: TEMPLE, J.

74 Cal. 502

HALL v. COUNTY OF LOS ANGELES. (No. 11,833.)

(Supreme Court of California. January 20, 1888.)

1. COUNTIES—LIABILITIES—CONTRACTS—CONDITIONS.

County Government Act, § 25, subd. 9, giving the board of supervisors power to erect a county jail, provides that it shall not be erected until plans shall have been made therefor and adopted by the board. *Held*, in an action by an architect against a county for the value of services rendered in making plans for a jail building, which had been adopted by the board on condition that they should receive a bid from some reliable person, and after receiving bids they refused to open or act upon them, and rejected plaintiff's plans, alleging that he procured their adoption by the board by fraud, that the plans had been adopted within the meaning of the act, and that plaintiff could recover.

2. SAME—CONSTRUCTION OF CONTRACT.

Where the board of supervisors of a county accepted the plans of an architect for a building on condition that a bid by a reliable party was "received" on the basis of such plan, *held*, that the word "received," as used, was not intended to include an acceptance of a bid. *Hall v. County of Los Angeles*, 13 Pac. Rep. 854, reversed.

PATERSON, J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; A. BRUNSON, Judge.

On rehearing. For former opinion, see 13 Pac. Rep. 854. The plaintiff, John Hall, brought this action against the defendant, Los Angeles county, to recover the value of certain services alleged to have been rendered by him in making plans for a jail for defendant. The complaint alleges that the board invited proposals from architects for plans and specifications for the building of a jail, in response to which plaintiff sent in his plans, upon which a resolution was passed adopting them on condition that, after duly advertising therefor, a bid by a reliable party should be received. It was also alleged that, after advertisement, a reliable bid was received, made by a party ready, able, and willing to enter into sufficient bond. That thereafter the board, in pursuance of a resolution, returned all bids, refusing to open or act upon them, and rejected plaintiff's plans. Defendant demurred, and the court sustained the demurrer, and on appeal to the supreme court the action of the trial court in sustaining the demurrer was affirmed. Plaintiff then filed his petition for a rehearing.

Williams & McKinley, for appellant. *Geo. M. Holton*, Dist. Atty., and *Becknell & White*, for respondent.

HAYNE, C. Further consideration has convinced us that our former opinion in this case was erroneous. The action is to recover the sum of \$2,500 upon a contract alleged to have been made between the plaintiff and the county of Los Angeles, acting through its board of supervisors. The complaint alleges that the board invited proposals from architects for plans and specifications for the building of a jail. In response to this invitation the plaintiff sent in his plans and specifications, and the board thereupon passed the following resolution, viz.: "Resolved, that we adopt the plans of John Hall for a county jail upon the condition that, after duly advertising for bids for the construction thereof,

according to said plans and specifications, we receive a bid from a reliable party, who will enter in a good and sufficient bond to construct the same in conformity to said plans and specifications for a sum not exceeding \$50,000; otherwise it shall be in the discretion of the board to reject said plans, reserving to the board the privilege of making any alteration or change in said plans previous to advertising for bids as aforesaid, which shall be agreed to by said Hall, and which had been discussed by him and the board in considering the same." It is then alleged that after advertisement, etc., the board received from a reliable party a bid for the construction of the jail in accordance with said plans and specifications, for a sum not exceeding \$50,000, which party was ready, able, and willing to enter into a sufficient bond, etc. The complaint then alleges that at a meeting thereafter held the board passed the following resolution: "Whereas, it appears from facts in evidence before this board that John Hall, whose plans for a county jail for the county of Los Angeles have been conditionally adopted, has been a party to the circulation of a baseless report, to the effect that money had been used, or was to be used, with the officers of this county and members of this board in connection with said jail plans; and, whereas, the action of this board in adopting said plans was largely due to the advice of one Holcomb, who represented to said board, and induced said board to believe, that he was there as an unbiased expert, giving impartial advice to the board, whereas he was, as the board verily believes, the secret agent and advocate of said Hall; and, whereas, said Hall has succeeded in procuring the adoption of his said plans and specifications by imposition practiced upon this board as above stated: Therefore, be it resolved, that the order heretofore, on the eighth day of January, 1886, made by this board adopting said plans and specifications, which said order is recorded in book 9, page 74, Minutes of the Board of Supervisors, be and the same is hereby, rescinded, vacated, and set aside, and said plans and specifications rejected." The complaint then alleges that Hall never was a party to the circulation of the report mentioned in the resolution last quoted, and that he had nothing to do with Holcomb; and denies that the adoption of his plans was procured by any kind of fraud or imposition. The court below gave final judgment for defendant upon demurrer to the complaint and the plaintiff appeals.

If plaintiff procured the adoption of his plans through the advocacy of Holcomb, who pretended to be, and was believed by the board to be, an unbiased expert, but was in fact the agent of plaintiff, there was such fraud as justified the board in rescinding the contract. But he says he did not, and upon demurrer it must be assumed that his statement is true. If it is not true, it is for the board to set up the facts constituting the fraud in their answer, and prove them at the trial. If this is done the defendant will be entitled to judgment. But the other ground alleged in the resolution was not sufficient to authorize the rescission of the contract. If Hall slandered the members of the board their remedy was to sue him for damages for the slander. They cannot rescind the county's contract to avenge their personal injuries. It is contended in support of the judgment, however, in the first place, that the board had no power to make a conditional contract with the plaintiff. The argument is that subdivision 9 of section 25 of the county government act provides that the board has power to cause to be erected a county jail, "provided that none of the aforesaid buildings shall be erected or constructed until plans and specifications shall have been made therefor and *adopted* by the board," and that a conditional adoption does not satisfy this requirement. But we think the plans were "adopted" within the meaning of this provision. The condition was a condition subsequent, going to defeat the adoption which was effected by the resolution, and was, in our opinion, a prudent and proper provision for the board to make.

In the next place it is argued that the condition was not fulfilled; that the first resolution means that a bid of the kind specified must be *accepted* by

the board; and that it did not accept any. But the resolution does not say "accepted." It says "received." And we do not think the expressions are equivalent. Probably most men have received many invitations and proposals which they have not accepted. In popular usage the words certainly differ in meaning. And we are not aware of any technical meaning which they have. The context supports this view. For it is provided that the party bidding must be "reliable," and that he must be willing to give bonds. What was the use of putting in these provisions upon defendant's theory? The whole would be included in the word "accepted." The object probably was to be reasonably sure that the plans did not require too great an outlay, and this was accomplished when the board found a reliable party who was willing to do the work and give bonds for its satisfactory performance. The other points made do not require special notice.

We, therefore, advise that the judgment be reversed, with directions to overrule the demurrer to the amended complaint.

I concur: BELCHER, C. C.

FOOTE, C., (*concurring*.) I agree with what is said by my associates in the foregoing opinion, except that I am by no means clear, where the word "received" was used in the resolution of the board of supervisors, that it was not intended to include an "acceptance" of a bid.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, with direction to the court below to overrule the demurrer to the amended complaint.

PATERSON, J., (*dissenting*.) I dissent. The board is the proper and the only tribunal to determine whether one proposing to do certain work for the county is a reliable party or not. The judgment of the superior court on that question cannot be substituted for that of the board; but if the complaint states a cause of action this can be done. The fact that the bidder can and will enter into a good and sufficient bond, of course, does not determine his reliability. By "a reliable party" the board evidently meant a party in whom they—the members of the board—had confidence; one so skilled, careful, and honest that there would be no necessity for a suit on his bond. The reasons given by the board for their second order may be very poor, and so unjust and libelous that plaintiff may maintain an action against the members thereof; but this fact does not supply the element necessary to create a contract between him and the county of Los Angeles, viz., a bid from a party known to the board to be *reliable*.

74 Cal. 523

In re ROWLAND'S ESTATE. (No. 12,301.)

(*Supreme Court of California.* January 24, 1888.)

1. EXECUTORS AND ADMINISTRATORS—DEMANDS AGAINST THE ESTATE—CLAIM OF HUSBAND TO COMMUNITY PROPERTY.

Civil Code Cal. § 1401, provides that, "upon the death of the wife, the entire community property, without administration, belongs to the surviving husband." The surviving husband and legatee of testatrix petitioned the court to have certain money and property in the hands of the executor declared community property of petitioner and deceased, segregated from the separate property of the testatrix, and delivered to him, instead of being distributed to the legatees under the will. *Held*, that his demand only amounted to a claim against the estate, and should have been presented to the executor.

2. SAME—DECREE OF DISTRIBUTION—EFFECT ON HUSBAND'S CLAIM TO COMMUNITY PROPERTY.

Under Code Civil Proc. Cal. § 1636, (which provides that "on final distribution, in the order or decree, the court must name the persons, and the proportions or parts to which each shall be entitled, and such persons may demand, sue, and recover

their respective shares from the executor or administrator, or any person having the same in possession. Such order or decree is conclusive as to the rights of heirs, legatees, or devisees, subject only to be revised, set aside, or modified on appeal,") the claim of a surviving husband and legatee of a testatrix for community property is not concluded by a decree of distribution, his claim being adverse to the estate.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

M. G. Cobb, (*John Reynolds*, of counsel,) for appellant. *A. N. Drown*, for respondents.

SEARLS, C. J. This is an appeal from a final decree of the superior court distributing the estate of Jane Rowland, deceased, and denying the petition of appellant, the surviving husband of deceased, to have certain money and property in the hands of the executors declared community property of petitioner and deceased, segregated from the separate property of the testatrix, and delivered to him, instead of being distributed to the legatees under the will. It appears from the petition of the appellant, to which a demurrer was interposed and sustained, that in 1867 the petitioner and testatrix, who were husband and wife, by an agreement between themselves, divided their community property; that \$12,000 of such property was in the hands of the testatrix, and was not divided, owing to the fact that petitioner supposed it was required to pay off certain claims against the common property. The property thus divided, and thereafter held by the parties in severalty as their separate property, was sold in 1879 for \$185,000, and thereupon an accounting was had between the parties, in which petitioner claims the testatrix was improperly allowed \$5,000 on account of alleged expenses incurred by her as the agent of petitioner in and about his property. He now claims these amounts, with interest, amounting in the aggregate to \$30,000, as community property, to which he was entitled upon the death of his wife. Deceased left a will, which was duly admitted to probate, whereby her property was disposed of, and in which petitioner was a legatee to the extent of one dollar.

It is made the duty of the probate court, or the superior court acting as such, to distribute the estate of deceased persons, when ready therefor, to the heirs, legatees, and devisees, as the case may require, and as provided by law; so, too, debts and demands against the estate may be ascertained, determined, and paid as provided by statute. The law does not contemplate or provide for the distribution of property or money in the hands of the executor or administrator to persons who may claim adversely to the estate, but leaves all such questions to be determined by action on behalf of or against the executor. The estate as distributed must go to the heirs or legatees or devisees, or to some of them, or those holding under them; and the decree, when made, is conclusive as to their rights, subject only to be set aside, modified, or reversed on appeal. Code Civil Proc. § 1666.

Appellant does not claim under or through the estate, but adversely, and in opposition thereto. "Upon the death of the wife, the entire community property, without administration, belongs to the surviving husband," etc. Civil Code, § 1401; *Moore v. Jones*, 63 Cal. 12. Under the eleventh section of the act of 1850, upon the death of the wife, one-half of the community property vested in her descendants. *Payne v. Payne*, 18 Cal. 292. The amendment of 1874, contained in section 1401, quoted above, has changed the rule in this respect; and, as to the community property, the husband does not, upon the death of the wife, take by succession. The estate in expectancy of the wife in the community property is dependent upon her survivorship, and, in the event of her death before her husband, it is deemed never to have existed. If we are correct in this, the husband does not, upon the death of his wife, as to the community property, take by descent or succession, but holds the community property as though acquired by himself, and as if his deceased wife had never existed.

The contention of counsel for appellant that the claim of the latter will be concluded by the decree of distribution, is not tenable. Under section 1666, Code Civil Proc., the decree is only made conclusive as to the rights of heirs, legatees, and devisees. As appellant does not, as to the claim, come within the category of these, he will not be bound thereby. He appears in a twofold capacity: *First*, as a legatee under the will, and as to his rights as such, he will be bound by the decree; and, *second*, as a claimant in his own right, antagonistic to the estate. In this latter capacity he will be no more concluded than a third party would be who might chance to claim real estate adversely to decedent and his representatives. Freem. Judgm. § 66, and cases cited; *Bath v. Valdez*, 70 Cal. 359, 11 Pac. Rep. 724. If, as may well be, his demand only amounts to a claim against the estate, which should have been presented to the executors, it cannot alter the case as presented here.

The decree and order of the court below appealed from are affirmed.

We concur: PATERSON, J.; MCKINSTRY, J.

74 Cal. 540

MORGAN v. HECKER. (No. 12,216.)

(*Supreme Court of California.* January 25, 1888.)

FRAUDULENT CONVEYANCES—GIFT FROM HUSBAND TO WIFE.

A gift from a husband to his wife, which was not unreasonable, made when the husband had property left with which to pay his debts easily, when no fraudulent intent appears, is not void as to existing creditors.¹

Commissioners' decision. Department 2. Appeal from superior court, Butte county; LEON D. FREER, Judge.

Belle M. Morgan, plaintiff, sued Fred Hecker, defendant, to recover certain property belonging to her, or the value of it, levied on and sold under judgment against her husband. Judgment for defendant, and plaintiff appealed.

Hundley & Gale, for appellant. *A. F. Jones and Reardan & Freer*, for respondent.

FOOTE, C. Hecker, the respondent here, was a creditor of W. J. Morgan, the husband of the plaintiff, in the sum of \$200. While he (the husband) was so indebted, Belle M. Morgan, the plaintiff, received from him as a gift, and without any valuable consideration, a certain mare of the value of \$200, a buggy of the value of \$75, and a set of harness of the value of \$15; all of which property was taken possession of by her, and used as her own, until levied upon by an execution issuing out of a justice's court by virtue of a judgment recovered against W. J. Morgan by the respondent, Hecker. The property was sold under the execution, and bought in by Hecker. This suit was instituted by Belle M. Morgan to recover the property or its value. The court below gave judgment in favor of Hecker, and from that the plaintiff has appealed upon the judgment-roll only. From the findings it appears, in addition to the facts heretofore stated, "that the said Morgan, the husband of the said plaintiff, was, at the time of the gift of the said personal property to his said wife, the plaintiff herein, in solvent financial circumstances, being the owner of real and personal property of the value largely in excess of

¹ As to fraudulent transfers from husband to wife, see *Milholland v. Tiffany*, (Md.) 2 Atl. Rep. 831, and note; *Knight v. Kidder*, (Me.) 1 Atl. Rep. 142, and note; *Platt v. Schreyer*, 25 Fed. Rep. 87, and note; *Hooser v. Hunt*, (Wis.) 26 N. W. Rep. 442; *Bank v. Warner*, (Iowa,) Id. 47; *Jackson v. Beach*, (N. J.) 9 Atl. Rep. 380; *Foster v. Knowles*, (N. J.) 7 Atl. Rep. 295; *Witz v. Osburn*, (Va.) 2 S. E. Rep. 33; *Webb v. Ingham*, (W. Va.) 1 S. E. Rep. 816; *Chapman v. Summerfield*, (Kan.) 14 Pac. Rep. 235; *Gibson v. Bennett*, (Me.) 9 Atl. Rep. 727; *Hanson v. Manley*, (Iowa,) 33 N. W. Rep. 357; *Bank v. Norwood*, (Ark.) 6 S. W. Rep. 323.

the value of the property given to his said wife, and more than sufficient to meet all of his then existing liabilities, and enjoying and receiving a salary of \$166.66 per month." There is no finding that in making the gift there was any intent on the part of W. J. Morgan to hinder, delay, or defraud his creditors; nor is it found that he owed any other debt than the one to Hecker.

From the conclusions of law, it is evident that the court below held the gift of the personal property involved in the action to have been void as to Hecker, an existing creditor, solely because the husband owed that debt at the time he made the gift. Formerly, it was a much vexed and doubtful question, so divided were different judges in their opinions upon the subject, whether or not a gift made of any of his property, by one indebted, was absolutely void as to existing creditors; Judge KENT, in *Reade v. Livingston*, 3 Johns. Ch. 481, having gone to the full extent of holding any such gift fraudulent and void; while the supreme court of Connecticut, in *Salmon v. Bennett*, 1 Conn. 553; the supreme court of New York, in *Seward v. Jackson*, 8 Cow. 438, 455, 456; the supreme court of the United States, in *Hinds v. Longworth*, 11 Wheat. 213, and in *Kehr v. Smith*, 20 Wall. 31, 35,—seem to repudiate so extreme a rule upon the subject, and hold that a voluntary gift without consideration only creates a *prima facie* presumption of an intent to defraud, and the presumption of fraudulent intent resulting from that fact may be rebutted by evidence. In California, the rule is declared to be that "the question of fraudulent intent is one of fact, not of law." *Swartz v. Hazlett*, 8 Cal. 128; *Read v. Rahm*, 65 Cal. 344; Civil Code, § 3442.

So far, then, as this case is concerned, the gift to Mrs. Morgan was void or not according as the facts found show, or do not show, a fraudulent intent on the part of her husband, at the time he made her the gift, to hinder, delay, or defraud his existing creditor, Hecker, for the record does not show that he had any other creditor. The fact that the gift was made without consideration, and that Hecker was at the time a creditor, is a fact which might tend to show a fraudulent intent on the part of W. J. Morgan; but when it is rebutted by the facts set out in the finding that Morgan was solvent, that is, able to pay his debts from his own means as they became due, (Civil Code, § 3450;) that he possessed more than sufficient property, both real and personal, to meet all of his then existing liabilities; and that, besides, he was receiving a salary of \$166 per month,—the presumption that might arise from the gift being made without consideration when he was indebted disappears.

It does not appear that the gift was an unreasonable provision for the wife, nor that in making it the husband did not still have enough property left easily, and without any delay or embarrassment, to have promptly paid his debts, or that his creditor could not without trouble have collected the debt by law. The court has not found any fraudulent intent on the part of the husband in making the gift, nor has it found any probative facts, from which the existence of such intent may be inferred as an ultimate fact.

We have been cited to many cases in our state reports, by respondent, as announcing a view in consonance with that held in *Reade v. Livingston*, *supra*; but a close examination of those cases discloses the fact that in none of them were the precise points directly decided which are here involved, and what is there said by this court touching those matters is not binding as to the present case.

Wherefore we are of opinion that the judgment should be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded for a new trial.

2 Cal. Unrep. 834

In re ALLEN. (No. 12,237.)*

(Supreme Court of California. January 25, 1888.)

HOMESTEAD—EXTENT OF RIGHT—PROPERTY USED IN CONNECTION WITH DWELLING.

Where the family of an insolvent consisted of 11 persons, and his house on one lot contained three bedrooms, and on another lot was his well, cow-house, and other out-buildings, and also a building containing a wagon shop, rented out by the insolvent, and a blacksmith shop used by him, and in the unfinished upper part of the building some of his family slept, and which, when able, he intended to finish to use with his house, both lots were properly set off as a homestead.

Commissioners' decision. Department 2. Appeal from superior court, Butte county; LEON D. FREER, Judge.

Albert Allen, an insolvent, made his application under the insolvent law for a homestead. The court ordered the property claimed set apart as a homestead, from which order the assignee appealed.

F. C. Lusk, for appellant. *Park Henshaw*, for respondent.

HAYNE, C. Appeal from a judgment setting aside a homestead under the insolvent law. The homestead set apart consisted of lots 4 and 5, in block 39, of the town of Chico. These two lots adjoined each other. Upon lot 5 was the dwelling-house, and upon lot 4 were certain out-buildings and a blacksmith shop. The two lots and buildings were together under the value of \$5,000. It is conceded that the order was proper as to lot 5, but it is argued that lot 4 was used exclusively for business purposes, and that, therefore, there could not be an actual residence upon it. It appears, however, that a part, at least, of lot 4 was used for family purposes. The court finds that "the well, cow-house, chicken-house, wood-shed, and other out-buildings necessary and convenient for the use of said premises, are situate upon lot 4." This we think is not contradictory of the other findings, when all are taken together. It appears from the evidence that the cow-shed was built in 1884-85. "Before it was built there was a wood-house there. The barn now is used for the same purpose that the old one was; wood-house, chicken-house, and cow-shed combined."

The homestead is not restricted to the ground actually covered by the dwelling-house. It includes the additional ground which is necessary or convenient for family use. In this regard SANDERSON, J., delivering the opinion in *Gregg v. Bostwick*, 33 Cal. 227, said. "It represents the dwelling-house at which the family resides, with the usual and customary appurtenances, including out-buildings of every kind necessary or convenient for family use, and lands used for the purposes thereof. If situated in the country it may include a garden or farm. If situated in town it may include one or more lots or one or more blocks. In either case it is unlimited by extent merely." The rule laid down in this case has been frequently approved and followed. And in pursuance of it the court held, in *Englebrecht v. Shade*, 47 Cal. 627, that the use of an adjoining lot "for the purpose of drying clothes, and as a means of access to the street," was sufficient to support a declaration of homestead including it. So, in *Skinner v. Hall*, 69 Cal. 195, 10 Pac. Rep. 406, it was held that a portion of a lot used as a chicken-yard, was properly included in the homestead. The above-mentioned portion of lot 4 certainly comes within the rule of these cases. It must be presumed that the legislature intended that the family should have water to drink, and wood to cook with. And inasmuch as a cow and a certain number of chickens are exempt from execution it is reasonable to suppose that it was the intention that there should be a place to keep them. A portion of lot 4, therefore, was clearly properly treated as part of the homestead. As to the remainder of this lot there is more doubt. The facts concerning it are as follows: On one end of the lot is a two-story frame building 80x40 feet, which is equal to about half of the area of the lot. The lower part of this building is divided into two por-

*Reversed in banc. See 20 Pac. 679, 73 Cal. 293.

tions. The front portion was used by the insolvent as a blacksmith shop. The rear portion was occupied by one Canfield as a wagon shop. The insolvent and Canfield seem to have been in some way interested together in these undertakings, for the court finds that "the wagon and blacksmith business was carried on in conjunction by Allen and Canfield." The portion of lot 4 not covered by buildings was used for the purpose of storing wagons, setting tires, and other work connected with the blacksmith and wagon shop. The business does not appear to have been conducted on a large scale.

The family of the insolvent was a large one. According to the evidence it consisted of 11 persons, "counting my wife and myself and a small girl we have to stay with us." In the house on lot 5 there were only three bedrooms. The court finds that "the small dwelling-house situate upon lot 5 is not sufficient for the needs of the family of said Allen," and that "said Allen intended, when said shop was built, to occupy the upper part or story in connection with the small house on lot 5 as his dwelling, and has, so far as his means permitted, prepared, used, and occupied it as such, and * * * that it is necessary for the use of his family." The court further finds that the insolvent "has been unable to complete the upper story as intended, for want of means to do so," and that "said building has never been finished off on the inside, either by boarding, ceiling, lathing, plastering, or otherwise;" but that "said upper story of the shop has been, since its erection, used as a sleeping-room for members of Allen's family." One of the rooms in the upper floor was rented out as a paint shop. Another was occupied jointly by one Nigro (who was one of the painters) and one Hall, which latter worked for the insolvent, but received no regular salary, and "boarded at said debtor's dwelling-house, and was considered one of the petitioner's family." At one time another painter lived in the upper floor with his family. Some of the insolvent's sons were in the habit of sleeping in the upper floor wherever they could find a place for their mattresses. Upon the whole evidence we cannot say that it was insufficient to support the finding that "said upper story of the shop has been, since its erection, used as a sleeping-room for members of Allen's family."

Taking this as established, it does not seem to us that the appellate court can say that there was no actual residence upon this part of the property within the meaning of the homestead law. When property is used both as a residence and for business purposes, the question of homestead is always a difficult one. The mere fact that it is partially used for business purposes is not of itself sufficient to defeat the homestead. This is recognized in *Gregg v. Bostwick*, cited for the appellant, for the court there says: "If, however, it is used as a place of business by the family, which frequently happens, it may not therefore cease to be a homestead, if it would be necessary or convenient for family use, independent of the business." 33 Cal. 228. So the mere fact that a portion of the property is rented out is not of itself sufficient to defeat the homestead. *Skinner v. Hall*, *supra*; *Ackley v. Chamberlain*, 16 Cal. 181. Each case must depend in great measure upon its own circumstances. But where the property is necessary and convenient for family use, and is put to such use, we think the homestead should be sustained, unless business is the primary and principal purpose of the property, and the family use merely incidental. Upon the whole, although the case is a close one, we are not convinced that the judgment of the court below was erroneous. Some of the rulings on the admissibility of evidence do not seem quite correct, but we do not think that injury could have resulted.

We therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

74 Cal. 536

In re RADOVICH'S ESTATE. (No. 11,346.)

(Supreme Court of California. January 25, 1888.)

1. EXECUTORS AND ADMINISTRATORS—ACCOUNTING—CITATION AFTER RESIGNATION.

Under Code Civil Proc. Cal. § 1629, providing that when the authority of an executor ceases or is revoked he may be cited to account at the instance of the party succeeding him, an executor who has resigned may be compelled to account for certain assets of the estate received by him but not accounted for.

2. SAME—GIVING ASSETS TO HIS ATTORNEY.

An executor of an estate has no right to give away any assets of the estate, though he may consider them worthless, nor has his attorney the right to receive them.

3. SAME—LIABILITIES—VALUE OF ASSETS.

Under Code Civil Proc. Cal. §§ 1613, 1614, providing that an executor shall be charged with the whole of the estate at the appraised value, and with the interest and profits thereof, and any excess at which he sells it, an executor who sells stock for more than the appraised value is liable for the price received, and interest.

4. APPEAL—WHO MAY APPEAL.

A party cannot appeal from an order entered on his motion modifying in his favor a prior order.

Commissioners' decision. Department 2. Appeal from supreme court, city and county of San Francisco; J. V. COFFEY, Judge.

In the matter of the estate of L. Radovich, deceased. This was an order obtained by the administrator of the deceased to compel a former executor, who had resigned, to account for certain assets of the estate received by him. The executor appealed from such order.

A. D. Splivalo, for appellant. A. Comte, Jr., for respondent.

BELCHER, C. C. In 1870 S. Martinovich was duly appointed executor of the last will and testament of L. Radovich, deceased, and he continued to act as such executor until August, 1882. Among the assets of the estate which came into his possession as executor was a certificate for five shares of the capital stock of the San Francisco & Oakland Railroad Company. This stock was mentioned in the inventory, and was appraised at \$250. Martinovich resigned his place as executor in 1882, and J. L. Radovich was appointed administrator of the estate with the will annexed. Martinovich never obtained any order for the sale or disposition of the stock, and never turned the certificate over to his successor. Subsequently, in March, 1885, Radovich, as administrator, obtained an order from the court requiring Martinovich to appear and render an account under oath of the five shares of stock which he had received and held as executor. To this order Martinovich answered, denying that as executor or otherwise he ever received the five shares of stock referred to, and alleging that at the time of L. Radovich's death the stock was, and ever since had continued to be, worthless, and of no value whatever. A hearing was had before the court, at which Martinovich appeared and testified that he was executor of the last will of L. Radovich, deceased; and that prior to November 28, 1873, as such executor, he had the control and possession of the said five shares of stock as a part of the assets of the estate, and "that he had indorsed the stock as such executor, and had delivered the same to A. D. Splivalo, his attorney and agent, to sell it for whatever he could; and that witness, as such executor, had filed accounts, but had never accounted for said stock, or the proceeds of sale thereof, and that he had been allowed by the court in his accounts, and had received from the estate, all his commissions, disbursements, and charges, and claims of all kinds, including attorney's fees in matter of said estate, and that nowhere and in no manner had he accounted for said shares of stock, but had omitted all mention thereof in his accounts, as he did not consider them of any value. That he had never applied to the court for authority to sell the stock, and that his indorsement

of the same and the delivery of the same to said Splivalo was without order from court." Splivalo was called as a witness and testified "that he had been attorney for the estate of L. Radovich, deceased, * * * and that said Martinovich had indorsed the stock as executor, and told him to sell it for what he could get, and keep it for his services; that the stock was not indorsed by any other person than the said Martinovich; that the stock was considered of no value whatever, but that witness sold it for \$450 some time prior to November 28, 1875; that \$450 was not its value, although he got that sum for it; that the stock had no value; that he received the stock as part compensation for his services in said estate, and that if it were not credited in the accounts it was through forgetfulness." The court found, among other things, that the five shares of stock were indorsed and sold without any order of court, and were transferred to the purchaser thereof on the books of the corporation on the twenty-eighth day of November, 1873; that the stock was sold for \$450, and that that sum was its market value at the time of sale; that neither the stock nor the proceeds of the sale thereof were ever accounted for by Martinovich prior to the filing of his account in May, 1885, and that there was no good or any sufficient cause for his delay in accounting for the same. Thereupon an order was made and entered, settling the account at \$450, with legal interest thereon from November 28, 1873, in the aggregate \$828.92, and requiring Martinovich forthwith to pay the last-named sum to the administrator of the estate. Subsequently, on motion of counsel for Martinovich, an order was made modifying the last-named order in certain unimportant particulars, and thereupon Martinovich appealed from both orders.

1. We fail to see that the court erred in making the first order complained of. As executor Martinovich had no right to sell or otherwise dispose of the stock without an order of court authorizing him to do so. When, therefore, without any such order, he caused the stock to be sold, he, in legal effect, converted it to his own use, and became responsible for its value, with legal interest thereon.

The claim that the court had no jurisdiction to make the order, because Martinovich resigned his trust as executor in 1882, and then settled his accounts and was discharged, is not tenable for two reasons: *First*, the Code provides that "when the authority of an executor or administrator ceases, or is revoked for any reason, he may be cited to account before the court at the instance of the person succeeding to the administration of the same estate," etc., (section 1629, Code Civil Proc.) and, *second*, it affirmatively appears that he never accounted for or was discharged from the liability in question.

So the claim that the stock was considered worthless and appellant therefore rightfully turned it over to Splivalo, attorney for the estate, is equally untenable. The executor has no right to give away the assets of the estate, even though he may consider them worthless; and the attorney has no right to receive such a gift from the executor's hands. Both parties knew, or should have known, such to be the law when the transfer was made.

So, too, the claim that appellant, if chargeable at all, should have been charged with only \$250, the appraised value of the stock, is wholly without merit. The Code makes the executor chargeable with the whole of the estate at the appraised value, and with all the interest, profit, and income thereof, and it requires him to account for the excess when he sells any part of the estate for more than the appraisement. Sections 1613, 1614, Code Civil Proc. As the stock was actually sold for \$450, the appellant was properly chargeable with that sum, with interest thereon.

2. The appeal from the second order cannot be considered, for the reasons—*First*, it was made at the instance of appellant; and, *second*, it was made to promote his interests, and could not possibly operate to his prejudice.

We conclude, therefore, that both of the orders appealed from should be affirmed.

We concur: HAYNE, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the orders are affirmed.

74 Cal. 528

ROCCA v. KLEIN. (No. 12,334.)

(Supreme Court of California. January 25, 1888.)

LIMITATION OF ACTIONS—TO WHAT CASES APPLICABLE—MUTUAL ACCOUNTS.

Where plaintiff had sold goods to defendant for a number of years, and had credited him with payments of cash and merchandise, not considering that defendant had an account against him, it is not a "mutual, open, and current account," as provided for in Code Civil Proc. Cal. 344, but is governed by section 339, providing that actions on contracts not in writing shall be brought within two years.

Commissioners' decision. Department 1. Appeal from superior court, Tuolumne county; J. F. ROONEY, Judge.

John Rocca, plaintiff, sued Frederick Klein, defendant, for a balance alleged to be due on an account. Judgment for plaintiff for a portion of his account, and plaintiff appeals.

F. W. Street, for appellant. *F. D. & G. W. Nicol*, for respondent.

BELCHER, C. C. This is an action to recover the sum of \$387.25 balance alleged to be due plaintiff from defendant on a mutual, open, and current account. By his answer, the defendant denied that the account between the parties was mutual, open, and current, and alleged that the plaintiff's action was barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure. The court found against the plaintiff as to all of the account, except \$43.59, which accrued within two years prior to the commencement of the action, and for which judgment was rendered in his favor. The plaintiff moved for a new trial, and has appealed from the judgment and from an order denying his motion.

It is admitted for the appellant that the only question presented for decision is as to whether there were reciprocal demands between the parties, making the account a mutual, open, and current account, within the meaning of section 344 of the Code of Civil Procedure. That section reads as follows: "In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item proved in the account on either side."

In *Norton v. Larco*, 30 Cal. 126, it was held that mutual accounts are made up of matters of set-off where there is an existing debt on the one side which constitutes a credit on the other, or where there is an express or implied understanding that mutual debts shall be satisfied or set off *pro tanto* between the parties. And it was further held that a payment, whether it be of money or of an article of personal property of a stipulated value, made on an account and intended as a payment, and not as a set-off *pro tanto*, does not make an account mutual. See, also, Ang. Lim. § 149; *Warren v. Sweeney*, 4 Nev. 101; and *Adams v. Patterson*, 35 Cal. 122.

The plaintiff was the only witness called upon either side. He presented his account, and testified that, within two years prior to the commencement of the action, he had sold defendant goods and merchandise amounting to \$43.59. The account showed a balance due plaintiff on the first of May, 1880, of \$413.25, and then a large number of charges for goods sold, running down to February 13, 1886. It also showed numerous credits for money paid, and for wheat, wood, hay, and work. In reference to the credits of money, plaintiff testified that the money was paid at the dates named in the account, and was deducted from the amounts then due thereon. And in reference to the other credits, he testified as follows: "On May 1, 1880, I received wheat from

the defendant, and gave him credit on the account for \$82.22, the value of said wheat. I have accepted this wheat on account at a stated value. I did not consider that the defendant had any demand against me on account of that wheat. I took it as part payment of my account against him. On the same date I received from him wood, for which I gave him credit for \$16.75. He cut the wood, and I hauled it myself. We agreed what the value of the wood was, and I gave him credit on the account for the amount agreed upon. I then deducted these credits from the account, and that left a balance due me of \$314.28 at that time. I did not consider he had any demand against me on account of this wood and wheat. The next items of credit on the account were for hauling grapes, \$6; wood furnished on account, \$107.25; and by hauling grapes, \$10. We agreed upon the price in February, 1881. He told me to give him credit on his account for the total, which I did, deducting the credit from his account, and there was at that time a balance due of \$313.87. These credits were the same as cash to me. I considered them as payments upon account. I did not consider he had any demand against me, or that he could sue me on account of the wood or for the hauling of the grapes. * * * On September 20, 1883, he was given credit on his account for \$50, being for hay bought by me from him. I gave him the credit on the account for \$50, the same as if it had been \$50 in cash. I did not consider he had any demand against me on account of this hay after I had given him credit for it on his account. * * * On July 9, 1884, gave defendant credit for work, \$5. Agreed with defendant as to the value of the work; gave him credit accordingly. Struck a balance showing \$355.58 due me on account. On July 3, 1885, gave defendant credit for work performed by him for me, \$3, and on August 7, 1885, gave defendant credit by wood furnished by him to me, \$28. Deducted credits from account and there was at that time a balance due me of \$356.17. We understood that these credits were payments on account, and that he had no demand against me for the same."

From this testimony it is very apparent that, within the rule laid down in *Norton v. Larco, supra*, the articles credited were received by the plaintiff as, and were intended to be, payments on his account. There were, therefore, no reciprocal demands between the parties, making the account mutual, open, and current.

It follows in our opinion that the judgment and order should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed

2 Cal. Unrep. 831

FARNUM v. HEFNER. (No. 12,351.) *

(Supreme Court of California. January 25, 1888.)

LANDLORD AND TENANT—LEASE—EXECUTION—SALE OF LEASEHOLD—RIGHTS OF PURCHASER.

A lessor sued defendant for a conversion of crops grown on a leasehold purchased by defendant under execution against the lessee. The lease provided that crops grown on the premises should be the lessor's property until the lessee performed certain conditions. *Held* that, as the conditions had not been performed, the purchaser acquired no right to the crop, and the judgment of sale and execution were properly excluded from evidence, as immaterial and irrelevant.

Commissioners' decision. Department 2. Appeal from superior court, Butte county; L. D. FREER, Judge.

Action by C. E. Farnum against Philip Hefner, to recover the value of certain wheat and hay. There was a trial by the court, and judgment was given for the plaintiff. The defendant appeals.

H. V. Reardan, for appellant. *Carter P. Pomeroy*, for respondent.

*Reversed in banc. See 21 Pac. 955, 79 Cal. 575.

FOOTE, C. This is an action to recover the value of certain wheat and hay claimed to be the property of Farnum, and alleged to have been converted to his own use by Hefner. The plaintiff recovered judgment for the value of the wheat. A motion for a new trial was made and denied, and from the order made in the premises an appeal has been taken. The facts of the case are that on October 15, 1884, the plaintiff was the owner of certain farming land in Butte county, and at that date made a written lease of the same to one D. L. Butler for a term of two years. On February 24, 1885, Hefner, the defendant herein, recovered a judgment against Butler in the superior court of Butte county for a considerable sum of money, and had execution duly issued and levied upon the leasehold interest held by Butler, which was afterwards sold under that writ, and purchased by the defendant. Thereupon he entered into possession of the land which Butler had leased, and proceeded to harvest the crop of growing wheat thereon. After the grain was sacked, and the defendant in possession of the whole of it, he offered the plaintiff one-third of it, which, after at first refusing, he afterwards received. The defendant kept the other two-thirds of the wheat, and converted it to his own use, and was sued for its value in this action.

It is claimed by the defendant that the court erred in refusing to admit in evidence the judgment roll, execution, and return thereon, under which the defendant claimed title to the leasehold interest of Butler, the judgment debtor. This point is not well taken, for the reason that the lease in express terms invested the legal ownership of the entire crop of wheat to be raised and grown upon the leased land in Farnum until the performance of certain stated conditions, and therefore, those conditions not having been complied with, when the defendant bought the leasehold interest of Butler he bought no right to convert the property which belonged to Farnum; and therefore the judgment roll, execution, etc., were immaterial and irrelevant to the issues joined. Until the delivery of the whole of the crop of wheat to Farnum, and a transfer to Butler of his portion by Farnum, the latter was, according to the terms of the lease, the absolute owner of the wheat; and until those conditions had been fulfilled neither Butler, the lessee, nor Hefner, the claimant of the leasehold interest under the judicial sale, could have any legal claim to its possession. Farnum owned the wheat, as the conditions of the lease remained unperformed, and was entitled to recover for its conversion without reference to what interest, if any, passed to Hefner in the demised premises under the sheriff's sale. *Howell v. Foster*, 65 Cal. 169, 3 Pac. Rep. 647, and cases cited.

It becomes unnecessary to determine the other point made by the defendant, viz., that the court committed error in admitting in evidence a written forfeiture of the lease made and executed by Butler, between the time of the levy of the execution and the sale thereunder; for conceding, without deciding, that the lease was in full force and effect, so far as Hefner's rights were concerned, at the time of the judicial sale, he acquired no right thereby to any of the wheat owned by Farnum, and therefore the admission in evidence of the forfeiture was immaterial, and could work no prejudice to the defendant.

The order appealed from should be affirmed.

We concur: HAYNE, C.; BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

74 Cal. 532

RAPP *et al.* v. SPRING VALLEY GOLD Co. *et al.* (No. 12,370.)

(Supreme Court of California. January 25, 1888.)

1. MECHANICS' LIENS—ENFORCEMENT—ATTORNEY'S FEES—WAIVER BY STIPULATION. Code Civil Proc. Cal. § 1195, relating to the foreclosure of mechanics' liens, provides for the allowance by the court of reasonable attorney's fees as part of the

costs. In an action to foreclose a mechanic's lien, judgment for plaintiffs was entered upon the following stipulation: "Plaintiffs shall reduce their claims to judgment in the following manner: Said G., in conjunction with * * *, shall immediately, or as soon as they can, ascertain and fix the amount due to each of the plaintiffs in said suit, and, upon such ascertainment, judgment shall accordingly be entered in said suit for the foreclosure of the mechanics' liens sued on." *Held*, that this stipulation did not exclude the allowance of attorney's fees.

2. SAME.

Code Civil Proc. Cal. § 1195, relating to the foreclosure of mechanics' liens, provides that "the court must also allow, as part of the costs, the money paid for filing and recording the lien, and reasonable attorney's fees in the superior and supreme courts," etc. *Held*, that this should not be construed as a provision against an actual outlay only, that the lienholder may have been compelled to make; but that where there was an express agreement that for services prior to the recording of the lien the attorney should receive 5 per cent. upon the amount collected, and for subsequent services "only such fee as the court would allow," the plaintiff was entitled to an allowance for attorney's fees.

Commissioners' decision. Department 2. Appeal from superior court, Butte county; LEON D. FREER, Judge.

This was an action brought by plaintiffs to foreclose laborers' liens upon the mining property of the defendant the Spring Valley Gold Company. The Bank of California, having an attachment upon said property, was made a defendant. Pending the trial of said action, a written agreement was entered into by plaintiffs and defendants for the entering of judgment for plaintiffs. Upon the filing of said written agreement, plaintiffs moved for a judgment, as prayed for in the complaint. The only controversy upon said motion was as to the allowance of attorney's fees for the foreclosure. The appeal here is from the order denying defendants' motion for a new trial, and from so much of the judgment as allows an attorney's fee.

Reardan & Freer and Newlands, Allen & Herrin, for appellants. *Park Henshaw*, for respondent.

HAYNE, C. Action to foreclose a mechanic's lien. Judgment for plaintiffs was entered upon a stipulation. The sole question is whether the plaintiffs should have been allowed an attorney's fee.

1. The first position of the appellants is that the stipulation waived the attorney's fee. The material portion of the stipulation is as follows: "Plaintiffs shall reduce their claims to judgment in the following manner: Said Gregory, in conjunction with Mr. N. S. Walker, Jr., vice-president of the company, shall immediately, or as soon as they can, ascertain and fix the amount due to each of the plaintiffs in said suit, and, upon such ascertainment, judgment shall accordingly be entered in said suit for the foreclosure of the mechanics' liens sued on." The argument for the appellants upon this language is that the provision is that judgment should be entered for the amount due to the plaintiffs, and, by implication, for nothing else, and that the attorney's fee was not a part of the amount due to the plaintiffs. This argument proves too much. It would exclude a judgment for costs, as well as for attorney's fees. Costs are not a part of the amount due to the plaintiffs, but it is not disputed by appellants that the judgment for costs was proper. The attorney's fee in this kind of case is not, strictly speaking, part of the costs. If allowed by the court, it need not be placed in the memorandum of costs. But it was properly allowed, for the same reason that costs were allowed, viz., that it was a necessary incident of the judgment stipulated for, and was not expressly, or by necessary implication, excluded by the stipulation. That the attorney's fee in foreclosure is merely an incident of the judgment, and not an element of the cause of action, was held in *Carriere v. Minturn*, 5 Cal. 435. In that case HEYDENFELDT, J., delivering the opinion, said: "The counsel fees stipulated to be paid were not the cause of action, but, like the costs, a mere incident to it, and may be fixed by the chancellor

at his discretion, not exceeding the amount stipulated." And this case was approved and followed in *Monroe v. Fohl*, 14 Pac. Rep. 515, 516. If the attorney's fee was an incident to the judgment stipulated for, it was properly allowed by the court, unless excluded by the stipulation, which, as above stated, we do not think was the case.

But it is further argued for the appellants, in this regard, that the negotiations between the parties leading up to the stipulation show that it was understood that no attorney's fees were to be allowed. But if we assume, in favor of the appellants, that prior negotiations were not superseded by the agreement finally arrived at and written out, and that such negotiations should control, we nevertheless do not think the result would be different. If the matter rested solely upon the letter of Mr. Robinson, the president of the gold company, and the reply of the attorney for the plaintiffs, there would be some strength in the position. It might then be contended that the agreement was to be interpreted "in the sense in which the promisor believed at the time of making it that the promisee understood it." Code Civil Proc. § 1649. But the matter does not rest solely upon the letters referred to. It appears that, before the hearing of the cause, the attorney for the plaintiffs had an interview with the attorney for the defendants and the vice-president of the gold company, at which the letter of Mr. Robinson was referred to, and he thereupon distinctly informed them that he did not understand that attorney's fees were cut off by the stipulation, and that he should press the matter before the court. This negatives the theory that the attorney for the plaintiffs allowed the defendants to proceed under the belief that attorney's fees would not be claimed. Upon receiving this information, the defendants, if not satisfied with the stipulation, should have asked to have it set aside. Upon a proper application, the trial court could have relieved them from a stipulation given through a misunderstanding. *Bonds v. Hickman*, 29 Cal. 464. No such application was made. After being informed of what the plaintiffs were going to do, the defendants chose to rely upon the stipulation, which, as we have seen, does not support their view.

The defendant the Bank of California was not represented at the interview referred to. But the argument as to the prior negotiations is based solely upon communication between the plaintiffs and the other defendant, of which the bank was not shown to be aware. And hence there is no question but that the stipulation prevails as to it.

2. The second position of the appellants is that, independent of the stipulation, the facts shown did not entitle plaintiffs to attorney's fees under section 1195, Code Civil Proc. This, the counsel say, "is a provision against an *actual* expense that may be incurred by the lienholder on account of the failure of the defendant to pay the lienholder's claim; and, *if such expense has been incurred*, then, and then only, the court may allow and fix such fees." We have no doubt at all that the attorney's fee need not be actually paid by the plaintiff; nor need there be any express agreement for the payment of a fee. If, indeed, it had appeared that the attorney had expressly agreed to give his services for nothing, or if he were an employe of the plaintiff at a yearly salary, as was the case in *Bank v. Treadwell*, 55 Cal. 379, then the plaintiff would not be entitled to an allowance for attorney's fee. But where there is an implied agreement for the payment of the attorney, or where, as here, there is an express agreement that for services prior to the recording of the liens the attorney shall receive 5 per cent. upon the amount collected, and for subsequent services "only such fee as the court would allow," it seems clear that plaintiff is entitled to an allowance for attorney's fees. The court would not be bound by an agreement between plaintiff and his attorney as to amount, but must, under the Code, allow such amount as is reasonable. We cannot say that the amount in this case is not reasonable.

We therefore advise that the judgment and order appealed from be affirmed.

FOOTE, C., concurs. BELCHER, C. C., took no part in this decision.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

CHIVELL v. SPRING VALLEY GOLD Co. *et al.* (No. 12,371.)

(*Supreme Court of California*. January 25, 1888.)

Commissioners' decision. Department 2. Appeal from superior court, Butte county; LEON D. FREER, Judge.

HAYNE, C. This case is similar to *Rapp v. Gold Co.*, *ante*, 325, (just decided.) Upon the authority of that case, the judgment and order appealed from should be affirmed.

FOOTE, C., concurs. BELCHER, C. C., took no part in this decision.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

75 Cal. 1

SHARON v. SHARON. (No. 9,984.)

(Supreme Court of California. January 31, 1888.)

1. MARRIAGE—WHAT CONSTITUTES—SECRET AGREEMENT.

Civil Code Cal. § 55, provides that consent alone will not constitute marriage, but must be followed by a solemnization, "or by a mutual assumption of marital rights, duties, or obligations." *Held*, that under this provision it is not necessary to the

validity of the marriage that the relation of the parties be made public; but, evidence of consent being given, proof of cohabitation is sufficient to show a mutual assumption of marital rights and duties.¹

2. DIVORCE—ALIMONY—ORDER DIRECTING PAYMENT TO THIRD PERSON—FEES OF UNNECESSARY COUNSEL.

Civil Code Cal. § 137, provides that in an action for divorce the court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to prosecute or defend the action. *Held*, that the money must be paid to the wife; and it is not within the discretion of the court to order it paid to any other persons, nor to allow the wife money for unnecessary counsel in the action.

3. SAME—AMOUNT OF ALLOWANCE.

Plaintiff and defendant had been secretly married, and the wife agreed to keep the marriage secret. The husband agreed to allow the wife a certain amount of money per month until the marriage was acknowledged. *Held*, in an action for divorce, upon application for temporary alimony, that it was an abuse of discretion to allow the wife more than the husband had agreed to allow her until the marriage was acknowledged.

THORNTON, SHARFSTEIN, and McFARLAND, JJ., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Action for divorce and alimony, brought by Sarah Althea Sharon against William Sharon. Judgment was rendered for the plaintiff, and defendant appealed. Pending the appeal, defendant died, and Frederick W. Sharon, executor of William Sharon, was substituted as party defendant. For former opinions in this case, see 7 Pac. Rep. 456, 635, 639; 8 Pac. Rep. 614, 109; 9 Pac. Rep. 187.

W. H. L. Barnes, Oliver P. Evans, J. P. Hoye, and H. J. Korvalsky, for appellant. *Tyler & Tyler, Flournoy, Mhoon & Flournoy, D. S. Terry, and Walter Levy*, for respondent.

McKINSTRY, J. The appeals herein were taken in the life-time of William Sharon, the original defendant. The first is from a judgment determining and declaring the validity of an alleged marriage of plaintiff and defendant; decreeing a divorce, and that plaintiff is entitled to one-half of the community property. The second appeal is from an order directing the payment of counsel fees and alimony. The court below found:

(2) "That on the twenty-fifth day of August, A. D. 1880, the plaintiff and defendant each signed a certain declaration of marriage, in the words and figures following, to-wit:

"In the city and county of San Francisco, state of California, on the twenty-fifth day of August, A. D. 1880, I, Sarah Althea Hill, of the city and county of San Francisco, state of California, age twenty-seven years, do here, in the presence of Almighty God, take Senator William Sharon, of the state of Nevada, to be my lawful and wedded husband, and do here acknowledge and declare myself to be the wife of Senator William Sharon of the state of Nevada.

SARAH ALTHEA HILL.

"AUGUST 25, 1880, SAN FRANCISCO, CAL.

"I agree not to make known the contents of this paper, or its existence, for two years, unless Mr. Sharon himself see fit to make it known.

"S. A. HILL."

¹ An actual ceremony of marriage is not essential to the establishment of the relation of husband and wife. It is sufficient that the parties, no impediment existing, consent to take each other as husband and wife, and cohabit as such. *Peet v. Peet*, (Mich.) 18 N. W. Rep. 220. As to the requisites of such agreement, see *Clancy v. Clancy*, (Mich.) 33 N. W. Rep. 891. A written contract of marriage, although not provided for by statute, is a good contract of marriage, *per verba de presenti*. *Mathewson v. Foundry Co.*, 20 Fed. Rep. 281. By the laws of *Arizona*, marriage may be established by contract, without ceremony. *U. S. v. Tenney*, 11 Pac. Rep. 472. So, also, in *Kansas*, *State v. Walker*, 13 Pac. Rep. 279. Such is also the law in many other states, in the absence of statutory regulations. *Maryland v. Baldwin*, 5 Sup. Ct. Rep. 278. But common-law marriages are not recognized as valid in *West Virginia*. *Beverlin v. Beverlin*, 3 S. E. Rep. 36.

"In the city and county of San Francisco, state of California, on the twenty-fifth day of August, A. D. 1880, I, Senator William Sharon, of the state of Nevada, age sixty years, do here, in the presence of Almighty God, take Sarah Althea Hill, of the city and county of San Francisco, Cal., to be my lawful and wedded wife; do here acknowledge myself to be the husband of Sarah Althea Hill.

WILLIAM SHARON, Nevada.

"August 25, 1880."

—Which was the only written declaration, contract, or agreement of marriage ever entered into between said parties; and, at the time of signing said declaration, plaintiff and defendant mutually agreed to take each other, as, and henceforth to be to each other, husband and wife."

(3) "That afterwards, and about the ——— day of September, 1880, the plaintiff and defendant commenced living and cohabiting together in the way usual with married people, although their cohabitation was kept secret, and so continued for the space of more than one year, and down to the twenty-fifth day of November, 1881, and during all of said time the plaintiff and defendant mutually assumed towards each other marital rights, duties, and obligations."

(4) "That during all the time plaintiff and defendant so lived together, defendant visited her relations with her, escorted her to places of amusement, and introduced her to respectable families and to members of his own family, and wrote to her several letters while absent from her, in which he addressed her as 'My dear wife.'"

(6) "The defendant, on or about December 6, 1881, drove plaintiff from her apartments in his hotel, in which she had resided, by his direction, since September, 1880, and which was the residence selected for her by the defendant, refused to longer live with or provide for her support, and has not since then lived with or sought to live with, or requested the plaintiff to return or live with him, or provide in any manner for her support."

(8) "That it is not true, as stated in the answer of defendant, that plaintiff has either falsely or fraudulently assumed the name of Sarah Althea Sharon; but, on the contrary, that it is her real name; nor is it true that she, or any one, forged the document mentioned in the complaint, and heretofore set out; on the contrary, the said document is genuine, and was signed by the plaintiff and defendant at the time it purports to have been signed."

(9) "That defendant never introduced plaintiff as his wife, nor spoke of her as such in the presence of other persons; that plaintiff never introduced defendant as her husband, nor spoke to nor of him to other persons in his presence as her husband; that the parties were never reputed among their mutual friends to be husband and wife, nor was there at any time any mutual, open recognition of such relationship by the parties, nor any public assumption by the parties of the relation of husband and wife."

The appellant contends that, on the findings, the judgment declaring the validity of the marriage must be reversed, and a judgment be ordered that no marriage existed between the parties. This, because of the written promise of the plaintiff, that the written declaration of marriage should, at the option of the defendant, be kept secret for the period of two years, and of the facts found showing that, while their cohabitation continued, the alleged marriage was not made known by the plaintiff or defendant to third persons. The objection that the findings do not sustain the judgment is in the nature of a demurrer to the findings. The evidence is not before us; and we are not to inquire how far, if at all, the secrecy maintained by the plaintiff and defendant, or the insertion of the written promise of secrecy on her part, tended, under the circumstances, to prove *that no marriage was contracted*. That was a matter to be argued in the court below. Here, and on this appeal, the facts set forth in the findings are admitted to be true.

If the contemporaneous promise of the plaintiff not to make known the pa-

per writing, or its contents, for a limited period, rendered the agreement of the plaintiff and defendant to take each other as husband and wife void, or if the parties could not, as matter of law, mutually assume marital rights, duties, or obligations, without making public their relation as husband and wife, the judgment must be reversed; otherwise we are to consider, as conclusively establishing the marriage, the facts that plaintiff and defendant did sign the paper writing as set forth in finding 2, and mutually agreed to take each other as husband and wife; that in September, 1880, they commenced living and cohabiting together in the manner usual with married people, in an apartment furnished by him, and so continued to live and cohabit together down to November, 1881; that he wrote to her several letters addressed, "My dear wife," and that during all of said time they mutually assumed "towards each other" marital rights, duties, and obligations.

Section 55, Civil Code, reads: "Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization, or by a mutual assumption of marital rights, duties, or obligations." In the first sentence of the section of the Code "marriage" is defined in terms which accord with the definition of the *status* or condition of marriage given by courts and learned law writers. The civil contract of the parties is simply that they forthwith enter into a certain *status* or relation. The rights and obligations of that *status* are fixed by society, in accordance with the principles of natural law, and are beyond and above the parties themselves. They cannot modify the terms on which they are to live together, nor superadd to the relation a single condition. Schouler, Dom. Rel. § 13. The Code declares marriage to be a personal relation "arising out of contract." The personal relation created by the contract is not merely a contract. The contract is the portal through which the parties enter into the relation of marriage, and they can enter into that relation in no other way. Although all persons competent may marry at their own volition, the law fixes the rights and duties of those who are married. The section of the Code defines "marriage," which, as distinguished from a present contract to marry, or the act of becoming married, is "the civil *status* of one man and one woman united in law for life, for the discharge to each other and to the community of the duties legally incumbent on those whose association is founded on the distinction of sex." 1 Bish. Mar. & Div. § 3. The contract out of which the marriage relation arises must be a contract then and there to become *husband and wife*. Hence, as appears from the cases cited by appellant, a contract between a man and woman to live and cohabit together, or even to assume the duties of husband and wife, for a limited period, or so long as it may prove agreeable to both, or any other agreement which attempts to limit in extent or duration the rights and duties inseparably annexed to the *status* of matrimony, has sometimes been held not to be an agreement to become husband and wife, out of which arises the relation of marriage.

But to make the principle underlying such decisions applicable to the case at bar, it must be made to appear that, by the terms of our statute, the making public of the marriage relation is a duty or obligation annexed to the *status* of marriage, without which the *status* cannot exist. Such is the contention of appellant, based on the last sentence of section 55, Civil Code: "Consent alone will not constitute marriage; it must be followed by a solemnization, or by a mutual assumption of marital rights, duties, or obligations."

It is claimed, in the first place, that the promise to keep secret the contract of marriage for a period of two years, unless defendant should waive that stipulation, controlled and gave color to the other terms of the contract, so that it became not a contract of marriage, but a contract for illicit intercourse. In the second place, it is claimed that, independent of the stipulation as to

secrecy, there was no marriage, because of the fact of secrecy; since with secrecy there was and could be no "mutual assumption of marital rights, duties, or obligations," within the meaning of the Code. The words "duties" and "obligations" are evidently used in the same sense in the section of the Code. The duties to be assumed are the obligations which flow from the relation of husband and wife. And the word "marital" must, to give any effect to the sentence in which it is found, be treated as the equivalent of conjugal; to include the rights and duties of the wife as well as those of the husband. The validity of the alleged marriage we are considering must depend upon the fact that it was not made known by the parties. The promise of the plaintiff not to make it known for a period of two years, except with the consent of the defendant, was a collateral agreement, and not a condition to the marriage contract taking effect. The agreement to become husband and wife was complete. If she had published the writing, called the "declaration of marriage," at any time, the publication would not have avoided the marriage contract, because the parties did not, if they could, agree, that the contract should become operative only in case the plaintiff should keep it secret for two years, unless in the mean time secrecy was waived by the defendant. It is said by Mr. Bishop: "Not unfrequently the courts hold to be void some contract entered into at the time of the marriage, while the sufficiency of the marriage itself is not denied." 1 Mar. & Div. § 266. Whatever may be the rule where some limitation is introduced into the contract of any of the obligations which accompany the state of wedlock, in such manner as to indicate that the contract would not have been entered into, except upon the condition inserted, here, as we have seen, the promise not to make known the contract was an independent promise, and not a condition. If the promise had been utterly disregarded, it could not be successfully contended that they were not married.

If the last sentence of section 55 means what appellant claims it means, there would have been no marriage in the absence of the promise on the part of plaintiff not to publish it. On the other hand, if there can be a marriage without publicity, the promise of the plaintiff that she would not make it known for a temporary period did not affect its validity, because not an illegal promise. At the common law an agreement to keep the marriage secret does not invalidate it. 1 Bish. Mar. & Div. § 252, and cases cited in note. In the judicial decisions which speak of an open recognition of the matrimonial union, the effect of such open recognition is considered as *evidence*. The fact of marriage is one thing; the evidence by which it may be established is another. The fact of the publication of their relation, by the conduct and declarations of the parties, may go far to corroborate testimony with respect to an actual contract to marry. And so, in cases where the contract has not been directly proved, evidence that the parties cohabited together, and were reputed to be husband and wife, or recognized or introduced each other as such, is admissible as tending to prove, and if sufficient, proves, that they had previously entered into an agreement forthwith to become husband and wife. Yet evidence of cohabitation merely, without evidence of recognition of the relation, or repute of marriage, is not sufficient to establish an inference that there had been a mutual consent to marry, in the absence of direct evidence of such consent. *Estate of Briswalter*, 13 Pac. Rep. 164.

Again, it has sometimes been said (and not incorrectly, in view of the context) that at the common law marriage may be contracted *per verba de presenti* merely, or *per verba de futuro cum copula*. But, strictly speaking, there can be no contract *per verba de futuro*, which imposes the *status* of marriage. When the parties have been shown to have agreed to a future marriage, evidence of the *copula* is admitted to prove that they changed their consent to a future marriage into a present consent. This by reason of a pre-

sumption in favor of morality. Thus evidence, whether direct or indirect, of a contract of marriage, is always evidence of a consent *per verba de præsenti*.

But by our statute such present consent does *not* constitute marriage. Civil Code, § 55. It must be followed by a solemnization or by a mutual assumption of marital rights or duties. What does this mean? It is urged that such mutual assumption is put as the alternative for "solemnization;" and as solemnization implies and requires publicity, so it is intended that the assumption of rights and duties shall be public. By section 78, Civil Code, the solemnization of a marriage is mentioned as a thing distinct from the license to marry, from the authentication of the marriage, and from the record of the marriage certificate. A marriage is solemnized when, in the presence of a judicial officer, priest, or minister, the parties declare that they take each other as husband and wife, (Civil Code, §§ 70, 71;) and the officer or minister who witnesses this ceremony is said to "solemnize" the marriage. Every person authorized to solemnize marriage, who willfully solemnizes a marriage forbidden by law, or makes false return of a marriage, is guilty of a misdemeanor. Pen. Code, §§ 359, 360. But if between competent persons, the solemnization makes the marriage complete, although not preceded by license, or succeeded by record. Such a marriage is valid, although retained within the knowledge of those present at its solemnization; without any communication of its existence to the community at large, which, in a certain sense, is said to have an interest in all marriages, or rather an interest that the institution of matrimony be maintained in its sacred purity. By the language of section 55, Civil Code, the solemnization *completes* the marriage, although not followed by a mutual assumption of marital rights and duties; since such assumption is required only where there is no solemnization. It may be said, however, it is giving to the word "solemnization," in section 55, too narrow a meaning to confine it to the mere ceremony before the officer or minister; that it should be held to include the issuing of the license and the record of the certificate, with the publicity incidental to the license and record; that the purpose of the section must be to facilitate the proof of marriages by requiring their existence to be made public.

But the purpose of a statute can only be derived from its words, read in the light of the previous law. If it is so confused and uncertain that it can be given no intelligible meaning, we must consider the common law unchanged by it. The public policy of the state can only be ascertained by reference to the constitution and statutes. The courts cannot *create* a policy, and then declare, in support of the policy so created, that the legislature must have meant what it has not said. By the common law, private marriages, clearly proved, are valid; and it is a cardinal rule of interpretation that the common law continues except as altered by the statute. It is certainly remarkable that if it was intended consent must be followed by a "public" assumption of matrimonial rights and duties, the legislature did not say so in express terms, since, if so much was intended, the departure from the common law would be radical. It may be claimed to be equally strange, if mere "consummation" was meant, it was not so declared. But, giving force to both of these suggestions, the utmost that could be argued from them would be that the code-makers probably meant neither of the two things—a public assumption or mere "consummation."

The commissioners who prepared the Civil Code of California adopted as a foundation for their labors the Civil Code prepared for submission to the legislature of New York, departing in places only from the language of the Code proposed in the latter state. It may throw some light upon the question we are considering to compare sections of the proposed New York Code and sections of our Code.

NEW YORK CODE.

"Sec. 34. Marriage is a personal relation, arising out of a civil contract, to which the consent of parties capable of making it is alone necessary."

"Sec. 36. Any unmarried male of the age of fourteen years or upward, and any unmarried female of the age of twelve years or upward, and not otherwise disqualified, is capable of *consenting* to marriage," etc.

"Sec. 35. *Consent* to a marriage may be manifested in any form, and may be proved like any other fact."

The distribution of a statute into sections is arbitrary, and merely for convenience of reference. The New York and California Codes may be read respectively. "The consent of capable parties is alone necessary to constitute marriage; the consent may be manifested in any form, and may be proved like any other fact." N. Y. Code. "Consent alone will not constitute marriage; it must be followed by a mutual assumption of marital rights and duties; the consent and consummation may be manifested in any form, and proved under the same general rules of evidence as other facts." Cal. Code.

The word "consummation," whenever used as something different from the mere consent or formal solemnization of marriage, had always been held to mean "simply sexual intercourse, copulation, nothing more nor less." Section 57 of our Civil Code provides how this consummation may be proved. As consummation, if it does not constitute, is at least included in, an assumption of marital rights and duties, it is a circumstance of some significance that, when providing for the mode of proving "consent and subsequent consummation," nothing is said with respect to the manner of proving other rights and duties to be mutually assumed, if the proof of others is contemplated by section 55. It is a circumstance tending to show that it was the intention to change the New York Code only by requiring consummation to follow mutual present consent. If more was intended, it would have been easy to say: "The mutual assumption of marital rights, duties, or obligations may be proved under the same general rules of evidence as facts in other cases." It has been suggested that "consummation" in sections 56 and 57 is to be interpreted in the broader sense of "completion," and as, by section 55, a marriage is not complete until *after* a public recognition of it by the parties, the consummation of sections 56 and 57 means the completion of the marriage as provided in section 55. This is only saying that in the absence of solemnization there is no marriage until after cohabitation known to others, or public recognition of the marriage *and* copulation. This, as we shall see, the sections cannot mean; the legislature could not have intended that (after a present consent to marry) a period of cohabitation, known to others, should be necessary to the constitution of marriage, or precede its "completion;" for, if so, the woman would be compelled to live with the man in such manner as that their coition would be inferred, before their coition would be lawful.

CALIFORNIA CODE.

"Sec. 55. Marriage is a personal relation, arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization, or by a mutual assumption of marital rights, duties, or obligations.

"Sec. 56. Any unmarried male of the age of eighteen years or upwards, and any unmarried female of the age of fourteen years or upwards, and not otherwise disqualified, are capable of *consenting to and consummating* marriage.

"Sec. 57. *Consent* to and subsequent *consummation* of marriage may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases."

Each article of the Code is preceded by head-notes, numbered to correspond with the sections following, and purporting to give in brief the subject of each of such sections. These head-notes are entitled to more consideration than the "title" to an entire act. They are parts of the statute limiting and defining the sections to which they refer. To refuse to give effect to them according to their import would be to make the law, not to administer it. *Barnes v. Jones*, 51 Cal. 303; *McKINSTRY, J.*, in *Ex parte Koser*, 60 Cal. 206; *Williams v. People*, 45 Barb. 201; *People v. Molineux*, 53 Barb. 15, 40 N. Y. 119. As we have seen, section 57 of the Civil Code relates to the proof of "consent and subsequent consummation." Additional force is given to the suggestion that it was intended that consent and consummation should constitute marriage by the fact that the head-note to that section is: "*Marriage—How manifested and proved.*" It may be added that when the propriety of requiring a public declaration to accompany unsolemnized marriages was directly called to the attention of the legislature of California, the legislature refused to act upon the suggestion, but permitted section 55 to remain as it now is. Among the amendments reported by the revisory commissioners, appointed in 1873, was one to make section 55 of the Civil Code read: "Marriage is a personal relation arising out of a civil contract, to which the consent of the parties is necessary. To render marriage hereafter contracted in this state valid, the contract must be accompanied by a solemnization, or by a public declaration, as provided in this chapter." While adopting many of the amendments proposed by the commissioners, the legislature rejected this one.

We do not propose to decide the question whether at the common-law consummation, as well as consent, was necessary to constitute marriage. Mr. Bishop says: "Consummation—the *copula*—is no part of the marriage; it only serves, to some extent, as evidence thereof. A maxim of the civil law, equally also of the ecclesiastical, of the common,—indeed, of all law governing the subject,—is, '*Consensus non concubitus facit matrimonium.*' Hence, when parties capable of intermarrying agree to a present marriage, the relation is made thereby complete. This is true everywhere, subject to the qualification that in some countries there are laws requiring the addition of specified ceremonies and forms; but the *copula* gives the marriage nowhere any additional strength." 1 Mar. & Div. § 228; and see cases cited in the note. And Chancellor Kent says: "If the contract be made *per verba de presenti*, without cohabitation, * * * it amounts to valid marriage, in the absence of all civil regulations to the contrary." 2 Comm. 87.

In this country, in those states where there is no statute prohibiting common-law marriages, and declaring all invalid except those solemnized in some particular form, the decided weight of authority is that to constitute marriage the contract *per verba de presenti* need not be succeeded by a consummation. Nor is it necessary here to decide whether, by the common law of England, a present consent, with or without subsequent cohabitation, constituted marriage, in the absence of religious sanction evidenced by the presence and approval of a clergyman of the Established Church. In a note to section 55 of our Civil Code the California commissioners say: "*As to whether consent alone constitutes marriage:* In *Jewell v. Jewell*, 1 How. 219, the court was equally divided. In *Reg. v. Millis*, 10 Clark & F., 534, the house of lords, on appeal from Ireland, were also equally divided on the same question. On reference of the question to the court, TINDAL, C. J., gave the unanimous opinion of the court that it was not a valid marriage, and held 'that by the law of England, as it existed at the time of the marriage act, a contract of marriage *per verba de presenti* was indissoluble between the parties themselves, and afforded to either of them, by application to the spiritual court, the power of compelling the solemnization of an actual marriage; but such contract never constituted a full and complete marriage, in itself, unless made in the presence and with the intervention of a minister in holy orders. The

civil contract and the religious ceremony were both necessary to a perfect marriage by the common law." Civil Code, Annotated, § 55.

The opinion referred to in the note as the opinion of the court was, in the opinion of the judges, in response to questions put to them by the lords, and did not decide the case. The judgment of the queen's bench was affirmed, because the votes in the house of lords for reversing or affirming it were equal. The views of the judges in their answers to the questions submitted to them in *Reg. v. Millis* have since been doubted, perhaps overruled, in England. But the question discussed in that case was whether, by the law of England, prior to the marriage act, 26 Geo. II., a contract *per verba de præsenti*, without the intervention of a minister in orders, was sufficient to make a complete marriage, so that by marrying a second time the defendant made himself liable to the pains and penalties of bigamy.

In *Jewell v. Jewell*, 1 How. 219, also referred to in the note, the circuit court directed the jury that, in the absence of solemnization, "if the contract be made *per verba de præsenti*, and remains *without* cohabitation, or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage, and which the parties (being competent as to age and consent) cannot dissolve." Upon this question the supreme court of the United States was equally divided.

The reference to the two cases in the commissioners' note was evidently to indicate that the object of the last clause of section 55 was to declare "a solemnization" not necessary, provided the mutual consent be followed by something else. The cases referred to leave unsettled the questions whether in England a religious ceremony was necessary prior to the marriage act; and whether, in some of the American states, where peculiar laws requiring certain ceremonies obtain, a solemnization in accordance with the forms required by such laws is necessary, in *addition* to the consent of the parties.

They are of no assistance in the present inquiry, except so far as they tend to show the purpose of the Code—already sufficiently clear from its language—that, in the absence of solemnization, more than mere consent should be requisite to constitute marriage.

As we have said, the Civil Code of California is based upon and in the main follows the Civil Code as reported to the legislature of New York. The California commissioners changed section 34 of the New York Code. That section provided that consent alone is necessary to constitute marriage. Our commissioners altered this by declaring "consent alone will not constitute marriage," and then added the clause so often quoted. This was done with the note of the New York commissioners (to section 34) before them. That note clearly shows the object of section 34. There had been two opinions among jurists; many holding that present consent makes marriage; some that, to make a marriage, either *consummation* or solemnization was also requisite. The New York commissioners determined to provide that present consent, *without* consummation or solemnization, should be sufficient. The note of the New York commissioners reads: "By 2 Rev. St. 199, section 1, marriage is declared to be a civil contract to which consent is necessary; but whether anything more than consent is necessary has been mooted; some authorities deeming that either consummation or solemnization is also requisite. *Jaques v. Public Adm'r*, 1 Bradf. Sur. 499. And see 2 Pars. Cont. (5th Ed.) 74. This provision makes consent alone sufficient, and is in accordance with the views declared in *Starr v. Peck*, 1 Hill, 270; *Jackson v. Winne*, 7 Wend. 47; *Caujolle v. Ferrie*, 23 N. Y. 106; *Hayes v. People*, 25 N. Y. 390." It is difficult to avoid the conclusion that the California commissioners, with the foregoing note before them, decided to adopt the position rejected by the New York commissioners, and to provide that, in the absence of solemnization, consent alone should not constitute marriage; but that it must be followed by "consummation." And yet it may be said the phraseology does excite a suspicion

that something more or different was intended, since it is hard to believe that the commissioners were actuated by a hyper-delicacy in rejecting a term in that particular sentence, which they subsequently did not hesitate to employ.

The difficulty of arriving at the meaning of the last clause of section 55 of our Civil Code was very fully set forth and illustrated by John Norton Pomerooy, late professor in the college of law of the university of California, in two articles published by him. 4 West Coast Rep. 50, 152. These articles were referred to by counsel at the argument. The theme of the series of articles in which the two above cited are included, is the necessity of applying well-known, uniform, and consistent principles of interpretation in adjudicating upon, applying, and enforcing all the various sections of the Civil Code. 3 West Coast Rep. 585. His conclusion is that the only method by which any certain, consistent, and just results can be attained through an interpretation of the provisions of the Code, is by adopting and following the principle that they are, "in general," declaratory of common-law and equity rules. 4 West Coast Rep. 150. And he points out that where the provisions of the Code are clearly not merely declaratory of the common law, the great, and in some instances apparently insurmountable, difficulty is to ascertain how far the particular provision departs from or changes the pre-existing law. This arises from a defect "which may be said to characterize the entire Code as a work of legislation." "From their constant, but wholly unnecessary, practice of abandoning well-known legal terms and phrases, the signification, force, and effect of which had long been settled and certain, and of adopting instead thereof an unknown and hitherto unused language and terminology, as well in their ordinary definitions as in the statement of general doctrines and single rules, they constantly create an uncertainty whether they intend merely to declare and restate, without change, a known common-law definition, doctrine, or rule, or whether, on the other hand, they intend to alter or modify such definition, doctrine, or rule; and, if the latter be their general intent, they make it uncertain how far the alteration extends." 3 West Coast Rep. 586.

Among other illustrations of the employment of language which renders the meaning, intent, and consequent effect of a particular section "obscure and uncertain," he cites section 55 of the Civil Code. With reference to that section he says: " 'Consent alone will not constitute a marriage; it must be followed by a solemnization, or by a mutual assumption of marital rights, duties, or obligations.' What is the meaning of this strange phrase? The phrase is absolutely unknown to the law. Does it mean that the two spouses must live openly as husband and wife, must hold each other out to the world as husband and wife, etc.? There are strong arguments against that meaning. In the first place, the phraseology to describe exactly that condition has long been settled, and is very familiar; and if the authors of the Code had such a meaning, it seems hardly possible that they should reject this familiar and expressive phraseology. Instead of saying that consent must be followed by 'habit and repute,' or 'by the parties holding themselves out to the world as husband and wife,' which would have left no doubt as to their meaning, they adopt this uncouth phrase, which does not necessarily have such a meaning. But, in the second place, such an alteration of the common-law rule seems to be entirely without any reason, and opposed to common sense. Under the law previous to the Code, proof that two parties had treated each other as husband and wife, had lived together as such, and had held each other out to the world as such, was sufficient to enable a jury or court to infer and find the fact of marriage. Why? Not at all because such living and holding out of itself constitutes a marriage; but solely because from such living and holding out the court or jury may find that at some previous time the two parties did, as a fact, consent to be married,—did, as a fact, agree to be husband and wife. This conclusion is sustained by all the decisions of authority. The

previous actual consent or agreement to be husband and wife is the ultimate and essential fact which the jury must find; the mode of life, the holding out, and the like, are nothing but circumstantial evidence from which that fact may be inferred. Now, when living as husband and wife, and holding out as such, were only necessary as evidence for the purpose of *inferring* the fact of a previous consent, it seems strange and useless to require evidence of the same kind,—of holding out and living as husband and wife, and the like,—when the fact of a prior consent has already been clearly established by other and independent evidence.” 4 West Coast Rep. 51.

In a subsequent article (4 West Coast Rep. 152) the same learned writer said: “Whatever weight may be due the considerations before suggested in a former article, there are, in my opinion, equal, if not greater, obstacles to an interpretation which treats the section (55) as having made no material alteration in the rule as previously settled—the common-law rule. *If, by the previous rule, after verba de præsenti, the copula was sufficient to constitute a marriage, it seems almost impossible to suppose that in the phrase ‘by a mutual assumption of marital rights, duties, or obligations’ the authors of the Code and the legislature did not mean something more and different—something additional. We may wonder at the employment of terms so unlike the usual phraseology of statutes, and may regret that words more certain and definite in their meaning were not selected; and still, if we give any fair and reasonable construction to all the language, we can hardly escape the conclusion that ‘a mutual assumption of marital rights, duties, or obligations’ imports acts and conduct of the two parties towards each other, and rights and duties belonging to the marriage relation, which cannot possibly be embraced in the word ‘copula,’ or the word ‘consummation,’ or even, perhaps, the word ‘cohabitation.’*”

There is no statement in either article that, in the opinion of the writer, a public recognition of the marriage relation is required by the Code. The writer does not pretend to interpret the provision of the Code, and his interpretation would not have been authoritative. His very purpose is to show the uncertainty of its language, by pointing out the objections to holding it to mean either consummation alone, or more than consummation. Much of the force of the argument of the second article is taken away when the uncertainty of the premise on which it is based is considered. “If, by the previous rule, after *verba de præsenti*, the *copula* was sufficient,” would seem to imply that, at the common law, the *copula* was necessary to constitute marriage. But as we have seen, Mr. Bishop, in his work on Marriage and Divorce, (referring to authorities in support of his position,) lays down the rule that the *copula* adds no force to the present consent, but the latter makes a complete marriage without the *copula*. Kent holds to the same view; and such is the effect of the decided weight of authority in this country. The New York cases cited in the note of the commissioners in that state are to the effect that, where the contract is *per verba de præsenti*, neither consummation nor solemnization is requisite to make a complete marriage; yet the case in Bradford, and what is said in Parsons on Contracts, induced the New York commissioners to declare in express words that neither should be necessary. The California commissioners deemed it wiser to declare that consent alone should not constitute matrimony; but it cannot be assumed that the provision of our Code was based upon the hypothesis that by the previous law there was no marriage unless consent was followed by consummation. At the most, the result of the statements of Professor Pomeroy is that it is doubtful whether the language of section 55 of the Civil Code means that the consent must be followed by consummation, or by consummation and something more.

It is claimed that, in *Graham v. Bennet*, 2 Cal. 503, the supreme court, by HYDENFELDT, J., speaking of an unsolemnized marriage, entered into in

1845, decided that to constitute such a marriage there must be an open assumption of the relative duties of husband and wife; and that the code commissioners clearly showed their intention to adopt the rule laid down in that case. In *Graham v. Bennet* the facts showed that the consent was in the presence of witnesses, and was followed by open and acknowledged cohabitation as man and wife. The learned judge delivering the opinion there said: "Marriage is regarded as a civil contract, and no form is necessary for its solemnization. If it take place between parties able to contract, an open avowal of the intention, and an assumption of the relative duties which it imposes on each other, is sufficient to render it valid and binding. The ceremony, therefore, which took place between the plaintiff and defendant, as shown by the complaint, was sufficient to constitute them man and wife," etc. The ceremony set forth in the complaint was the signing by the parties of the writing, witnessed by persons therein named, which reads: "Marriage in the year 1845. Isaac Graham of Santa Cruz, and Catherine Bennet of San Francisco, were married at Lyant, by banns, this twenty-sixth day of September, 1845, by one who was requested to read the ceremony, Henry Ford. This marriage was solemnized between us, ISAAC GRAHAM, CATHERINE BENNET. In presence of WILLIAM WERM, HENRY FORD." The 'ceremony' held to be sufficient to constitute the parties man and wife was the execution of the foregoing writing. By it, in the presence of the witnesses, they made open avowal of their intention, and agreed to take upon themselves the relative duties imposed by marriage. Even if the language of the court should be construed to mean more than an assumption, as proved by the ceremony or consent, it was at most but a decision that, upon the facts of that case,—the consent and subsequent open assumption of marital duties,—the parties were married. The language of a court must always be read in view of the facts before it. This is an established canon of legal criticism. The court did not decide that all the facts appearing in that case must exist to constitute marriage, but that the facts there appearing proved a marriage. The former could not have been intended, because it would be in violation of every precedent. The marriage involved in *Graham v. Bennet* took place prior to the acquisition of California by the United States, but the court assumed that the law of Mexico was the same as the common law. It had never been held in this country that, at common law, a contract *per verba de præsenti*—followed or not followed by the *copula*—must be succeeded by a public assumption of the relative duties arising out of the *status* of marriage. Nor was such an interpretation placed upon the decision of *Graham v. Bennet* during the 20 odd years intervening between that decision and the adoption of the Codes.

While this action was pending in the court below, a judgment of the circuit court of the United States for Maryland was reversed by the supreme court of the United States. *Maryland v. Baldwin*, 112 U. S. 490, 5 Sup. Ct. Rep. 278. One of the issues there was, was Markeley the real plaintiff, a son and heir of Daniel Lord, deceased? and it involved the validity of an alleged marriage between the deceased and the mother of the plaintiff. In the circuit court there was a general verdict for the defendants. A witness, one Cross, testified at the trial that the deceased had admitted to him his marriage with plaintiff's mother, and had given a certain reason for concealing his own name and taking hers; also that, after her death deceased had spoken of his marriage, and attributed all his early success to her. One of the defendants was permitted, against the objection of the plaintiff, to testify to conversations with the deceased about Cross; and that the deceased had expressed great distrust of him, calling him anything but an honest man, etc. The supreme court held this last testimony clearly inadmissible; it being mere hearsay. For the error in admitting it, against the objection of the plaintiff, the judgment of the circuit court was reversed, and the cause remanded for a new trial. No exception seems to have been taken to the charge of the cir-

cuit judge. Mr. Justice FIELD said that, as, for the error mentioned, the cause must go back for a new trial, it was proper to say that by the law of Pennsylvania, where, if at all, the parties were married, a marriage could be made *per verba de presenti*, without attending ceremonies, religious or civil; that such is the doctrine of the common law. "But where no such ceremonies are required, and no record is made to attest the marriage, some public recognition of it is necessary, as evidence of its existence." He adds, the charge of the court should direct the jury as to the necessity of such recognition, in the absence of statutory regulations on the subject. And the learned judge said: "The law of Pennsylvania, as we are advised, requires, in some form, such recognition. See *Nathan's Case*, 2 Brewst. 149, 153; *Com. v. Stump*, 53 Pa. St. 132."

In *Maryland v. Baldwin* no witness was present at any marriage ceremony, or at any contract of marriage; a marriage, if it existed, was to be inferred from their declarations and living together. Pages 493, 494. The language of the court is to be interpreted in view of the facts. If, however, as claimed by appellant, it was intended to be said that, when there is direct evidence of a contract of marriage, by words in the present tense, there must also, by the law of Pennsylvania, be evidence of a public recognition of the marriage, a reference to the two cases cited shows that the learned judge was wrongly advised as to the law of that state.

In *Com. v. Stump*, the supreme court of Pennsylvania decided: "*Where there is no proof of actual marriage*, cohabitation and reputation are necessary to ground a presumption of marriage; proof of cohabitation alone is insufficient." 53 Pa. St. 132, 135.

In *Nathan's Case*, the court of quarter sessions held that the wife was a competent witness to prove a present contract to marry; and, independent of her testimony, (page 168,) the marriage was sufficiently proved by the acts and declarations of the parties; that reputation and cohabitation are sufficient evidence of marriage, and may be conclusive where the rights of third persons are affected, and the legitimacy of children is called in question.

Even if the "mutual assumption," etc., be a broader expression than "consummation," it may be given full effect by holding it to include, not only consummation directly proved, as it rarely is or can be, but also the mutual taking on, by a man and woman, of marital rights and duties, from which consummation may be inferred. The phrase called by Professor Pomeroy "uncouth," does not, as said by him, require that they shall "hold themselves out to the world as husband and wife." The common law underlies all our legislation and furnishes the rule of decision, except in so far as the statutes have changed the common law. When the common law is departed from by a provision of the Code, effect is to be given to the provision to the extent, and only to the extent, of the departure. This is not saying that the Code must be strictly construed, as those terms were sometimes applied to classes of statutes prior to the Codes. Every provision of the Code, expressed in intelligible language, must be given full force and effect. But, under pretense of an interpretation—or explanation in different language—the courts cannot add to the significant terms of a statute; nor, by resorting to conjecture, can they go beyond the intent derivable from the terms actually employed, considered with the pre-existing law. Certainly the courts are not authorized to declare something more must have been intended, because, in the opinion of individual judges, a greater departure from the common law would be wise or expedient. As said by Lord STOWELL, secrecy sometimes attends the most regular marriages "from prudential reasons," (*Dalrymple v. Dalrymple*, 2 Hagg. 54;) although, where prudential reasons do not appear, that may cast doubt upon the fact of marriage. As valid marriages might be secret at the common law, we cannot say that the departure in the Code from the common law requires that in every case they must be public, unless the words employed demand such interpretation.

The question presented by these findings (and we can know nothing of the case except from the findings) is this: Shall a man be permitted to say: "True, this woman and I agreed to enter into the marriage state, by words in the present tense. That agreement was followed by cohabitation, and by our mutually taking upon ourselves 'towards each other' marital rights, duties, and obligations. But we are not married, because we did not discharge a marital duty, to-wit, make public the relation between us; but, on the contrary, by mutual consent, kept it secret for a period; and I never acknowledged it. The community had a right to know that we were married, or pretended to be married, and I appeal to public policy,—as declared by section 55 of the Civil Code,—and to great principles of *morality*, which demand that such a union as ours shall be declared to be illicit?" Surely, if the legislators had intended consequences such as would flow from upholding a party in a position like that, they would have expressed their purpose in unmistakable terms. If the position of appellants be correct, there is no marriage, notwithstanding previous consent, until after a public recognition of the marriage relation. But from cohabitation and such recognition, sexual intercourse may properly be inferred, and there can be no lawful intercourse of that character before marriage. It would follow, therefore, that, in the absence of solemnization, a marriage could only be proved by establishing a fact from which unlawful intercourse could be inferred. On the other hand, if consummation, "the most intimate union of the sexes," completes the marriage, and is an assumption of marital rights and duties, and the consummation may be proved directly, or as an inference from another fact from which it may be inferred, no such anomaly is presented. The statute either means that, after present consent to marriage, the consummation (however proved) is sufficient evidence of an assumption of marital rights and duties; or the acts, other than consummation, must precede consummation; the consummation must be the last of the series of acts. If cohabitation as man and wife, to the knowledge of the acquaintances of the parties, must precede the consummation, how long must it be continued, and to what extent must it be made public, to authorize sexual intercourse? It is incredible the legislature intended that copulation may take place before the marriage is complete, or to put it in the power of the man, after he has enjoyed the person of the woman, to say, "I will proceed no further." Yet it is the duty of the woman, after the mutual consent to present marriage, to live with the man, and their cohabitation must, from the nature of things, create the presumption of copulation; which reduces the statute to an absurdity. It does not require a public assumption of the marriage relation to create a presumption of consummation. The cohabitation of persons of opposite sexes, whether legal or illicit, suggests sexual intercourse, (*Imperial Dict.*) and is evidence of it. When previous consent is proved, cohabitation is itself evidence of an assumption of marital rights and duties, and is evidence of such assumption by means of the consummation which has completed the marriage.

It is urged there can be no "mutual assumption" of marital rights and duties which is unknown to the community at large, or to the acquaintances of the parties; that the word "mutual" requires an "open and respectful" recognition before the community, "in all their social intercourse," that they stand to each other in the relation of husband and wife. But, where the holding out to the world of the relation is evidence of a prior contract, such evidence does not necessarily depend for its effect upon amenity of manners, or upon the degree to which the parties extend to each other the affectionate respect which should attend the intercourse of husband and wife in well-ordered households. The statute does not make the validity of a marriage by consent depend upon the full performance of their mutual duties; the failure to perform certain important obligations is made ground for divorce. It may be conceded the Code requires the mutual assumption of such duties. The assumption of rights and duties by the parties must be *mutual*, and the Code is

given effect if they are assumed between and towards each other. The title of a tale by a great novelist—"Our Mutual Friend"—has been much criticised as a misapplication of terms, and it presents, perhaps, the only instance in standard literature of the application of the word "mutual" to that which cannot be interchanged. The adjective "mutual" is defined: "Reciprocally acting or related; reciprocally receiving; reciprocally given and received; reciprocal; interchanged; as mutual love, assistance, advantage, aversion." Webster. If the words had been "mutual performance" of the duties common to both, they would have demanded simply the performance of such duties to each other; and would not have required that the relation should be made public, unless the making it public is a duty inherent in the relation, such as cannot be waived; which it is not. It is said, however, the "assumption" of the Code implies publicity; that the word is ordinarily used as appearing to others in a given character, station, or relation, and necessarily conveys the idea of a public appearance. But the first definition of the lexicographer referred to in the briefs, is "the act of assuming or taking to or upon one's self." (*Ad* and *sumere*.) It is sometimes used to express the pretension of having or possessing; the taking on in appearance, and not in reality. But, when used in the last sense, it does not necessarily mean a pretense presented to the eyes of the community, although it may include such general pretense. To adopt the illustrations of counsel, one may assume to an individual—to take upon himself by words, manner, or bearing, in the presence of one person alone—a virtue, though he "have it not." To deceive a single soul, the devil hath power to assume a "pleasing shape."

The section of the Code requires that the parties shall mutually take on themselves marital rights and duties. This they agree to do when they agree to become husband and wife, but inasmuch as the section provides that the mutual assumption shall "follow" consent, it may be conceded that there must be evidence of other facts, showing the assumption, in addition to direct evidence of consent; that the Code does away with the presumption of consummation, which has sometimes been said to arise out of a contract *per verba de presenti*. But the Code does not declare that the fact of marriage must be proved independently of, and without regard to, direct evidence of an actual present consent. Since, as before the Code, evidence of cohabitation, and that the parties, in the presence and hearing of their acquaintances,—openly, "in their social intercourse,"—have recognized each other as husband and wife, is sufficient to prove previous consent, and, therefore, marriage. In effect, the contention of appellant is that direct evidence of a consent to marry *per verba de presenti*, however full and satisfactory, shall count for nothing; but that in every case, in the absence of solemnization, there must be evidence sufficient, in and of itself, to prove the marriage, independent of direct evidence of an actual contract. But such independent and complete proof of the marriage is not made necessary by the words "consent *alone* will not constitute marriage; it (the consent) must be followed by the mutual assumption," etc. The language clearly implies that the "mutual assumption" is to be shown, not by evidence sufficient of itself to prove consent, but as something in addition to consent already proved. Under the Code, the fact to be proved is the existence of the relation which "arises out of a civil contract." Besides evidence of the mutual consent of the parties, which makes the contract, there must be other evidence that they have assumed towards each other marital rights and duties.

"There are two principal ends of marriage—a lawful indulgence of the passions to prevent licentiousness, and the procreation of children under the shield and sanction of the law." Stew. Mar. & Div. 103. The intercourse, which is the means by which these ends are attained, is both a right and duty. Evidence that the man and woman have enjoyed the right and discharged the duty, whether direct or consisting of proof of another fact from which the in-

tercourse may be inferred,—as cohabitation,—is, when preceded by present consent to marry, evidence that the parties to the contract have actually assumed all the duties incident to marriage. Whether, in addition to and in the light of the consent, there is sufficient evidence that they have taken on themselves marital rights and duties, must depend upon the circumstances proved in each case. When parties agree to a present marriage, they mutually agree to take on themselves the obligations appertaining to the marriage state; but the Code requires that to justify a finding of marriage there shall be additional evidence that they have assumed marital rights or obligations. If a case be supposed, where, immediately after consent to present marriage, the parties have permanently separated, there would, perhaps, be no marriage; not because they would not have mutually agreed to assume marital obligations, but because the section of the Code requires evidence of other and subsequent facts, showing the actual assumption of marital obligations. In considering the evidence of such facts subsequently occurring, however, the direct evidence of previous consent is not to be rejected. All the evidence is to be taken together. As we have seen, cohabitation alone does not prove marriage, because the relation between a man and woman cohabiting may not be that of husband and wife. But cohabitation, with evidence of a reputation that they were married, created by the conduct of the parties, proves a previous consent and marriage. So, under the Code, cohabitation, with direct evidence of previous consent, proves a marriage; because, when viewed with the previous consent, cohabitation is evidence of a mutual assumption, etc. Cohabitation being proved, *direct proof* of previous consent is at least as effective as is evidence of reputation from which the previous consent may be inferred.

So far as we are informed the only law writer, other than Professor Pomeroy, who has employed language similar to that of our Civil Code, is Mr. Stewart, in his work on Marriage and Divorce, published in 1884. At section 103, speaking of "the consummation," he defines consummation as "subsequent sexual intercourse between the parties, or the assumption of the rights, duties, and obligations of husband and wife, from which such intercourse may be *implied*." In a note he refers to section 55 of the California Code, and to the dissenting opinion of Judge MILLS of the Kentucky court of appeals, in *Dumarsely v. Fishly*, 3 A. K. Marsh. 377. That was an action of slander, in which the defendant pleaded that the plaintiff was his wife. The court held that the position that consummation, in addition to present consent, was necessary to constitute a valid marriage in fact, was "neither founded on reason, nor supported by authority." Citing 1 Ruth. Inst. 345; Co. Lit. 34; 1 Bl. Comm. 433. The dissenting judge thought that a marriage, not solemnized according to statutory formalities, "should require consummation evidenced by cohabitation." If the learned author intended to say that the California Code had adopted the rule thought by Judge MILLS to be the proper one, then the Code simply requires that the consent shall be followed by cohabitation from which sexual intercourse may be inferred. It is only by the inference to be drawn from cohabitation, as husband and wife cohabit, that such intercourse is ordinarily proved. In his dissenting opinion Judge MILLS nowhere suggests that a public recognition of the marriage relation is necessary; and the language of Mr. Stewart, read in the light of his note, intimates that the consummation is the important matter; that the consummation may be inferred from the mutual assumption of marital rights and duties, and that such assumption may be proved under our Code by evidence of *cohabitation*.

Cohabitation may be lawful or illicit. It is lawful if preceded by consent, by words in the present, however such consent may be proved. When cohabitation follows consent, it is evidence that the parties have mutually assumed marital rights and duties, as it is evidence that the marriage has been completed by consummation. The rights and duties of married persons are manifold. Except as to property rights, the Code does not pretend to

enumerate them, except by saying that the parties contract "towards each other obligations of mutual respect, fidelity, and support." Civil Code, § 155. The common-law decisions do not define them, save in general terms. Nor does the Code provide that consent shall not constitute marriage unless followed by a full enjoyment and complete performance of all the rights and duties appertaining to marriage. Whatever else the section may mean, it does not mean that present consent, followed by consummation and cohabitation, and by other acts tending and sufficient to show that the parties have mutually assumed conjugal rights and duties, shall be held no marriage, at the instance of one who may have become dissatisfied with the relation, in case it is shown that either party has not actually discharged all the duties which an exalted view of the subject may induce one to believe to be incidents of marriage.

The court below found *as facts* that, during a certain period after the consent to marry, "the plaintiff and defendant lived and cohabited in the way usual with married people, * * * and mutually assumed towards each other marital rights, duties, and obligations." If, as we have said, they might mutually assume marital rights and duties, although their relation was kept secret, the insertion of the words "towards each other" does not vitiate the finding, and the finding of facts is conclusive on this appeal. Moreover, marital rights and duties are correlative. There can be no rights without corresponding duties. The rights of the wife are to those things which she may claim of the husband, and *vice versa*. The claim to some of her rights may be waived temporarily, and when waived there is no corresponding duty to be done while the claim is in abeyance. To make public the marriage relation, notwithstanding a mutual assent to privacy, may be conceded to be a duty, when the claim to publicity is asserted; but it is not an absolute duty to be performed while the mutual consent to privacy continues.

Our conclusion is that the provision of the Code requiring a mutual assumption of marital rights and duties to follow consent does not make it indispensable to the validity of the marriage that the relation between the parties shall be made public. The section of the Code does not purport to require it. The policy of the common law does not demand it, and the policy of the common law has not been changed by statutory enactment. It would be giving the words of the statute a meaning which does not accord with just and established rules of interpretation to hold that these parties, who, as found by the superior court, mutually consented to become husband and wife, thereafter cohabited in the manner usual with married people, and mutually assumed towards each other marital rights and duties, were not married. We cannot so construe the Code to meet the supposed exigencies of the particular case.

On the sixteenth of February, 1885, the following order was entered in the cause: "It is hereby ordered that the defendant pay to the plaintiff, or her order, on or before the ninth day of March, 1885, the sum of seven thousand five hundred dollars as alimony herein, and the further sum of twenty-five hundred dollars on or before the eighth day of April, 1885, and the same amount on or before the eighth day of each and every month thereafter, as alimony until the further order of this court. It is further ordered that the defendant pay as counsel fees herein, on or before the ninth day of March, 1885, the sum of fifty-five thousand dollars, that is to say—twenty thousand dollars to Messrs. Tyler & Tyler, or order; ten thousand dollars to George Flournoy, or order; ten thousand dollars to Walter Levy, or order; ten thousand dollars to David S. Terry, or order, and five thousand dollars to R. P. Clement, or order; and in case any of such payments are not made on or before the time herein fixed, then the party or the parties entitled thereto shall have execution therefor, pursuant to section 1007 of the Code of Civil Procedure of the state of California."

The court has held the foregoing order to be appealable.¹ The order, so far as it relates to counsel fees, is, in effect, a judgment that the defendant in this action pay to Messrs. Tyler & Tyler, and to the other counsel named, respectively, the several sums mentioned,—aggregating fifty-five thousand dollars,—and that Messrs. Tyler & Tyler, and each of the others, shall have execution for the sum directed to be paid to them or him. Section 137 of the Civil Code provides, “While an action for divorce is pending the court may in its discretion require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action.” There can be no doubt the order must require the alimony to be paid to *the wife*, and it seems equally plain it was intended that the money ordered to be paid, as necessary to prosecute or defend the action, should be ordered paid to her. Section 137 regulates the matter in this state, and that section contemplates an order to pay to the wife. It would seem that where the statutes are silent on the subject, temporary alimony and suit money can be awarded to the wife. 2 Bish. Mar. & Div. § 396. But when awarded, either by statute or upon general principles, “suit money” is awarded to her; and by section 137 counsel fees, if ordered to be paid, are ordered as part of her necessary expenses for prosecuting or defending the action for divorce. There is a great deal of American authority that the wife’s legal agent cannot recover compensation of the husband, in a distinct action, for his services rendered her in a suit for divorce. Cases cited to section 391, 2 Bish. Mar. & Div. He certainly cannot recover a judgment for such services, past and contemplated, upon a motion in the suit for divorce. The order here was a direct judgment for money in favor of persons not parties to the suit, and to that extent was irregular and void. Moreover, it would seem to be an undeserved reflection upon the administration of justice in the superior courts to hold that at least six lawyers were “necessary” to present the merits of plaintiff’s cause. The wife cannot, as of course, employ as many attorneys as she chooses and compel the husband to furnish funds for whatever she is to pay them. The rule was laid down in Massachusetts to be that the sum required to be paid by him is not to exceed what, under all the circumstances, may be reasonable for the compensation of counsel and the payment of other charges, without regard to what might properly be demanded as between counsel and client by the counsel actually employed. *Baldwin v. Baldwin*, 6 Gray, 341.

In *Williams v. Williams*, where it would seem several members of the bar were employed, the supreme court of Wisconsin said: “There can be no doubt whatever that any one of the attorneys for plaintiff, without any severe strain upon his professional ability, would have prosecuted this action to the same result.” 29 Wis. 528. Making every allowance for the suggested difficulties in the prosecution of the case at bar and the labors of counsel,—the full extent of which does not, perhaps, appear on this appeal,—we can conceive of no case of the character of the present which can require as necessary the array of counsel who appeared for the plaintiff herein. Of course, the “necessity” must be gauged by the services rendered in a cause such as are strictly those of attorney and counselor. Independently of the fact that the order was irregular in that it provided for a recovery and collection by those not parties to the action, we are of the opinion the amount was too large, and beyond the legal discretion to be exercised by the court. This action was commenced November 1, 1883. On the twenty-third day of October, 1883, George W. Tyler, member of the firm of Tyler & Tyler, to whom a fee was allowed by the order above recited, entered into a written agreement with the plaintiff herein in words and figures following:

“This agreement, made and entered into this twenty-fourth day of October, 1883, by and between Mrs. William Sharon, formerly Sarah Althea Hill, of

¹ 17 Pac. Rep. 456, 635.

the city and county of San Francisco, party of the first part, and George W. Tyler of the same place, party of the second part, witnesseth, that whereas, about three years ago the party of the first part entered into a contract of marriage with one William Sharon, as provided by the Civil Code of California, no ceremony having been performed, and whereas, said William Sharon is now disposed to repudiate said marriage and deny its binding force and efficacy, and whereas, said party of the first part has employed said party of the second part to commence and prosecute to final hearing, or settlement, all such suit or suits as may be necessary to vindicate the good name of the party of the first part, and secure to her a division of the common property of herself and her husband, or a just and suitable provision for her support out of his property, and to defend all such suits as may be brought against her by said Sharon: Now, therefore, it is mutually agreed by and between the parties hereto as follows: The party of the second part, as the attorney of the party of the first part, is to commence and prosecute to final determination, and defend, all such suits as may be brought, or may be necessary or proper for the complete vindication of the name of the party of the first part, and the enforcement of her rights as against said William Sharon, and is to advance the money to pay the costs and all ordinary expenses of any litigation that may ensue in carrying out the objects of this agreement; and as compensation he is to receive one-half of all sums realized or secured to her by such litigation. The party of the second part agrees that he will not settle with said Sharon, or dismiss or compromise any suit or suits that may be brought, without the consent of the party of the first part obtained, and of her agent, W. M. Neilson. The party of the second part agrees to pay one-third of the amount necessary to secure the legal services of D. M. Delmas, or some other person she may desire, as counsel on such litigation, provided his services can be secured for the sum of \$1,000. The party of the first part agrees to pay the party of the second part one-half of all money or property secured from said William Sharon by settlement, promise, or litigation, and said party of the first part agrees not to settle or compromise with said Sharon without the consent of the party of the second part.

"This agreement is executed in duplicate.

"In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written. Executed in duplicate.

"October 24, 1883.

GEO. W. TYLER.

"S. A. HILL.

"Witness: F. A. RODNEY."

On the hearing of the motion for alimony and counsel fees no fact was presented to the court below tending to prove either the incapacity of Mr. Tyler, or any indisposition on his part fully to discharge all the obligations assumed by him under his agreement, or that he had in any way failed to perform them. On the contrary, there was evidence that up to that time he had done, with the assistance of others, all he had agreed to do. If he had not, that, perhaps, would have been sufficient reason for not allowing him \$20,000 or any other sum. It is not necessary to decide whether, as between the parties, the written agreement is valid and enforceable; and, for obvious reasons, we express no opinion as to its validity. In *Reynolds v. Reynolds*, 67 Cal. 177, 7 Pac. Rep. 480, this court declined to decide the effect on an order for counsel fees "of an agreement between plaintiff and her attorney that the latter have, as compensation for his services, a share of the property ultimately recovered." Conceding that the agreement cannot be enforced, in case, as the final result of the litigation, the plaintiff shall realize a share or portion of the community property, the agreement was a fact which should have influenced the action of the court below. If it had appeared at the hearing of the motion that Mr. Tyler, actuated solely by a desire to vindicate justice and the good name of the plaintiff, had promised to prosecute the action without compen-

sation, that he was fully competent, and had prosecuted it, the circumstances would show that she had no necessity for money to pay counsel. The question is not whether, as between the parties, counsel ought to be paid, but whether the wife has need of money to prosecute her action. We can neither assume that plaintiff will, nor that she will not, perform her promise to Mr. Tyler if the event contemplated shall occur. Counsel learned in the law must be supposed to have considered and determined to their own satisfaction whether a contingent arrangement of the character mentioned could be enforced, and to have relied upon the contract, or upon the honor of their client to fulfill her promise when she should be in a position to do so. They ought not now to be permitted to say for her, or for themselves, that they are entitled to compensation from another source. If counsel had abandoned her cause, it might perhaps have been necessary for the court to provide the plaintiff means for securing legal assistance. We think the order directing the defendant to pay \$55,000 counsel fees should be reversed.

In what we shall say with respect to the remaining question—whether the court below erred in directing the payment to the plaintiff of certain sums as alimony *pendente lite*—we shall confine ourselves to the points made by counsel for appellants. In a suit for divorce, when the marriage is denied by the defendant's answer, three things must be made to appear on application for temporary alimony: the marriage,—by satisfactory evidence showing, at least *prima facie*, a marriage in fact; the needs of the party applying for the order; and the "faculties" or ability of the husband to furnish the support ordered. 2 Bish. Mar. & Div. §§ 386, 402. Evidence of these things has been called "auxiliary proofs;" it is evidence subsidiary to and in support of the order. The making of the order implies a finding of the marriage as to, and for the purposes of, the order. But it does not determine the issue made by the pleadings, so as, in any degree, to affect the final judgment. It has been said that it is not necessary to prove the marriage as fully, or the faculties as exactly, on a preliminary application for a temporary allowance, as to sustain a final decree. 2 Bish. Mar. & Div. § 386; *Brinkley v. Brinkley*, 50 N. Y. 184. And it is distinctly to be understood that, in affirming an order for temporary alimony, the court expresses no opinion upon the merits of the main controversy, or as to what should be its final determination. *Brinkley v. Brinkley*, *supra*.

It is claimed by appellant that, as the main purpose of the action was to obtain a decree declaring the validity of the alleged marriage, and the principal issue was marriage or no marriage, the plaintiff should not have been allowed a support for the time occupied in contesting that issue; and the order was on its face unauthorized, or at least excessive. But the suit was not brought merely to secure a decree declaring the validity of the marriage. The complaint contains all the averments necessary to a complaint in a suit for divorce, including allegations of causes for a divorce, and it prays for a decree of divorce. In every action for divorce, the marriage must be averred by the plaintiff; and if it be denied by the answer of the defendant, it must be proved. The only fact alleged in the complaint, in addition to the marriage and causes for divorce, is that the defendant had refused to recognize the marriage. But, in his answer, the defendant denies the marriage. In this state of the pleadings, the allegation that, prior to the commencement of the action, the defendant had denied or refused to recognize the marriage, did not make it necessary for the plaintiff to introduce other or different evidence than such as would have been necessary if the allegation as to his previous denial of the marriage had not been inserted. The application for alimony should be treated, therefore, as made in an action for divorce, the marriage being denied by the answer.

It is said by counsel for appellant that, in this case, the court is called on to determine whether "the opinion, judgment, and findings" are sufficient to

justify the conclusion of the court below that the marriage relation existed at the commencement of the action, and thereupon to make the order for temporary alimony. The order was made February 16, 1885, and the findings and judgment were subsequently filed and entered. The opinion referred to was filed December 24, 1884. It was filed after the trial of the action; refers to and discusses portions of the evidence given at the trial; discusses questions of law arising thereon, and foreshadows the findings to be afterwards filed. It is now before us only because incorporated in an affidavit of the defendant, used on the hearing of the motion for alimony and suit money. It is urged that the opinion clearly shows that, in the mind of the judge below, it was sufficient, to constitute an unsolemnized marriage, for the parties to enter into a secret marriage contract, secretly to indulge in sexual intercourse, etc.; that the court below erred in this view, and, therefore, there was no marriage, and the order for alimony should be reversed. What has been said with reference to the appeal from the judgment is, in our view, a sufficient response to this point.

It is further urged that the order should not have been made, or at least that the amount allowed is excessive, because, in his opinion, the judge below declared that the plaintiff, as a witness, had sworn falsely to various matters, and that she had produced, and attempted to introduce in evidence, fabricated and forged documents. If she attempted to support her cause by forged papers, or by her own perjury, her conduct was evidence tending to prove an admission of the falsity or fraudulent character of her claim. And if, as a witness, she willfully swore falsely with respect to any material matter, her whole testimony was to be distrusted, and it was in the power of the court below to reject all of it. But the evidence given at the trial is not before us, and we cannot say how far the testimony of the plaintiff was corroborated as to such of her statements, if any, as were accepted as true by the court below; nor can we, in the absence of the evidence given at the trial, say but that, as to the material issues, the evidence may have been sufficient to sustain the conclusion reached by the judge in his opinion, even after rejecting all the testimony of the plaintiff, and giving due weight to the discredit cast upon her claim by her resort to fraud in maintaining it.

We cannot say, as the case comes to us, the court should have allowed nothing as alimony. Nevertheless, the evidence before the court below, when the order for alimony was made, shows that the fact of marriage was warmly contested, and that the alleged marriage was not made public. As appears from the opinion, the plaintiff had testified that when "the contract" was signed the defendant had agreed to let her have \$500 a month, for her expenses. His payments to her always aggregated at least \$500; but, "in many instances," the sums given during a month were largely in excess of \$500. Conceding that, for the purposes of the order, the implied finding of the marriage should be held conclusive on this appeal, the actual conditions should have been considered in fixing the *amount* of the temporary allowance. The order for temporary alimony always precedes the final judgment. After the decree for divorce is granted for the offense of the husband, the court may compel the husband to make a suitable allowance to the wife for her support during her life, etc. Civil Code, § 139. And if a dissolution of the marriage be decreed, on the ground of the adultery or extreme cruelty of the husband, the community property may be assigned to the parties in such proportions as the court may deem proper. Civil Code, § 146. The order for permanent alimony may provide for the payment of the allowance from the appearance of the defendant in the action, or from its commencement. *Wilson v. Wilson*, 45 Cal. 402. Temporary alimony, should, of course, under all ordinary circumstances, be less than permanent alimony. It is not given as the ultimate award of justice, but as a needful step in the course of ascertaining what justice demands. 2 Bish. Mar. & Div. § 458.

No uniform rule can be laid down with respect to the amount to be allowed for support *pendente lite*. The husband's income is but one of the elements entering into the inquiry. Mr. Bishop says a common rule of the English ecclesiastical courts is, "subject to variations," to allow for temporary alimony about one-fifth of the joint income, though the proportion will vary according to circumstances,—sometimes as little as one-eighth being given,—and that the English practice has been generally followed in this country. 2 Bish. Mar. & Div. §§ 455, 457, 460. An examination of the cases in which such general statements are made shows that they were cases in which the marriage was not disputed. On the other hand, in New York, even where the marriage is admitted, a wife proceeding against the husband is, according to some of the judicial decisions there, allowed, in general, no more than will meet her actual wants; the object of the rule being to discourage vexatious suits, and other like abuses, and to prevent indiscreet friends from fomenting family quarrels. Mr. Bishop says of the New York practice: "A yet stronger claim to favor is its admirable equity, when, with it, another rule sometimes resorted to in this state is permitted to operate; namely, to let the permanent alimony commence from the date of the suit, deducting from it the temporary alimony already paid." 2 Bish. Mar. & Div. § 461. As we have seen, in California, the decree for permanent alimony may provide for its payment from a date anterior to the order. But, without adopting the New York rule in its strictness, it seems very clear that the amount of temporary alimony named in the order appealed from is excessive. Where the income of the husband is very large, and the parties have publicly lived together in a style conformable to such income, a just allowance would seem to be one sufficient to enable the wife to continue the enjoyment of many luxuries which habit has made apparent necessities; this, however, subject to the limitation that, while her suit is pending, she is to live in the discreet and quiet manner appropriate to one whose domestic relations are being made the subject of public investigation; and without expenditures for mere display, or the gratification of personal vanity.

In the case now here, the plaintiff never enjoyed a portion of the defendant's income accordant with the position of his recognized wife. Assuming every fact in her favor, she was, at the commencement of their relations, willing that the marriage should be kept secret for a definite time, and, during that period, to live in comparative obscurity, upon an allowance of \$500 a month. That largesum (however small a portion of the defendant's actual income) was amply sufficient for her comfortable support, and to supply her with many of the appliances of wealth. An order providing for the continuance during the pendency of the action of the sum that the defendant had agreed to pay her during their cohabitation, and until their marriage should be made public, would surely have provided for her reasonable, not to say liberal, support; whatever was more than reasonable was excessive. The discretion of the court below is a *legal* discretion to be reasonably exercised. "Abuse of discretion" in making such orders does not necessarily imply a wilful abuse, or intentional wrong. In a legal sense, discretion is abused whenever, in its exercise, a court exceeds the bounds of reason, all the circumstances before it being considered. An application for temporary alimony may be made at any time, at least after answer. The fact that, in this case, the application was made so late, does not alter the principle on which it is to be determined. Ordinarily, when the application is heard, the ultimate decree cannot be anticipated,—the plaintiff may fail to establish any cause of action. When the marriage is denied, although the marriage may be shown *prima facie* on the hearing of the motion, it is unreasonable to allow the wife, for her support *pendente lite*, not only more than is necessary to supply her actual wants, but more than the defendant agreed to pay her until the marriage should be openly acknowledged; that sum being fully sufficient to secure every comfort and many of the luxuries of life.

The judgment appealed from (entered on the nineteenth day of February, A. D. 1885) is affirmed. The judgment or order appealed from, (made and entered the sixteenth day of February, 1885,) directing the payment of alimony to the plaintiff, and the payment of counsel fees, is modified by striking out therefrom the words "the sum of \$7,500 as alimony herein, and the further sum of \$2,500, on or before the eighth day of April, 1885," and inserting in the stead and place of those words "the sum of \$1,500, as alimony herein, and the further sum of \$500, on or before the eighth day of April, 1885." And the judgment or order appealed from (so as aforesaid made and entered on the sixteenth day of February, 1885) is further modified by striking out therefrom the portion thereof which reads: "It is further ordered that the defendant pay as counsel fees herein, on or before the ninth day of March, 1885, the sum of *fifty-five thousand dollars*; that is to say: Twenty thousand dollars to Messrs. Tyler & Tyler, *or order*; \$10,000 to George Flournoy, *or order*; \$10,000 to Walter Levy, *or order*; \$10,000 to David S. Terry, *or order*, and \$5,000 to R. P. Clement, *or order*; and in case any of such payments are not made on or before the time herein fixed, then the *party or parties* entitled thereto *shall have execution* therefor, pursuant to section 1007 of the Code of Civil Procedure of the state of California;" and the portion of said order of February 16, 1885, so as aforesaid providing for the payment of counsel fees, is hereby reversed.

We concur: SEARLS, C. J.; TEMPLE, J.; PATERSON, J.

TEMPLE, J., (*concurring*.) I have concurred in the prevailing opinion, and I add: The main question is a pure question of law. Do these facts constitute marriage? Persons capable of marriage consented to present marriage. Thereafter they cohabited in the way usual with married persons, for more than one year, during which time they mutually assumed towards each other marital rights, duties, and obligations. The cohabitation and the supposed marriage was, however, kept a secret, pursuant to an agreement in writing made at the time of the mutual consent to present marriage. But for the secrecy there would be no doubt as to the validity of the marriage. Does that render the marriage void? This depends entirely upon our statute. Section 55, Civil Code, is as follows: "Sec. 55. Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage. It must be followed by a solemnization, or by a mutual assumption of marital rights, duties, or obligations." It is claimed that the words, "the mutual assumption of marital rights, duties, or obligations" implies the public assumption of the relation. Such is certainly not the natural and obvious meaning of the language. That would naturally, and in the absence of any preconceived idea upon the subject, be held to mean only that the parties must not only agree to present marriage, but must by some act or deed take upon themselves the duties and rights of the relation. The language is exactly adapted to express the necessity of actually taking upon themselves contract obligations. However it may be looked upon from other points of view, in law marriage is regarded simply as a relation arising from civil contract. It is so declared in this very section. Perhaps we should be able to appreciate the force of the language better if we substitute for marriage some other well-known contract relation. For instance, "Partnership is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute partnership; it must be followed by a mutual assumption of partnership rights, duties, or obligations." Had there been a section of the Code to this effect, would any one doubt its meaning? It would mean simply that an agreement to be partners was not sufficient to constitute partnership un-

til it was followed by the actual commencement of partnership business. It seems to me this illustration shows that the language of the section is exactly adapted to the purpose intended, and that, as I have said, it is only when read with the preconceived idea that it ought to mean something else that it seems to be inexact or ambiguous. And it may be added that, in the case supposed, there would be nothing inconsistent with the assumption of partnership rights, duties, or obligations, *inter sese*, if the relation were kept secret or even denied. A secret partner assumes the duties and obligations of the relation. The only trouble is in the matter of proof. There is no necessary relation between the assumption of contract rights and duties and publicity.

This construction will be understood when we remember there were two species of marriage at common law, by mere act of the parties, *per verba de presenti* merely, or *per verba de futuro cum copula*, and there were those who contended that marriage *per verba de presenti* must also be *cum copula subsequente*. The legislature plainly intended to adopt the view that the agreement to present marriage must be followed by consummation, which, however, might consist of any conduct which would show that the parties had actually entered upon the married state. This is made still more obvious by section 57, Civil Code. The word "consummation" was avoided in section 55, because it has come to be a euphemism for the more indelicate word "*copula*," and thereby has acquired a more narrow meaning than was intended. Therefore the phrase which only indicates the assumption of the contract relation was used. But in section 57 the word "consummation" is substituted for the phrase. It cannot mislead here, for it has been defined; but it shows that the mutual assumption of marital rights, duties, or obligations is of the nature of consummation,—something in the nature of part performance of the consent to present marriage; though that is not limited to the *copula*.

"Sec. 57. Consent and consummation may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases." Subsequent consummation, as well as consent, may be manifested in any form. What can this mean except exactly what I have claimed for it? And if in any form, why not by secret cohabitation, where the husband claims the right, believing himself a husband, and the wife submits because she believes herself a wife? It is contended that the use of the word manifested in this section indicates that it must be made known—that it cannot be secret. But this is a total misapprehension of the office of the section. It is simply and only to provide a mode of proving a private marriage, and the word "manifested" has reference to proof. To illustrate: Suppose in this case the plaintiff had testified in her own behalf in general words, "Defendant and myself each agreed to present marriage, and we subsequently consummated it." It would then be natural to ask, "You say the defendant consented to marriage with you; how did he manifest that consent? what did he say?" etc. This shows what to my mind is the plain, obvious, and only meaning of the word in this section. It means manifested for the purposes of proof, whenever the fact may come in issue. A private marriage must still be capable of proof, otherwise it is practically no marriage. In fact, the provisions of our statute with reference to solemnization are mainly, if not entirely, to provide means of proof, and not for the purpose of publicity. If it had been intended to require publicity, the addition of one word would have removed all doubt. On the contrary, the language is exactly adapted to express the mere assumption of contract obligations. It seems to me it is rather late in the Christian era to claim that a secret marriage, or a contemporaneous agreement to keep the marriage secret, is opposed to good morals or public policy, in any sense which will render the marriage, otherwise contracted according to the law of the land, void. By the Justinian Code, in the sixth century, it was expressly provided that the mere consent of the parties should be sufficient to constitute marriage, except as to persons of rank. Such marriages have been held valid

throughout Christendom ever since, with some few exceptions, made by positive law, within the past two centuries. It goes without saying that there have always been secret marriages. They have always been condemned by the church and by the courts; and yet they have always been held legal. It is, I think, safe to say that there is not a case in any country in Christendom in which a marriage has been held void merely because it was kept a secret, or because of a contemporaneous agreement of secrecy; and no law writer has ever suggested this as a possible cause of invalidity.

Our ancestors seem to have realized the strength of the passion they were attempting to regulate. They knew there would always be irregular unions, and they evidently thought it in the interest of good morals and good public policy to bring as many of these relations as possible within the regulative force of law, and the courts have always inclined to the validity of marriages in favor of the legitimacy of offspring. A secret marriage is not necessarily clandestine or irregular. The most regular marriage, and one duly solemnized, may be secret. Under our statute, consent and consummation are in all respects the equivalent of solemnization. The law requires a solemnized marriage to be recorded, but if not recorded, and if in fact kept secret, no one would doubt its validity. The issue of the license does not prove a marriage; and, of course, cannot give it publicity. Many licenses issue where no marriage follows. Repute—the holding out to the world—living in the face of their neighbors as husband and wife—is evidence of marriage without proof of solemnization. It appears to me that much confusion arises right here. It is tacitly, perhaps unconsciously, assumed that the marriage thus proved is marriage by mere consent; and then the proposition is reversed, and it is claimed that marriage by consent and consummation can be proved only by repute,—that it is not marriage unless followed by publicity. This idea, although not expressed, is, I think, implicit in all the arguments in favor of the necessity of publicity. But, in the first place, the marriage presumed from repute may as well be one by solemnization as by the mere act of the parties. In the next place, our statute makes a marriage by consent, with consummation, the equivalent in all respects with marriage by solemnization. And finally, this view is expressly and *ex industria* negated by our statute, which provides that consent and consummation may be manifested in any form. It need not be by repute, nor by the *copula*, nor by support and cohabitation, nor by the recognition of children as legitimate; but it may be by any of these modes, or by any other act in addition to mere consent, which manifests an actual entering upon the relation. And I think it will be found that all the cases which seem to insist upon some degree of publicity are cases of presumed marriages, without direct proof. It is admitted that to *establish* marriage in that mode, publicity, to some extent, is required. But the exigency of appellant's argument is a case where an actual marriage being proven, it was held invalid because kept secret.

But we are not without authority upon the effect of secrecy, the marriage being otherwise valid. *Dalrymple v. Dalrymple*, 4 Eng. Ecc. R. 485, was decided by Lord Stowell, perhaps the very highest authority upon questions of this character. The case arose under the Scotch law, which is, on this point, exactly the law of California; that is, consent and consummation were sufficient without solemnization. The parties so married; but, at the time of the consent, the wife also stipulated in writing to keep the marriage secret. The marriage was in fact kept secret for nearly four years, when the husband married again. The second marriage was held void. Lord Stowell remarks as to the agreement of secrecy: "An engagement of secrecy is perfectly consistent with the most valid, and even with the most regular, marriages. It frequently exists even in them from prudential reasons; from the same motive it almost always does in private or clandestine marriages. It is only an evidence against the existence of a marriage when no such prudential reasons

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can be assigned for it, and where everything, arising from the very nature of the marriage, calls for its publication." This last suggestion, it seems to me, contains all there is in the matter of secrecy. It is merely an important fact in the proof of the marriage. This case strikingly illustrates this: The plaintiff, by this agreement, certainly placed herself in a most trying situation. Had the secret cohabitation been discovered, her mouth would have been hermetically sealed for at least twelve calendar months to any explanation of the most compromising circumstance. She might have become a mother, and have been for the same period unable to deny the bastardy of her child, and her own disgrace. And had either event happened, her silence would have rendered it extremely difficult ever after to establish her wifehood. These undeniable difficulties in her case seem not only to create a prejudice against the case, but against the law under which the validity of the marriage is claimed, and have constituted, in my opinion, no small part of the force of appellant's argument here. These facts were entitled to great weight in the court below, and no doubt received due consideration, and yet the plaintiff was found to be his very wife. The evidence is not before us; only the facts as found constituting consent and consummation. We can imagine that one might make even this tremendous sacrifice to compass a desirable marriage, and that she might confide in her husband to protect her reputation. At any rate, it is not for us, on this appeal, to estimate probabilities, but to pronounce the judgment of the law upon admitted facts.

THORNTON, J., (*dissenting*.) Appeal from the judgment declaring a marriage and for a divorce.

I dissent. Let it be admitted that marriage at common law might be consummated by words of present contract, or *per verba in futuro cum copula*, still the validity of a marriage in this state, since the Code went into effect, must be determined by the provisions of the Civil Code. This Code has ample provisions on the subject of marriage; and it is declared in section 4 that it "establishes the law of this state respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice." It is further declared in the same section that "the rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code." The clause last quoted immediately precedes the one first quoted. *Derogation* is defined by Webster to be "the act of annulling or breaking a law or some part of it. More generally, the act of taking away or destroying the value or effect of anything, or of limiting its extent, or of restraining its operation; as, an act of parliament is passed in *derogation* of the king's prerogative; we cannot do anything in *derogation* of the moral law." Whatever meaning we may attribute to the word "derogation" in the first clause of the section referred to, so far as the Code annuls or changes the common law, its provisions must be not strictly, but liberally construed to effect its objects and to promote justice. The object of a law is the end or purpose for which it was enacted. Such end or purpose must be deduced from the words employed in the statute; and when such end or purpose can be deduced from the law, its provisions are to be liberally construed, to effect such end or purpose. We do not understand by this language that words are to be construed so as to give them a strained meaning, — a meaning which the words, on a reasonable interpretation, cannot bear; in fact, the language of the fourth section is controlled by the thirteenth section of the Code, which declares that "words and phrases are construed according to the context and the approved usage of the language; and in the case of technical words and phrases, or such others as may have acquired a peculiar and appropriate meaning in law, or the meaning defined by statute, they are to be construed according to such peculiar and appropriate meaning or definition."

The fifty-fifth section of the Civil Code defines marriage and what shall constitute it. In the first clause of the section marriage is defined thus: "Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary." As to what shall constitute the relation of marriage, these words are used: "Consent alone will not constitute marriage; it must be followed by a solemnization, or by a mutual assumption of marital rights, duties, or obligations." The words "marital rights, duties, or obligations" have some meaning. We cannot presume that such words were idly used by the law-making power, or that they used unmeaning words. We must first find that they are meaningless, before we can reject them as entitled to no weight in arriving at the meaning of the statute. Whatever the meaning of these words, it is something additional to the consent spoken of in the first clause of the section. If anything is added, the rule of the common law is changed, and a new rule is established. At the common law there could be no valid marriage without consent. In the case where the nuptial contract is made by present words, the consent was manifested by express words; in the case of a union where there was not this express consent, the consent to marry was deduced from circumstances, either from cohabitation or from cohabitation and the various acts accompanying the marriage state, which may be designated as its *res gestæ* or *indicia*. We think that the above rule can be positively declared to exist as a part of the common law, viz., that there can be no valid marriage at common law without consent to marry. The consent between the contracting parties constituted the marriage. Whether there was such consent, when the marriage is denied, and becomes a subject of judicial investigation between the parties to a cause, must be established by proof. In the one case, it is shown by express declaration or unequivocal acts; in the other, it has to be implied or deduced from circumstances. When such consent was found to exist, the marriage was held to have been constituted.

Now, if anything is added, by the section referred to, to consent, the common law is changed. How far changed we do not say here. It may not be necessary to say how far these words change the rule of the common law, to define, point out, and limit the extent of the change made. It is the better course to leave each case as it arises to be determined on the peculiar facts or circumstances presented by it. "Consummating marriage" and "consummation of marriage" are mentioned in the sections immediately following the section first quoted; the first form of words is employed in the fifty-sixth, and the latter form in the fifty-seventh, section. Conceding that at common law a marriage was consummated by sexual intercourse, we cannot understand these words as having that meaning in the fifty-sixth and fifty-seventh sections. The consummation referred to in them is, we think, the assumption by each of the contracting parties, following consent, of the marital rights, duties, or obligations. The declaration in the fifty-fifth section, that consent alone will not constitute marriage, but it must be followed where there is no solemnization by a mutual assumption of the marital rights, duties, or obligations, is, in effect, declaring the consummation referred to must be the mutual assumption of the marital rights, duties, or obligations. Sexual intercourse may be an element in such assumption, but it is not all of it. In our judgment, in a case of consent to marry, followed by sexual intercourse merely, without living together, the mutual assumption required by law is not indicated. If consent and sexual intercourse, alone, constituted marriage, then a single act of such intercourse, immediately after which the parties separated, each party going his own way, and never meeting the other again, would be such an assumption as the law required. We cannot think that such is or can be the meaning of the law in this state, as declared in the fifty-fifth section of the Civil Code.

After a careful consideration of the findings in this case, we discern that the following facts are found: That the parties had the residence in the city and county of San Francisco required by law, prior to the action herein; that on the twenty-fifth of August, 1880, they consented in writing, actually signed by them, to intermarry; that afterwards, sometime in September, 1880, they commenced living and cohabiting together, in the way usual with married people, although their cohabitation was kept secret, and so continued for the space of more than one year, and down to the twenty-fifth day of November, 1881, and that during all of said time the parties mutually assumed towards each other marital rights, duties, and obligations; that during all of the same time plaintiff and defendant so lived together, defendant visited her relations with her, escorted her to places of amusement, and introduced her to respectable families and members of his own family, and wrote to her several letters, while absent from her, in which he addressed her as "My dear wife;" that the marriage was never solemnized, and the consent in writing to intermarry was not a declaration made in compliance with section 75 of the Civil Code of this state; that defendant, on or about December 6, 1881, drove plaintiff from her apartments in his hotel, in which she had resided by his directions since September, 1880, and which was the residence selected for her by defendant, refused to longer live with her, or provide for her support, and has not since then lived with, or sought to live with her, or requested the plaintiff to return or live with him, or provided in any manner for her support; that plaintiff's real name is Sarah Althea Sharon, and that she has not falsely or fraudulently assumed it; that defendant never introduced plaintiff as his wife, or spoke of her as such in the presence of other persons; that plaintiff never introduced defendant as her husband, nor spoke to him or of him to other persons in his presence, as her husband; that the parties were never reputed among their mutual friends to be husband and wife, nor was there at any time any mutual, open recognition of such relationship by the parties, nor any public assumption by the parties of the relation of husband and wife. The written consent to marry, above referred to, contains an agreement by plaintiff not to make known the contents of such writing, or its existence, for two years, unless the defendant himself shall see fit to make it known.

It will be observed that the veil of secrecy covers all the acts of the parties which pertained to the alleged marriage. Their entire intercourse is hidden and concealed, except when they visited together or attended places of amusement. They lived together secretly. Such we understand to be the meaning of the finding, that their cohabitation was kept secret; inasmuch as living together and cohabitation mean the same thing. By no act of the parties were marital relations indicated to other persons; not even to their mutual friends and associates. They never addressed each other as husband or wife in the presence of any person, never spoke of each other as husband or wife to any person, nor was this relation known or indicated by any act to any person whatever. The lives of the parties were, during every moment of the period referred to in the findings, an assertion that the relation of husband and wife did not exist between them. It is not even found, and, therefore, does not appear, that defendant supported plaintiff. The finding on this point is that defendant, some time in 1881, drove plaintiff *from her apartments in his hotel*, in which she had resided by his directions since September, 1880, and which was the residence selected for her by the defendant, and refused to longer live with her, or provide for her support. The finding that he supported her prior to this time, can only be implied from the words "refused to longer live with her, or provide for her support." Such a finding as this is not sufficient. The fact of support prior to the time when he drove her from her apartments in his hotel must not be left to implication. The fact of previous support must be distinctly found, or it cannot be held and acted upon

here as a fact which existed. See *Brickhead v. Brown*, 5 Hill, 634; and Broom, Leg. Max. on the rule *De non apparentibus et de non existentibus eadem est ratio*. It is not even found that the parties had a common home. The statement in the finding is that defendant drove plaintiff, not from the common apartments of both parties, but *from her apartments*. It does not appear that plaintiff ever at any time addressed defendant as her husband, or assumed his name during the period of such cohabitation mentioned in the findings. Under the rule for construing findings of fact, we must hold that facts not found never existed. If she had a right to be called by the name of the plaintiff, she never assumed or claimed that right during the period commencing with the twenty-fifth of August, 1880, and ending with the sixth of December, 1881. In fact, it does not appear when she assumed the name of plaintiff, or claimed a right to be called by his name. She not only did not assume or claim this right, but her conduct was such as to amount to a non-claim of any such right. She was never known or called by the name of plaintiff, during the period of time to which the findings refer; and, though it is found that defendant, during the time that he and plaintiff "so lived together," wrote her several letters in which he addressed her as "My dear wife," it does not appear that she ever addressed defendant as her husband, either orally or in writing.

We cannot understand that a mutual assumption of marital rights, duties, and obligations can be otherwise than open to view, at least open to the view of the mutual friends and associates of the parties. We do not mean by this that such assumption must be carefully and studiously made public; but persons must manifest such assumption by that open, visible, and undisguised living together, such as is usually practiced by persons holding towards each other the relation of husband and wife. When the statute enacts that the subsequent consummation of marriage may be manifested in any form, (section 57, Civil Code,) its meaning is that it must be done in a form which manifests or shows such consummation, that is, manifests the assumptions of marital rights, duties, and obligations; that the conduct of the parties and their intercourse with each other must be of a character which shows that they have mutually assumed the rights and duties of husband and wife. The general finding that during all of said time the plaintiff and defendant mutually assumed towards each other marital rights, duties, and obligations, amounts to nothing when it is also found that plaintiff never was known as, or called by the name of, her husband; that defendant never introduced plaintiff as his wife, nor spoke of her as such in the presence of other persons; that plaintiff never introduced defendant as her husband, nor spoke to him nor of him as her husband, in the presence of other persons, or in his presence; that the parties never were reputed among their mutual friends to be husband and wife; nor was there at any time any mutual, open recognition of the relation of husband and wife by the parties; that their whole intercourse with each other was kept hidden from the view of every one; that defendant never supported plaintiff, nor contributed any further to her support than to furnish her apartments in his hotel, in which she resided; that she never assumed or claimed the right to assume his name. Of such circumstances, though defendant did write plaintiff letters during the period mentioned above, in which he addressed her as "My dear wife," it cannot be held as matter of law that there was ever a mutual assumption by the parties of marital rights, duties, or obligations. It follows from the above that marriage was never consummated by the parties in this cause, and that plaintiff and defendant were never, according to the laws of this state, married, or sustained toward each other the relation of husband and wife.

We are of opinion that the judgment in favor of plaintiff, adjudging a marriage and for divorce, should be reversed, and judgment ordered for defendant. As, in our opinion, there was no marriage, there can be no order for

alimony and counsel fees. The judgment or order for alimony and counsel fees should therefore be reversed.

I concur: SHARPSTEIN, J.

McFARLAND, J., (*dissenting.*) I dissent. The complaint avers a marriage between plaintiff and defendant, and various acts of defendant constituting causes of divorce. The answer denies the marriage. It was admitted that if there was a marriage, a divorce should follow; so that the real contest in the case was as to the existence of the marriage. The court below made and filed its findings; adjudged that the parties were husband and wife; and decreed a divorce, with one-half of the common property, etc. From the judgment defendant appealed. (Since the trial in the lower court, the defendant died, and his executor has been substituted as appellant.) With the sufficiency of the evidence in the case to justify the decision of the court below we have nothing to do on this appeal. The full "findings of fact" (so-called) of the court are as follows:

"*First.* That for more than six months prior to the commencement of this suit the plaintiff and defendant were residents of the city and county of San Francisco, state of California.

"*Second.* That on the twenty-fifth day of August, A. D. 1880, the plaintiff and defendant each signed a certain declaration of marriage in the words and figures following, to-wit:

"In the city and county of San Francisco, state of California, on the twenty-fifth day of August, A. D. 1880, I, Sarah Althea Hill, of the city and county of San Francisco, state of California, age twenty-seven years, do here, in the presence of Almighty God, take Senator William Sharon, of the state of Nevada, to be my lawful and wedded husband, and do here acknowledge and declare myself to be the wife of Senator William Sharon, of the state of Nevada.

SARAH ALTHEA HILL.

"AUGUST 25, 1880, SAN FRANCISCO, CAL.

"I agree not to make known the contents of this paper or its existence, for two years, unless Mr. Sharon himself see fit to make it known.

"S. A. HILL.

"In the city and county of San Francisco, state of California, on the twenty-fifth day of August, A. D. 1880, I, William Sharon, of the state of Nevada, aged sixty years, do here, in the presence of Almighty God, take Sarah Althea Hill, of the city and county of San Francisco, Cal., to be my lawful and wedded wife, do here acknowledge myself to be the husband of Sarah Althea Hill.

"August 25, 1880.

WILLIAM SHARON, Nevada.'

—Which was the only written declaration, contract, or agreement of marriage ever entered into between said parties, and, at the time of signing said declaration, plaintiff and defendant mutually agreed to take each other, as, and henceforth to be to each other, husband and wife.

"*Third.* That afterwards, and about the —— day of September, 1880, the plaintiff and defendant commenced living and cohabiting together, in the way usual with married people, although their cohabitation was kept secret, and so continued for the space of more than one year, and down to the twenty-fifth day of November, 1881, and during all of said time the plaintiff and defendant mutually assumed towards each other marital rights, duties, and obligations.

"*Fourth.* That during all the time plaintiff and defendant so lived together, defendant visited her relations with her, escorted her to places of amusement, and introduced her to respectable families, and to members of his own family, and wrote to her several letters while absent from her, in which he addressed her as 'My dear wife.'

"*Fifth.* From the foregoing facts the court finds that plaintiff and defendant intermarried in August, 1880, and that the allegations of paragraphs 2 and

3 of the complaint as to the fact of marriage are true, except in so far as the declaration therein referred to is alleged to be in compliance with section 75 of the Civil Code of this state.

"*Sixth.* That defendant, on or about December 6, 1881, drove plaintiff from her apartments in his hotel, where she had resided, by his directions, since September, 1880, and which was the residence selected for her by the defendant, refused to longer live with her or provide for her support, and has not since then lived with, or sought to live with her, or provide for her support, and has not since sought to live with her, or requested the plaintiff to return or live with him, or provided in any manner for her support.

"*Seventh.* That no proof was offered of either charge of adultery in the complaint, the same being, on the trial, deemed withdrawn by mutual consent.

"*Eighth.* That it is not true as stated in the answer of defendant that plaintiff has either falsely or fraudulently assumed the name of Sarah Althea Sharon, but on the contrary, that it is her real name; nor is it true that she, or any one, forged the document mentioned in the complaint, and heretofore set out; on the contrary, the said document is genuine and was signed by the plaintiff and defendant at the time it purports to have been signed.

"*Ninth.* That defendant never introduced plaintiff as his wife, nor spoke of her as such in the presence of other persons; that plaintiff never introduced defendant as her husband, nor spoke to nor of him to other persons as her husband; that the parties were never reputed among their mutual friends to be husband and wife, nor was there at any time any mutual, open recognition of such relationship by the parties, nor any public assumption by the parties of the relation of husband and wife."

It will be observed at once that in these findings there is a confused intermingling of matters of fact and matters of law; that many of them include statements which are either clear conclusions of law, or else certain general inferences and deductions which are difficult of assignment to the category of either law or fact; and that, to a great extent, they are inconsistent with each other. For instance, what is the meaning of that part of the third finding, which says that the parties lived together "in the way usual with married people," when read in the light of the ninth finding? The court below can hardly be understood as intending to say that the way of life of these parties, as described in the ninth finding, was "the way usual with married people." And, if it is to be so understood, is the finding to be taken as one of fact, or one of law? Must a conclusion or opinion about a general custom of the country be received as a specific finding of fact? Is the statement in the third finding, that plaintiff and defendant "assumed towards each other marital rights, duties, and obligations," to be taken as conclusive, if the facts specifically found show the contrary?

It is not difficult, however, to see in these findings what actual *facts* are found, and what are not found; and to segregate those parts which are merely indefinite generalities, containing conclusions, opinions, and inferences, but *not facts*. And the case must be decided by the application of the law to the actual facts which appear upon the face of the findings. These facts are briefly as follows: The parties had the required residence where the suit was brought. On the twenty-fifth day of August, 1880, they executed the written instrument set forth in the second finding. For more than a year from that date they had secret sexual intercourse. During that time plaintiff, by defendant's directions, occupied apartments in defendant's hotel. During that time also, defendant visited plaintiff's relations with her, escorted her to places of amusement, and introduced her to respectable families, and to members of his own family,—all the time *introducing her as a single, unmarried woman*. (The italicized part of the last sentence is clearly found; because, while the fourth finding states that he *did* introduce her, etc., the ninth finding specifically states that he *never* introduced her *as his wife*, or spoke of her

as such.) Defendant also, during this time, wrote to plaintiff "several letters," in which he addressed her as "My dear wife." It does not appear affirmatively that he furnished her money or other support than the apartments in the hotel in which she resided. She never, during this time, took or was known by his name. About December 8, 1881, he "drove plaintiff from her apartments in his hotel." It does not appear that at that time she asserted her claim as wife. And during all this time it appears, as stated in the ninth finding, "that defendant never introduced plaintiff as his wife, nor spoke of her as such in the presence of other persons; that plaintiff never introduced defendant as her husband, nor spoke to nor of him to other persons, in his presence, as her husband; that the parties were never reputed among their mutual friends to be husband and wife, nor was there at any time any mutual, open recognition of such relationship by the parties, nor any public assumption by the parties of the relation of husband and wife." During the period mentioned, their whole lives, conduct, and deportment constituted, except secretly between themselves, a direct and continued repudiation and disavowal of the marital relation. It does not appear if any person ever imputed to either of them that relation, (indeed, it does not appear that their marriage was ever suspected;) but if such imputation was ever made, it must, of course, have been met with a denial. The court below came to the conclusion that these facts constituted a valid marriage, under the laws of this state; and the question to be determined is, was that conclusion right or not?

We are aided but little, in determining this question, by inquiring what the law of England was upon the subject fifty or a hundred years ago. Jurisprudence here is not called upon to stand with drawn sword among the broken arches and prostrate columns of old common law, and defend them from fancied attacks of the legislature. There is no rule here that statutes derogatory of the common law are to be strictly construed. The Code itself prescribes the rule upon the subject in the following language: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. The Code establishes the law of this state respecting the subjects to which it relates; and its provisions are to be liberally construed to effect its objects and to promote justice." Civil Code, § 5. And the Code treats of marriage fully and in great detail, and "establishes the law" upon that subject. But, as counsel have discussed with great learning and ability the requisites of a valid common-law marriage, we may say, in passing by the subject, that it is by no means clear that at any time, in England, a present contract, followed by nothing more than secret sexual intercourse, constituted a perfect marriage at common law. There are innumerable authorities upon the subject, and they greatly conflict. In some cases the law is strained in favor of the legitimacy of children, and of persons criminally charged. But in cases, like the one at bar, of direct attempts to establish marriage, the weight of authorities seems to be against the position taken by respondent. Whoever shall closely study the arguments and authorities presented in the elaborate report of the celebrated case of *Queen v. Millis*, 10 Clark & F. 534, will see most cogent reasons for agreeing with the unanimous conclusion to which the judges came in that case. And that conclusion was to this effect: That with respect to the requisites of a valid marriage, the common law followed the ecclesiastical law; not the general canon law of Europe, but the "king's ecclesiastical law," as established and administered in England; that whatever the latter provided the former required; and that at no time did the ecclesiastical law hold a marriage valid unless performed in the presence of an ordained minister. Lord Chief Justice TINDAL, in delivering the opinion, says: "And with respect to the decisions of the courts of law, and the other common-law authorities, if no case can be referred to, directly and distinctly laying it down as law, in so many words, that a contract *per verba de presenti*, alone, and without the intervention of a minister in

orders, is not sufficient to create a valid and complete marriage, yet such conclusion is necessary from many of the decided cases, and is inconsistent with none; nor in fact could the difficulty to be determined in any of the cases ever have existed, except upon the supposition that some religious ceremony was necessary to the contract; thus leading to the conclusion above laid down that, by the law of England, the contract *per verba de presenti* alone did not constitute a full and complete marriage."

There are numerous authorities to the same effect; although there are others which hold, or seem to hold, differently. But *Queen v. Millis* presents the fullest discussion of the question which we have been able to find. It is said that the common law looked upon marriage as a civil, rather than as a religious, institution. That may be true; but, as it always followed the ecclesiastical law, and as the latter always required a celebration in the face of the church, thus, as a matter of fact, the common law always did employ a machinery which worked the *publicity* of marriages. Whether, if the ecclesiastical rule had not been adopted, some other method of publicity would have grown up with the common law, cannot be known, but may be presumed. And it is rare, indeed, to find a case at common law where *any* respectable court has held a marriage entirely secret to be valid. In *Queen v. Millis*, the attorney general and the solicitor general were contending for the validity of the marriage there in question, where the ceremony was performed by a Presbyterian preacher, and not by a minister of the Established Church; and in nearly every authority cited by them there had been an agreement of marriage before witnesses, and generally some form of religious ceremony. And it must be remembered that the "clandestine marriage" referred to in the authorities was by no means a secret marriage; it was a marriage entered into before witnesses, usually with an irregular ceremony,—without the publication of banns, and lacking other requisites of the ecclesiastical law. Even the Fleet and Gretna Green marriages were not secret.

But, if it were admitted that the common law was what the counsel for respondent claim it to have been, what consequences important in the decision of the case at bar would flow from such admission? Take for instance the doctrine of the case of *Dalrymple v. Dalrymple*, so much relied on by respondent, 4 Eng. Ecc. R. 485,—which case, however, was held in *Queen v. Millis* to be only declaratory of the loose Scotch law of marriage, and to be incorrect so far as it undertook to state the law of England. The doctrine of the *Dalrymple Case* is that present mutual consent to be married does, of itself, at common law, constitute marriage, whether followed by any other act or not. Now, of what value is such an authority here, even if it be taken as a correct statement of the common law, in face of an express provision (as we shall see) of the statute law of California that "consent alone will not constitute marriage."

Let us see, then, what the law of marriage in this state is. It may be first remarked, however, that under all the authorities, and from the very nature of the relation, marriage is something more than a contract; it is a civil condition. Bishop defines it as "the civil *status* of one man and one woman united in law for life for the discharge to each other, *and the community*, of the duties legally incumbent on those whose association is founded on the distinction of sex." 1 Bish. Mar. & Div. § 3. Husband and wife owe a duty to society, as well as to each other. Except as to property, they cannot, either before or after marriage, settle or merge or modify their rights or obligations. Neither can end the relation by notice; and a disregard of marriage obligations by one does not give a right of action for damages for breach of contract to the other. Their rights and obligations come, not from any contract between themselves, but from the law. They are changed by a change of the law, or by a change of residence to a place where the law is different. The divorce laws which happened to exist at the time the relation is entered into

do not form "part of the contract." If the legislature should at its next session repeal all laws granting divorces, such repeal would not affect the legal status of married people in the least. They may be said to enter into the marriage condition by contract; but after that the contract vanishes.

Now, marriage is defined in section 55 of the Civil Code of this state; and by that section, and not by the Scotch or the Irish law, or the canon law of Europe, or the common law of England, (whatever it may be,) must the question here presented be determined. That section is as follows: "Sec. 55. Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by solemnization, or by a mutual assumption of marital rights, duties, or obligations." Here, then, it is clearly, and beyond all controversy, "provided, deliberately and expressly, that consent alone is *not* sufficient. The whole doctrine of a contract *per verba de presenti* or *per verba de futuro cum copula* being a sufficient marriage is obliterated. In order to "constitute marriage," not as evidence merely, but as an essential part of the thing itself, the consent must be followed either by solemnization, or by the "assumption" of the marriage relation. And, as in the case at bar, there was no solemnization, the only question is: Was there an "assumption of marital rights, duties, or obligations" within the meaning of the language of the Code? The words of the language to be construed do not appear to have any well-defined "technical" meaning. Neither have they "peculiar" meaning in law. They do not occur in the statute law of any other state or country—at least we have not been referred to any which contain them. They are therefore to be construed as stated in section 13, Civil Code, "according to the context and the *approved use of language*." Now, we venture to say that neither in the works of any standard author, nor in the common speech of intelligent people, can any instance be found where the word "assumption" or "assume" has been used in any sense consistent with, or in any sense other than repugnant to, the idea of concealment, denial, or repudiation. A man may assume to be that which he is not; but how can he, with any "approved use of language," be said to assume to be that which he denies himself to be? The etymological meaning of assume is to "take on." Among the definitions given by Webster are "to pretend to possess," "to take in appearance;" and as synonyms, "arrogate," "usurp." Stormonth also gives the definition "to pretend to possess;" and as synonyms, "affect," "pretend," "presume." Now, could any of these meanings be rightfully applied to relations of men and women who sedulously, and *ex industria*, and in accordance with a prior contract, conceal those relations, and, if charged with holding them, deny and repudiate their existence? Moreover, in order to assume the marriage relation there must be an assumption of that which is peculiar to that relation—that which distinguishes it from all other relations. But mere secret sexual intercourse is not peculiar to marriage, and does not distinguish it from illicit sexual commerce. To call a horse "an animal with four legs," is to give no definition of a horse; and so, to describe marriage, or the assumption of its rights, duties, and obligations, merely as secret copulation, is to give no definition of marriage. How, therefore, can logic draw the conclusions that by the assumption of marital rights, duties, or obligations, the legislature meant only the secret act referred to?

Again, what plainer or more obvious construction can be put upon the language in question than to say that the legislature meant by it that kind of conduct which generally, and we might say, universally, characterizes married people who *have* assumed marital rights, duties, and obligations? The legislature must be presumed to have had that common knowledge which all people have of the familiar and habitual social customs of the country with respect to the marriage relation, and of the usual deportment of persons who have assumed that relation. Now, can it be pretended that married people

usually (or at all) refuse to recognize each other as husband and wife, in the presence of others; that they never speak of each other as husband and wife; that they never so live together that their residence, however humble,—though it be but a room in a garret,—is the recognized home of a family with its usual relations and associations; that they so carefully guard their conduct that they are never reputed, or even suspected, among their acquaintances and friends to be husband and wife; that they never indulge in any deportment whatever that would intimate in the slightest way to any human being except themselves that they were married? It seems difficult for any human understanding, not too much swayed by artificial distinctions and attenuated niceties, to receive such conduct as an “assumption of marital rights, duties, or obligations.” What marital rights has a woman “assumed” who could not even protect herself against apparent shame by asserting the honorable name of wife? What marital obligation of protection can a man fulfill towards a woman whose wifehood he publicly repudiates? And how can society enforce its rights in a relation of which it can have no knowledge, and of the existence of which it has no grounds of suspicion? And what of the children, if any, of such a marriage? Is there to be no one whom they can call “father” or “mother?” And what possible protection could there be against fraudulent pretenses of marriages—made, perhaps, for the first time after the deaths of alleged husbands or wives?

It is argued that but little meaning can be attached to the language of the Code because the word “open” is not used to qualify the word “assumption.” It is possible that to some mental visions the adjective referred to might have made the meaning more satisfactory; just as some minds, perhaps, could not entirely grasp the idea conveyed by the word “ball,” or “globe,” unless it were accompanied by the word “round.” But in either case, the use of the adjective would be wholly superfluous—*ferens ligna in sylva*. When people assume the marital relation, the assumption becomes necessarily open. There is no need to have it proclaimed by the town crier, or placarded on the walls of the court-house. If they assume the marital relation, and do not deny it, no matter how quietly and modestly they may conduct themselves, and no matter how small may be their circle of friends, or how humble their surroundings, the fact of the marriage will inevitably disclose itself.

Some confusion is sought to be thrown into the problem by the endeavor to give a peculiar and limited meaning to the word “consummation,” as used in section 57 of the Code. That section is as follows: “Consent to, and subsequent consummation of, marriage, may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases.” And it is argued that “consummation” means simply sexual intercourse; and that, therefore, sexual intercourse, following consent, is all that the Code requires to constitute a valid marriage. No doubt, in some of the cases which hold that a contract *per verba de presenti*, or *per verba de futuro cum subsequente copula*, constitutes a marriage, the *copula* is sometimes spoken of as the consummation. But the essential meaning of consummation is “the act of carrying to the utmost extent or degree; completion; termination; close; perfection.” Webster. And its particular meaning when used in connection with other language must be gathered from the context. Now, section 57 almost immediately follows section 55; and both sections are about the same subject; and as section 55 provides what must follow consent in order to make the marriage valid,—in order to give it “completion” and “perfection,”—no reasonable construction can be given to the two sections together other than that “consummation” in the latter refers to the “completion,” the “perfection” provided in the former,—that is, the “assumption of marital rights, duties, or obligations;” so that the meaning of these words last quoted is the sole question in this case, no matter from what direction we approach it.

It is impossible, within reasonable limits, to notice the various points made

by counsel in the able and learned arguments, both oral and written, which they have presented to the court. For instance, it is argued very forcibly that secret marriages, or secret attempts at marriages, are against the policy of the law; and that, therefore, the very contract relied on in this case as constituting the marriage is itself absolutely void, because it enjoins secrecy. Section 75 of the Code provides that persons married without solemnization "must jointly make a declaration of marriage;" and section 77 provides that "declarations of marriage must be acknowledged and recorded in like manner as grants of real property." It is true that a previous section of the same article provides that "non-compliance with its provisions does not invalidate any lawful marriage;" but, considering all the sections together, it is difficult to resist the conclusion that the policy and intent of the Code, with respect to unsolemnized marriages, is that they must either be made matters of record, or that they must be accompanied by such circumstances—such acts and conduct of the parties—as will approximate that publicity of which a record notice is the most complete evidence; and that, therefore, a contract to enter upon the marriage relation which provides for secrecy is void; for, if the relation between these parties was marriage, then all marriages may be of that character; and society might be undermined everywhere with such secret relations without there being one recognized wife or family home in all the land. And it must be remembered that the legislature adopted the Code with the knowledge that this court, in *Graham v. Bennet*, 2 Cal. 506, speaking of marriage, used this language: "If it takes place between parties able to contract, an open avowal of the intention, and an assumption of the relative duties which it imposes on each other, is sufficient to render it valid and binding." But, while we are strongly of the impression that the contract relied on in this case is void on account of its clause of secrecy, we are not called upon to hold that if, notwithstanding said agreement for secrecy, the parties had assumed the marital relation in the way hereinbefore indicated, there still would have been no marriage.

My conclusion is that the facts found in this case did not, under the law of this state, constitute marriage; and that the judgment should be reversed, with directions to the superior court to enter judgment for defendant. With respect to the appeal from the orders allowing alimony and counsel fees, as, in my opinion, there was no marriage, of course, in my judgment, those orders should be reversed.

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HYDE v. REDDING. (No. 12,245.)

(*Supreme Court of California.* January 17, 1888.)

1. QUIETING TITLE—RIGHT TO MAINTAIN ACTION—AGAINST ACTUAL ADVERSE POSSESSION.

Code Civil Proc. Cal. § 738, provides that "an action may be brought by any person against another who claims an estate or interest in real property adverse to him." *Held*, that under this section an action to quiet title can be maintained, though defendant is in the actual adverse possession of the premises in controversy.

2. SAME—JURISDICTION.

And the superior courts of California, as courts of equity, have jurisdiction of such actions, even though plaintiff's title is a legal title, on which he could recover at law in "ejectment."

3. SAME—LACHES.

Plaintiff on the twenty-second of May, 1872, became the owner by assignment of a certificate of purchase issued by the state to one G., November 21, 1872, judgments were entered by the district court foreclosing and annulling the interest of G. in said certificate of purchase; and March 15, 1883, certificates of purchase of the same land were issued to the assignors of defendant, and they received patents, February 20, 1884. Plaintiff brought suit December 26, 1883, for possession and to quiet title, alleging invalidity of the judgments of the district court aforesaid. *Held* that, if the issue presented was one to be tried in a court of law, the question of laches could not arise, as defendant must rely upon the statute of limitations; and if the action be treated merely as a bill in equity to quiet title, only nine months having elapsed

after the issue of the certificates of purchase to defendant's assignors, and the patents not having been granted until after the commencement of the action, there was no such laches as to deprive plaintiff of his right to sue.

4. SAME—PLEADING.

A bill to quiet title alleged generally the invalidity of the judgments which constituted the source of defendant's title, but did not aver the specific facts showing such invalidity. *Held* that, in the absence of a demurrer to the complaint, such general allegations were sufficient.

5. JUDGMENTS—COLLATERAL ATTACK.

Where the affidavits of service in an action were wholly insufficient to authorize the court in entering judgment, and such defect appeared upon the face of the judgment roll, *held*, that the judgment could be collaterally attacked. *People v. Greene*, ante, 197, followed.¹

6. SAME—REGISTRY—BONA FIDE PURCHASER.

And the filing of a copy of such judgment with the state register, as provided by the act of 1868, § 66, (St. Cal. 527,) was not conclusive evidence of its own validity so as to put a party claiming under it in the attitude of an innocent purchaser for value, under the registry laws.

In bank. Appeal from superior court, Santa Barbara county; R. B. CANFIELD, Judge.

Joseph B. Redding and Crittenden Thornton, for appellant. *C. A. Stoke, S. W. Benton*, and *Sawyer & Burnett*, for respondent.

MCKINSTRY, J. This is an appeal by defendant from a judgment of the superior court in and for the county of Santa Barbara, and from an order denying a new trial. The action was brought to determine the adverse claims of the defendant to certain lands and premises situated in the said county. The plaintiff claims under two certificates of purchase from the state of California, for the land in controversy, made and issued to one W. E. Greene on the sixteenth of November, 1868, and by mesne assignments from said Greene to himself. The defendant claims under two certificates of purchase made and issued to M. Wolf and George Lee, respectively, which, as alleged, became vested through certain mesne assignments in the defendant. The particular adverse claim made by the defendant is (as stated in the complaint) under a judgment given and made by the district court of the First judicial district of the state of California in and for the county of Santa Barbara, in a certain action brought by the people of the state of California against W. E. Greene and others. This judgment is alleged to have been rendered without jurisdiction. It may be inferred from the language of the complaint that the judgment was one purporting to foreclose and annul the interest of Greene in the certificates of purchase above mentioned. The further allegation is made that the claim of the defendant is without right, and that the defendants have not any right, title, estate, or interest in the premises; that the certificates of purchase issued to Wolf and Lee, and by them assigned to the defendant, were unlawfully and improvidently issued, and constitute a cloud upon the plaintiff's title, etc. Prayed that the defendants may set forth the nature of their several claims, that the same may be determined; that the said judgment and certificates of purchase hereinabove referred to may be decreed null and void; and that the defendant may be forever debarred from asserting any claim whatsoever in or to said lands and premises; and for general relief. The answer of the defendant appealing contained—*First*, a general denial; *second*, a plea of two judgments, such as mentioned and referred to in the complaint, as a bar to the plaintiff's action; *third*, a plea setting forth the

¹Respecting the grounds on which the court will permit a judgment to be collaterally attacked, see *Jasper Co. v. Mickey*, (Mo.) 4 S. W. Rep. 424; *Crawford v. Wilcox*, (Tex.) 3 S. W. Rep. 695, and note; *Grimmett v. Askew*, (Ark.) 2 S. W. Rep. 707, and note; *Rolins v. Love*, (N. C.) 2 S. E. Rep. 166; *Jones v. Coffey*, Id. 165; *Seamster v. Blackstock*, (Va.) Id. 36; *Hollingsworth v. State*, (Ind.) 12 N. E. Rep. 490; *Strieb v. Cox*, Id. 481; *Hall v. Durham*, (Ind.) 9 N. E. Rep. 926, and note; *Fahey v. Mottu*, (Md.) 10 Atl. Rep. 68; *Hawley v. Simons*, (Ill.) 14 N. E. Rep. 7; *Head v. Daniels*, (Kan.) 15 Pac. Rep. 911; *Kleyla v. Hasket*, (Ind.) 14 N. E. Rep. 387; *Murray v. Weigle*, (Pa.) 11 Atl. Rep. 781.

rendition of the said judgments on November 21, 1872, and a plea of laches committed and permitted by the plaintiff in neglecting to allege or assert any rights therein until the filing of the complaint herein, (which was on December 26, 1883;) *fourth*, an allegation that the defendant is the owner in use of the premises in controversy, under patents issued by the state of California, subsequent to the commencement of the action.

Upon these pleadings a trial was had. At the trial the defendant admitted that W. E. Greene made application to the state to purchase the lands in the complaint mentioned, and made the first payment required by law to be made, to-wit, 20 per cent. of the purchase money, and one year's interest, and no more, and received certificates of purchase thereof. It was further admitted that the consideration for the assignment of each of the certificates mentioned was the sum of five dollars. Upon these admissions the plaintiff rested. Thereupon the defendant, to maintain the issues upon his part, introduced and offered in evidence the judgment rolls in the cases of *People, etc., v. W. E. Greene et al.* These judgment rolls are set forth at full length in the transcript. The judgments purport to foreclose the rights of defendants in those actions, and to annul the certificates of purchase under which such defendants claim. The defendant further proved that copies of both of the judgments mentioned were filed in the office of the register of the state land-office prior to the purchase of the land by Wolf and Lee, the defendant's assignors; that by certain probate proceedings in the estate of B. B. Redding, deceased, and assignments, all the estate of said Redding (claimed to be derived to him from Wolf and Lee) had become vested in the defendant; that the said defendant had made valuable improvements upon the premises to the amount and value of \$1,000; that he had paid taxes to the extent of \$100; that the defendant and his predecessors in interest had been in possession, and had paid all taxes levied upon said premises; and that the amount of the purchase money and interest paid to acquire the land from the state was the sum of \$1,550. The court found according to the admissions of the parties, and in accordance with the allegations of the complainant. The superior court held, in terms, that the judgment alleged by the plaintiff to be void, and by the defendant to be valid, was void and of no effect.

1. It is contended by appellant that the action cannot be maintained, because, when it was commenced, the defendant was in the actual adverse possession of the premises in controversy; that the plaintiff's title, if any he has, is a legal title, on which he can recover at law in "ejectment;" and that the legislature has no power to deprive a party of his trial by jury, in cases where a jury trial was a right at the common law, by attempting to give the superior court, as a court of equity, jurisdiction of matter of purely legal cognizance.

But the superior court has jurisdiction to enforce a legal title to land, and the legislature may provide the mode in which the jurisdiction may be employed. If, in an action brought under section 738, Code Civil Proc., the plaintiff avers a legal title against a defendant in possession, the latter is perhaps entitled, under the constitution, to a trial by jury of the issue at law thus presented. But section 738 provides that the issue (which might have been the subject upon action of ejectment) may be tried in a proceeding begun under that section. That issue determined, the court—by virtue of the authority conferred by section 738—may, in the same action, proceed to determine the adverse claims set up by the defendant, and to decree that they be quieted. If the plaintiff shall prove a right to the possession by virtue of his legal title, the further rights of the parties are to be adjudicated as if the plaintiff had been in possession at the commencement of the action. The appellant here cannot be heard to complain that the legal issue, as distinguished from the equitable issues, was not tried by jury, since a trial by jury was expressly waived by a stipulation of the parties. Transc. 22.

The foregoing accords with what is said in *People v. Center*, 66 Cal. 551-563, 5 Pac. Rep. 263, and 6 Pac. Rep. 481: "It may be said that if it appear the grantees or their assigns could not, under the acts of the legislature, acquire an equity which a court of equity can enforce, the present suit should be dismissed, because the plaintiffs had a perfect remedy at law. Under our system a defendant in an action at law to recover lands, against whom judgment has passed, cannot subsequently, in a distinct suit, assert a legal right which existed when the ejectment was commenced, nor subsequently claim relief based upon an equity which was *pleaded* by cross-complaint in the ejectment. So far the judgment in favor of the plaintiff, in the action of ejectment, is conclusive of the defendant's rights. But a decree in a suit under section 738, Code Civil Proc., that the defendant has no right, title, or interest in certain lands, would seem to be more effective, as a final adjudication with respect to the rights of the parties, than would be a mere judgment for the recovery of the possession. The latter, to some extent, leaves open to be proved, by evidence *dehors* the record, *what* rights might have been asserted in the action of ejectment. In an action under section 738, Code Civil Proc., it is not necessary to allege in the complaint the nature of the estate or interest claimed by the defendant. *Crook v. Forsyth*, 30 Cal. 662. Until the answer comes in, it need not appear that the issues to be tried will be *legal*, as distinguished from equitable issues. A proceeding by which one may compel another to expose and have adjusted the nature of the interest on which he is asserting an adverse claim against the estate of the former, is one to be conducted in a court of equity. The discovery of the nature of the adverse claim precedes its adjudication. It may be added that, strictly speaking, we have no separate courts of law and equity. Within the limits of the constitution, the legislature may provide the mode by which, in particular cases, the jurisdiction of the superior court shall be employed; may, among other things, prescribe the form of judgment to be entered. Section 738, Code Civil Proc., allows an action to be brought by any person against another who claims an estate or interest adverse to him. Its language is very broad. If the plaintiff is out and the defendant is in possession, nevertheless the action can be maintained; so, if the plaintiff and the defendant each claims to be the owner in fee. In the last case the question who has the better right may be tried in the action in the form usually called (for want of a better name) 'ejectment,' but it may also be tried in an action under section 738 of the Code. Whether, when brought under the Code, the action be called an action at law, in which the statute authorizes a judgment determining the estate or interest claimed by the defendant, or be called a suit in equity to quiet the plaintiff's title against the adverse claim, the superior court has jurisdiction. If it be considered an action at law, the defendant may demand a jury; but here, as we have seen, a jury was waived. In the case at bar, the defendants, appealing, averred in their answer that they were in possession of the lands when the action was commenced. The court did not find upon that averment, and defendants do not complain of the omission. But the omission is immaterial, because the action is maintainable whether they were or were not in possession."

2. What has been said is to some extent an answer to the claim of appellant that the plaintiff was guilty of such laches as should have barred his right; that, as the plaintiff sues in equity, a delay of 11 years after the entry of the judgments in *People v. Greene* shows such lack of diligence as should preclude him from demanding equitable relief. But, if the issue first presented is one to be tried in a court of *law*, the question of laches does not arise. As to that issue, the defendant must rely upon the statute of limitations; and here the statute of limitations was not pleaded, nor was an adverse possession for the statutory time proved. As to the defendant's alleged adverse claim, if plaintiff's legal right to the possession was established, the defendant's adverse

claim was, as we have seen, to be tried as if the plaintiff had been in actual possession at the beginning of the action. And where a plaintiff has been in possession of land he cannot be guilty of laches in the bringing of a suit to remove a cloud, at any time before an action has been brought to disturb his possession, or to deprive him of any enjoyment of his right. *Liebrand v. Otto*, 56 Cal. 248. The continued assertion of the adverse claim constitutes from day to day a new cause of action. The plaintiff became the owner, by assignment, of the certificate of purchase issued to W. E. Greene on the twenty-second day of May, 1872. The judgments in the actions of *People v. Greene et al.* were entered November 21, 1872. Certificates of purchase were issued to Wolf and Lee—from whom defendant derails—on the fifteenth day of March, 1883, and, as appears from the supplemental complaint, they received patents February 20, 1884. It does not appear that Wolf or Lee ever had possession of the land, nor does it appear when B. B. Redding took possession of it, or when he or the appellant improved it. Was the plaintiff guilty of such laches, even if this action be treated merely as a bill in equity to quiet title or to remove a cloud, as deprived him of the right to seek equitable relief? He waited 11 years after the judgments in *People v. Greene*, but only nine months elapsed after the certificate of purchase issued to Wolf and Lee. The Wolf and Lee certificates would not have constituted a cloud as against the prior certificate issued to Greene; the patent to Wolf and Lee did not issue until after the commencement of this action. As we shall see, the judgments in *People v. Greene* are void on their face, and therefore constitute no cloud. Even then, if the action be treated simply as one to remove a cloud, there was no laches such as deprived the plaintiff of his right to sue.

3. It is also contended by appellant that the complaint is insufficient as a bill to remove a cloud upon title, because it does not aver the specific facts showing that the district court had no jurisdiction to enter the judgments in *People v. Greene*. In support of this view, *Stokes v. Geddes*, 46 Cal. 17, is referred to by counsel for appellant. In *Stokes v. Geddes* there appears to have been no general allegation that the court had no power or jurisdiction to render the judgment, and no allegation of irregularity on the face of the proceedings. A demurrer was sustained to the complaint. In the case now here the complaint was not demurred to, and, in the absence of demurrer, we think the averments sufficient as to the invalidity of the judgments in *People v. Greene*.

4. Appellant claims, however, that the judgments in *People v. Greene* were regular and valid on the face of the rolls, and are not subject to collateral attack. Section 203 of the practice act provided that, in case the complaint was not answered, the judgment roll should consist of "the summons, with the affidavit or proof of service," and "the complaint," with the default memorandum indorsed thereon. In *People v. Greene et al.* the affidavits of service were wholly insufficient to authorize the district court to enter the judgments. *People v. Greene, ante*, 197, (filed December 23, 1887.)

5. Copies of the judgments in *People v. Greene* were filed with the register, but not, so far as appears, with the county recorder. It is insisted that the only purpose of the sixty-sixth section of the act of 1868, (St. 527,) requiring copies to be so filed, is to afford notice to subsequent purchasers from the state, and that defendant was not affected by the fact that there was no evidence of service in *People v. Greene*, because the absence of such evidence did not appear in the record,—the judgment roll. But, as we have seen, the non-service did appear in the judgment rolls. Section 66 of the act of 1868, however, only required certified copies of the *decrees* to be filed. But we are not authorized to assume that the only possible purpose of the requirement was to give notice to subsequent purchasers from the state, so that they are to be absolutely protected by it as conclusive evidence of its own validity. The decree is not a subsequent conveyance by the state, and there is no analogy be-

tween the position of appellant and that of a subsequent purchaser in good faith, and for a valuable consideration, under the registry laws. It is only when a "decree" shall have been "obtained" that the district attorney is to cause certified copies of such decree to be filed with the state register and county recorder, (St. 1868, p. 527, § 66;) and only after a "decree of the court," that the land is to be subject to entry and sale, (section 67.) The statute does not purport to deprive a prior purchaser of any rights he may have acquired, except by and through a *valid* decree.

Judgment and order affirmed.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; PATERSON, J.; MCFARLAND, J.; TEMPLE, J.

74 Cal. 530

SILVA v. HOLLAND *et ux.* (No. 12,150.)

(Supreme Court of California. January 25, 1888.)

1. HUSBAND AND WIFE—ACTIONS AGAINST—JOINDER OF PARTIES.

In an action against a husband and wife to recover for work alleged to have been done for both, there was testimony that plaintiff had worked in and about a business which they conducted jointly, and that the property used therein was the wife's separate estate. Defendants admitted that plaintiff had not been paid for the work. *Held*, that the evidence tended to prove that defendants were liable jointly, and there was no misjoinder of parties.

2. NONSUIT—MOTION FOR—FAILURE TO SPECIFY GROUNDS.

At the close of the evidence for plaintiff, defendant moved for a nonsuit, without specifying grounds therefor. *Held*, that the motion was properly denied.

3. APPEAL—REVIEW—WEIGHT AND SUFFICIENCY OF EVIDENCE.

In California, when the statement on motion for new trial specifies no particulars wherein the evidence is insufficient, the sufficiency of the evidence will not be reviewed on appeal.

Commissioners' decision. Department 1. Appeal from superior court, Sacramento county; T. B. MCFARLAND, Judge.

Action by August Silva against M. Holland and A. Holland, his wife, to recover for work done for both defendants. Defendants, in their answer, denied that they were liable jointly. Plaintiff recovered judgment. Defendants appeal, and contend on the appeal that the judgment was not warranted by the evidence. By Code Civil Proc. Cal. § 659, *subc.* 3, "when the notice of the motion [for new trial] designates as the ground of the motion the insufficiency of the evidence, * * * the statement shall specify the particulars in which such evidence is alleged to be insufficient. * * * If no such specifications be made, the statement shall be disregarded on the hearing of the motion."

Ed. Martin, for appellants. *McKune & George*, for respondent.

BELCHER, C. C. This is an action to recover the value of work and labor alleged to have been performed by plaintiff for defendants, who are husband and wife. The answer denied all the allegations of the complaint, and alleged that there was a misjoinder of parties defendant. Findings were waived by both parties, and judgment was given in favor of plaintiff for \$374 and costs. The defendants moved for a new trial, and have appealed from the judgment, and order denying their motion.

The only point made for appellants relates to the alleged misjoinder of defendants. It is contended that it appeared from the evidence that the husband was alone responsible to the plaintiff, and that, there being no joint responsibility of defendants, the plaintiff should have been nonsuited on motion. At the conclusion of the plaintiff's testimony the record recites that: "Defendants here moved for a nonsuit, which, after argument, was denied by the court, and the defendants excepted." But the grounds of the motion were not stated; and for that reason, if for no other, the motion was properly

denied. *Coffey v. Greenfield*, 62 Cal. 608. If, however, the grounds of the motion had been stated, the ruling must have been the same. It was conceded by both defendants that plaintiff had performed labor for which he had not been paid, and the testimony introduced by him showed that he worked for the defendants in and about a business which they were jointly engaged in carrying on, and that the property used in that business was the separate property of the wife. In the absence of findings, it will be presumed that the court accepted this testimony as true.

The statement on motion for new trial contains no specification of errors, or of particulars wherein the evidence is claimed to be insufficient to justify the decision. The statement must therefore be disregarded. Section 659, Code Civil Proc.

Looking at the whole record, we see no merit in the appeal, and the judgment and order should be affirmed.

We concur: HAYNE, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

74 Cal. 557

KELLY v. CENTRAL PAC. R. CO. (No. 11,604.)

(*Supreme Court of California*. January 25, 1888.)

1. SPECIFIC PERFORMANCE—FRAUD IN OBTAINING CONTRACT—INJURIES TO THIRD PERSON.

Where plaintiff obtains by fraud from defendant a contract to convey land wherein another had acquired rights by performing labor and making improvements, the injury to the third person is sufficient to render the fraud a bar to an action for specific performance.

2. SAME—FALSE REPRESENTATIONS.

Defendant, having large tracts of vacant land, issued a circular inviting settlement thereon, and stating that settlers who in good faith improved the land would generally be given the preference in purchasing. To obtain a contract for conveyance of part of the land, plaintiff falsely represented to defendant that he had settled thereon, thereby deceiving defendant, and inducing him to make the contract, which he would not have done but for the deception. *Held*, that plaintiff's fraud, without regard to damage resulting from it, was a bar to an action for specific performance.

3. PUBLIC LANDS—SETTLERS—NOTICE.

Plaintiff entered, for the purpose of settling, upon public land whereon another resided and had made improvements. The latter ordered him off. *Held*, that plaintiff had notice of the other's rights in the land.

Commissioners' decision. In bank. Appeal from superior court, Placer county; B. F. MYRES, Judge.

Action by Thomas Kelly against the Central Pacific Railroad Company for specific performance of a contract between them for the conveyance of land to plaintiff. George W. Cole intervened, and the court below entered a decree against plaintiff on the merits, and in it directed a conveyance of the land to Cole. Plaintiff appeals from the parts of the decree denying relief to him, and directing a conveyance to Cole.

Hart & White and *John M. Fulweiler*, for appellant. *Hale & Craig*, for respondent. *C. A. & F. P. Tuttle*, for intervenor, George W. Cole.

HAYNE, C. Action for specific performance of a contract to convey land. The Central Pacific Railroad Company, being the owner of large tracts of land acquired from the federal government, placed the disposition of the same in the hands of one of its officers, called its "Land Agent." The finding in this regard is that "said railroad company, for the purpose of disposing of its lands, established a land department, and appointed a land agent, who had power to issue and carry into effect the circulars hereinafter copied. Said land agent had full power to appoint subordinate agents, and to distribute to

them the work of the land department." In the exercise of his functions, the land agent addressed a circular to the public, inviting settlement upon its vacant lands, and stating, among other things, that "settlers and actual occupants, who in good faith cultivate and improve lands belonging to either of the companies, will *generally* be given preference of purchase at the regular price."

It appears that, in the spring of 1881, one Menger, who was then in occupation of the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 7, in township 13, range 9 E., Mount Diablo base and meridian, and of an adjoining piece, received the above-mentioned circular and certain verbal assurances, and, after several months, sold and conveyed whatever rights he had to one Cole. Before making the purchase, Cole inquired of one Perkins, the deputy of the land agent, "whether, if he bought from Menger, he could get the title of the company" to the said S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, and the other land which Menger occupied. And Perkins "then gave him one of said circulars, and informed him that, if he moved upon the land and improved it, he could safely buy of said Menger, and that the railroad company would give him the preference to buy the same at such price as it might fix; and said Cole made said purchase under said advice, and moved into said Menger's house immediately upon the purchase. * * * Said Cole moved upon said land, and continued to reside upon it and make improvements on it, relying upon said circulars and what was said to him by said Perkins; believing that he would have the prior right to purchase from said railroad company said land at a price which it might fix." In December, 1881, he filed his application to purchase with the land agent; but no immediate action appears to have been taken thereon.

During all this time, the plaintiff, Kelly, had brought himself within the terms offered by said circular as to certain adjoining land, but had never done so as to the land in controversy. It sufficiently appears, we think, that Kelly had notice of Cole's equities; for he resided in the vicinity, and it is found that on one occasion he undertook to make an entry upon Cole's possession, and commenced to erect "a small board house" upon the land in controversy, but Cole ordered him off, and he left and moved his house away. He therefore knew that Cole had a claim to the land, and by inquiry he could easily have learned the nature of such claim. Several weeks after this, Kelly filed with the land agent an application to purchase certain lands, including the tract in controversy, and represented to the land agent that he (Kelly) had settled upon the same. The land agent, believing these representations, entered into a contract with Kelly for the conveyance to him of this and other tracts, and received from him the first payment therefor. These representations of Kelly were entirely false. The finding in this regard is as follows: "Kelly's said representations made by himself and his witnesses to the land agent were untrue, and *he at the time knew that they were untrue*, and they deceived the land agent, and induced him to award to said Kelly said south half of the north-east quarter; and the land agent, but for such deception, would not have awarded said south half of the north-east quarter to said Kelly, but would have awarded it to said Cole." Upon becoming aware of the deception which had been practiced upon him, the land agent notified Kelly that he could not have the tract in controversy, and tendered him back the portion of his first payment which applied to that tract, but did not tender him back the money applying to the other lands mentioned in his contract. Kelly refused to receive the money, and brought this action to compel the conveyance to him of all the land mentioned in the contract. Cole intervened and prayed for the conveyance of the land in controversy to him. The court below decreed that the land be conveyed to Cole, and Kelly appeals. The evidence is not brought up; the appeal being from the judgment, and upon the judgment roll alone.

The point made on Kelly's appeal is that the false representation was not productive of injury to the railroad company; and the argument is that there

was no injury, because, in the first place, it was under no obligation to convey to Cole,—the promise contained in the circular being merely that “preference will *generally* be given to settlers,” in which respect it differs from the promise contained in the circular considered in *Boyd v. Brinckin*, 55 Cal. 427,—and because, in the second place, the company was willing to convey, and will convey, the land to Cole for the same price that it agreed to convey it to Kelly, and hence could not be injured pecuniarily.

It is deserving of serious consideration whether, admitting that *Boyd v. Brinckin* can be distinguished as contended, there was not sufficient part performance of the oral promise to Cole to take the case out of the statute of frauds, and entitle him to a specific performance. But, waiving this, we think there are two answers to the argument for the appellant:

First. Assuming the correctness of appellant's major proposition, viz., that, in order to defeat a suit for specific performance on the ground of fraud, the fraud must be productive of injury, it is not necessary that the injury should result to the vendor; it is sufficient if it would result to third persons. It is upon this principle that the relief is refused where the thing to be done would operate as a fraud upon the public. Thus, a court will refuse to decree specific performance of an agreement to publish a book purporting to be written by one person, but in fact written by another. *Post v. Marsh*, 16 Ch. Div. 406. So upon the same principle the relief is refused, where the agreement was in fraud of the rights of creditors. *St. John v. Benedict*, 6 Johns. Ch. 117, *Baldwin v. Campfield*, 8 N. J. Eq. 600; *Ryan v. Ryan*, 97 Ill. 40; or in fraud of the rights of other parties, (*Kitchen v. Coffyn*, 4 Ind. 507.) So, it is refused where the act sought to be enforced would operate to the injury of interests in remainder, (Fry, Spec. Perf. *p. 141, § 304; *Thomas v. Dering*, 1 Keen, *747, *748;) or to a wife's right in a homestead, (*Phillips v. Stauch*, 20 Mich. 383;) or to subsequent purchasers from the same vendor, (*Curran v. Holyoke*, 116 Mass. 90; and see Pom. Spec. Perf. § 181.) The court will not make itself an instrument to carry out the fraud, whether the person to be injured be a party to the contract or not. It will not assist the plaintiff to get the benefit of the intervenor's labor and improvements upon the tract in controversy.

Second. But we do not think that in order to defeat a suit for the specific performance of a contract to convey land, upon the ground of fraud, the fraud must be productive of damage either to the vendor or to third persons. If the misrepresentation was intentional, and made for the purpose of deceiving the vendor, and the vendor relies upon it, and was deceived by it, and would not have entered into the contract but for the fact that he was so deceived, then we think a court of equity will not enforce the contract whether it be accompanied by damage or not. So far as this kind of suit is concerned, such a misrepresentation is material, although not accompanied by damage.

The counsel for the appellant cite, in this connection, the case of *Morrison v. Lods*, 39 Cal. 325, as affirming the contrary doctrine. The report of that case is somewhat obscure. It does not show what the representation was, nor whether it was intentionally false, or a mere innocent misrepresentation. But, if the court meant to decide that a court of equity will enforce a contract obtained solely through a false and fraudulent representation, then we think the decision is in violation of established principles. It is perfectly true, as stated in the opinion, that an action at law cannot be maintained for fraud unless accompanied by damage. It is also true, as stated in the opinion, that a court of equity will not set aside a contract obtained through fraud unless it be productive of injury. 1 Story, Eq. Jur., § 203. But it is not true that this applies to suits for specific performance. It is well settled that a court of equity may refuse specific performance of a contract which it would not set aside. *Mortlock v. Buller*, 10 Ves. *308; *Cadman v. Horner*, 18 Ves. 11;

Seymour v. Delancy, 6 Johns. Ch. 222; *Jackson v. Ashton*, 11 Pet. 248; *Barksdale v. Payne*, Riley, *178; *Frisby v. Ballance*, 4 Seam. 299; *Clement v. Reid*, 9 Smedes & M. 543; *Taylor v. Merrill*, 55 Ill. 61; Hil. Vend. 445; Fry, Spec. Perf. (Amer. Ed.) *p. 192, § 427.

Although the court will refuse to destroy the contract, it will not further in any way the fraudulent design. In such cases, by an application of the maxim that he who comes into equity must come with clean hands, the court is enabled to give greater effect to the principles of morality than can be done in ordinary cases. The leading text writers are agreed in this view. Chancellor Kent, after stating the general rule that fraud must be accompanied by damage, and that "there are many duties that belong to the class of imperfect obligations, which are binding in conscience, but which human laws do not and cannot undertake directly to enforce," goes on to say: "But, where the aid of a court of equity is sought to carry into execution such a contract, then the principles of ethics have a more extensive sway." 2 Comm. 490. This statement is adopted by Story. 1 Eq. Jur. § 206. So Kerr, in his work on Fraud and Mistake, says: "Where the aid of a court of equity is sought by way of specific performance of a contract, the principles of ethics have a more extensive sway than where a contract is sought to be rescinded. * * * Where a party calls for specific performance, he must, as to every part of the transaction, be free from every imputation of fraud or deceit," and "must show that his conduct has been clear, honorable, and fair." Kerr, Fraud & M. (Amer. Ed.) 357, 358. So Hovenden says: "Specific performance of an agreement is never compelled unless the case is clear of the imputation of any deception, the conduct of the party seeking it must be free from all blame." 2 Hov. Frauds, 4. See, also, Fry, Spec. Perf. (Amer. Ed.) *204. This rule is embodied in section 3391, Civil Code, which provides that "specific performance cannot be enforced against a party to a contract * * * (3) if his assent was obtained by the misrepresentation, concealment, circumvention, or unfair practices of any party to whom performance would become due," etc. And it is evident that such must be the rule. To say otherwise is to place suits for specific performance on the same level with actions at law, which is contrary to all the authorities. If, therefore, the case of *Morrison v. Lods* is to be construed as affirming any such doctrine, it does not state the law correctly. The case of *Board, etc., v. Younger*, 29 Cal. 172, was a suit to set aside a contract, and not for specific performance.

In the present case the false and fraudulent representation of plaintiff was the inducing cause of the contract. This is apparent from the fact that, as soon as the company discovered the fraud which had been practiced upon it, it repudiated the contract. And it is expressly found that "the land agent, but for such deception, would not have awarded said south half of north-east quarter to said Kelly, but would have awarded it to said Cole." This state of facts well illustrates the wisdom of the doctrine which does not insist upon measuring everything by the standard of damage, but, so far as can be done, allows parties to determine what is for their own interests, and to contract, or refuse to contract, accordingly. It is evident from the circulars contained in the record that it was the policy of the company to encourage the settlement of its vast tracts of unoccupied land. To carry out this policy, it offered special inducements to settlers. It ought to be allowed to fulfill its promises to those who have relied upon its good faith. It is not for one who falsely pretends to be entitled to the benefit of those promises to say that it is all the same to the company because he pays the same price as the other would. The case is one where the vendor has special motives for selling to one person at a price which it would not accept from another. See *dictum* of Lord ELDON in *Bonnett v. Sadler*, 14 Ves. 528.

It may be conceded in favor of appellant that the company did not take the proper course to rescind its contract with the plaintiff. Be that as it may, he

cannot, for the reasons stated, have the aid of a court of equity to carry it out. His case against the company therefore fails. And, this being so, he cannot inquire into the correctness of the decree directing the company to convey to the intervenor; for, if he is not entitled to the specific thing, it is of no consequence to him what becomes of it, and he cannot concern himself with that question. We do not regard the case of *Taylor v. Railroad Co.*, 67 Cal. 615, 8 Pac. Rep. 436, as conflicting in any degree with the above positions.

We therefore advise that upon the appeal of the plaintiff the judgment be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion in the appeal of the plaintiff the judgment is affirmed.

74 Cal. 565

KELLY v. CENTRAL PAC. R. CO. (No. 11,258.)

(Supreme Court of California. January 25, 1888.)

SPECIFIC PERFORMANCE—CONTRACT OBTAINED BY FRAUD—COSTS.

In an action for specific performance of a contract which plaintiff had obtained fraudulently, where a decree is entered against him on the merits, it is an abuse of the court's discretion as to costs to order defendant to pay them.¹

Commissioners' decision. Appeal from superior court, Placer county; B. F. MYERS, Judge.

Action by Thomas Kelly against the Central Pacific Railroad Company to compel specific performance of a contract between them for the conveyance of land. A decree was entered against plaintiff on the merits, but the court ordered defendant to pay the costs, and defendant appeals from that order.

Hale & Craig, for appellant. *Hart & White* and *J. M. Fulweiler*, for respondent.

HAYNE, C. The facts of this case are stated in *Kelly v. Railroad Co.*, ante, 386, (No. 11,604, just decided.) The court below refused to order specific performance in favor of the plaintiff, but ordered the land to be conveyed to the intervenor, and stated in its conclusions of law "that said railroad company pay all the costs of this action." Judgment was entered accordingly. The company appeals from so much of the judgment as relates to the costs.

We are inclined to think that a suit for specific performance "involves the title" to real estate, within the meaning of sections 1022, 1024, Code Civil Proc.; and that therefore, upon a judgment in its favor, the defendant was entitled to costs against the plaintiff as a matter of right. But assuming, in favor of the plaintiff, that this is not so, and that costs were in the discretion of the court, then we think there was an abuse of discretion. The plaintiff was denied a judgment because of his fraudulent misrepresentations. The defendant was free from all blame. What is there in this state of facts which entitled the plaintiff to costs? According to the practice of courts of equity, "where a specific performance is denied in consequence of any unfairness on the part of the plaintiff, costs seem to follow as of course." 2 *Hov. Frauds*, 24.

No argument is made by appellant as to the intervenor's costs, and for that reason we have not examined that branch of the question.

We therefore advise that that part of the judgment which relates to costs

¹ A bill to compel the specific performance of a contract is an application to the sound discretion of the court, and such performance will not be decreed when for any reason it would be inequitable. *Williams v. Williams*, (Wis.) 6 N. W. Rep. 814; *Town v. Railway Co.*, (Wis.) 27 N. W. Rep. 169; *Bird v. Logan*, (Kan.) 10 Pac. Rep. 564; *Kelly v. Kendall*, (Ill.) 9 N. E. Rep. 261.

between the plaintiff and the defendant be reversed, with directions to the court below to enter judgment for defendant against plaintiff for its costs of suit; the defendant to recover its costs of appeal from plaintiff.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion that part of the judgment which relates to costs between the plaintiff and the defendant is reversed, with directions to the court below to enter judgment for defendant against plaintiff for its costs of suit; the defendant to recover its costs of appeal from plaintiff.

74 Cal. 575

PEOPLE v. CLINE. (No. 20,341.)

(*Supreme Court of California.* January 25, 1888.)

1. CRIMINAL LAW—CONTINUANCE AT DEFENDANT'S REQUEST.

Pen. Code Cal. § 1382, enacts that a prosecution shall be dismissed if a defendant, whose trial has not been postponed upon his application, is not brought to trial within 60 days after the filing of the information. At defendant's request, the court refused to set a cause down for trial which was delayed beyond the time allowed. *Held*, that defendant was not entitled to a dismissal.

2. LARCENY—RECENT POSSESSION OF STOLEN GOODS—EVIDENCE.

On the trial of an indictment for the larceny of a horse, defendant offered evidence, by a witness present at the time, to prove a payment he had made for the horse to a party from whom there was some evidence to show he had purchased it. The evidence of the prosecution depended largely upon recent possession. *Held*, that the evidence offered by defendant was material and admissible.

3. SAME—INSTRUCTION.

The court instructed the jury that "the possession of stolen property, supported by other evidence tending to show guilt, is a strong circumstance tending to show guilt." *Held* erroneous, as the jury is the sole judge of the weight to be given to the fact of recent possession, in view of all surrounding circumstances.¹

In bank. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

Indictment for larceny. One Cline, being convicted for stealing a horse, appealed.

W. D. Grady, for appellant. Atty. Gen. Geo. A. Johnson, for the People.

SEARLS, C. J. The defendant was convicted of grand larceny. The information was filed April 22, 1886. A demurrer was interposed, which was properly overruled, on the eleventh day of June, 1886. The trial did not take place until November 22d of the same year. At the trial, counsel for defendant moved to discharge the defendant upon the ground that said cause had not been brought to trial within 60 days after filing the information. The motion was properly denied. After the demurrer was overruled, the district attorney asked to have the cause set down for trial. This was objected to by counsel for defendant, who thereupon asked that it be not set down, and offered, if the cause was not set down, to waive the time fixed by law for the trial thereof; and thereupon the court refused to fix a day, and it went over. When, as here, the delay has been granted at the request of defendant, and presumably for his benefit, the objection is entitled to little consideration. The delay was of his own seeking, and is equivalent to a motion on his part

¹To warrant a presumption of guilt from the mere circumstance of the possession of stolen property, the possession must be personal, must be recent, must be unexplained, and must involve a distinct and conscious assertion of property. *Robinson v. State*, (Tex.) 3 S. W. Rep. 736. As to the weight to be assigned to the fact of the possession of stolen goods recently after the theft, see *State v. Kirkpatrick*, (Iowa,) 34 N. W. Rep. 301, and note; *People v. Flynn*, (Cal.) 15 Pac. Rep. 102; *Bean v. White*, (Tex.) 5 S. W. Rep. 525; *Moreno v. State*, (Tex.) 6 S. W. Rep. 299; *Stockman v. State*, (Tex.) 6 S. W. Rep. 298; *People v. Guitierrez*, (Cal.) 15 Pac. Rep. 444.

for a postponement of the case, and therefore did not entitle him to a dismissal under section 1382, Pen. Code.

At the trial, defendant offered to prove by one Frank Serradell that on the fifth day of February, 1886, at the saloon of one Degan, in Fresno, he paid to one Robles the sum of \$20. The testimony was objected to. Objection sustained, and an exception taken, and the ruling is assigned as error. The testimony relied upon by the prosecution to prove guilt depended largely, but not wholly, upon the fact that the horse stolen was found in the possession of defendant soon after the theft was perpetrated. There was evidence tending to show that defendant purchased the animal in question on the fourth day of February from Robles for \$30; that he paid \$10 on account of the purchase, and agreed to pay the residue of \$20 the next day at Fresno; that he took the colt to Owen's ranch, where he worked; that the next day he procured \$20 from his employer, mounted the animal, rode it to Fresno, where he placed it in a livery stable, and proceeded to the saloon of Degan, where he met Robles, and, as he himself testified, in the presence of the witness Serradell paid to Robles the \$20. Under these circumstances, the proffered testimony was both material and admissible. It was not only proper to prove the fact of payment, but also defendant's declaration, made at the very time of payment, of the account upon which it was paid. The credit to be given to the testimony when introduced was quite another thing, and was a question for the jury to determine, but which did not bear upon its admissibility.

It is also urged that the court erred in giving the jury the following instruction: "The mere possession of stolen property, recently stolen, is not of itself sufficient evidence to convict. The possession of stolen property, supported by other evidence tending to show guilt, is a strong circumstance tending to show guilt." In *People v. Ah Sing*, 59 Cal. 400, the court below had instructed the jury in language almost precisely similar to the above, and this court reversed the judgment, saying: "Whether the possession was strong evidence, or only slight evidence, tending to show guilt, was a matter for the jury to pass upon, and not a question for the court to determine." In other words, it is not a question of law, upon which the court should instruct the jury, but one of fact, which is wholly within the province of the latter. In deducing the ultimate fact of guilt or innocence, they are the sole judges of the weight to be given to the probative fact of possession of property recently stolen, and of all the circumstances surrounding and stamping the character of such possession.

For the errors indicated, the judgment and order denying a new trial are reversed, and a new trial ordered.

We concur: MCFARLAND, J.; PATERSON, J.; MCKINSTRY, J.; TEMPLE, J.

74 Cal. 544

WEST v. RUSSELL et al. (No. 12,111.)

(Supreme Court of California. January 25, 1888.)

LIMITATION OF ACTIONS—RUNNING OF THE STATUTE—WHEN CAUSE OF ACTION ACCRUES.

F. and C., residents of Pennsylvania, entered into a contract in 1852 by the terms of which C. was to proceed to the mining regions of California, and engage in mining for 18 months, or longer if arranged by letter. On his return to Pennsylvania he was to give F. half of all he made, or, if he died, F. should have the share just the same. C. came to California, but did not go to the mining regions. F. died in 1880, and his administrator brought action to recover half of what C. had made since he came to California. Held, that F.'s right to an accounting under the contract accrued 18 months after C. arrived in California, and the statute of limitations began to run against his claim from that date.

In bank. Appeal from superior court, Sacramento county; J. W. ARMSTRONG, Judge.

This was an action brought by John J. West, as administrator of the estate of Irwin McFarlane, against F. H. Russell, administrator of the estate of

William McCain, and the heirs of McCain. The action is brought to recover on a contract as follows: "Article of agreement entered into this twelfth day of February, 1852, between Irwin McFarlane, of the first part, and William McCain, of the second part, witnesseth, that said McFarlane agrees to give said McCain the sum of \$275, and the receipt of which is hereby acknowledged, with which said McCain agrees to proceed to California to the gold mines; and said McCain agrees to give said McFarlane one-half of what he may make until his return; and if he does not return, or dies, said McFarlane shall be entitled to one-half the same as if he returned,—that is, one-half of all his (McCain's) expenses; and the understanding between the parties is that said McCain shall stay eighteen months, or until other arrangements are made, which arrangements may be made by either." McCain came to California in 1852, but did not go to the mining regions. He accumulated a large property, and finally died in 1885. McFarlane died in 1880, and this suit was begun in May, 1886. No demand for an accounting had been made by McFarlane in his life-time. Judgment for defendants, and plaintiff appeals.

Taylor & Hall, for appellant. *Freeman, Johnson & Bates*, for respondents.

THORNTON, J. The demurrer in this case was properly sustained. The contract on which the action is based was entered into in February, 1852. This suit was commenced on the first of May, 1886. The intention of the contract was that the intestate of the defendant (one William McCain) should go from Pennsylvania (where the contract was made) to the gold mines in California; engage in business there, either of mining or some other employment; remain there 18 months, or a longer period as should be arranged by letter or otherwise; and at the end of such period, and on his (McCain's) return to Pennsylvania, to give McFarlane, plaintiff's intestate, one-half of what he might up to that time have made; and if McCain did not return, or died, McFarlane was to be entitled to one-half, the same as if he returned. McCain came to California in 1852, but it does not appear by averment that he ever went to the mines at all; accumulated property, both real and personal, which he had at the time of his death, which occurred in Sacramento in February, 1885.

We think it would be giving an unjustifiable construction to the agreement to hold that McCain, who broke his agreement, and never did go to the mines, or engage in business in the mining regions, should be held to account to McFarlane for whatever he might make by his labor or industry, exerted elsewhere in California than in the mining regions. Further, we are of opinion, it not appearing that the period of 18 months was ever prolonged by agreement, within a reasonable time after the lapse of the period of 18 months from his arrival in California, McFarlane had a right to call on him for an account, and, not having done so, his right to proceed against McCain under the agreement has been long since barred by lapse of time.

Let it be conceded that McFarlane had a right at any time during the years 1855 or 1856 to call on McCain to account. This would have given the former a reasonable time to demand an account of the latter, and, upon refusal, to bring his action. The statute would then have commenced to run on the first of January, 1857. McFarlane could not be allowed to extend the day on which the statute of limitations began to operate by his failure to call for an account. The statute thus commencing to run on the first of January, 1857, the period of four years (Code Civil Proc. § 343) which barred the relief asked had elapsed several times before the commencement of the action.

The judgment should be affirmed. So ordered.

We concur: PATERSON, J.; SHARPSTEIN, J.

We concur in the judgment: SEARLS, C. J.; TEMPLE, J.

We concur in the judgment on the ground that the facts set forth in the complaint show such laches on the part of plaintiff and her intestate as justified the court below, as a court of equity, in refusing to entertain a suit for an accounting: *McKINSTRY, J.; MCFARLAND, J.*

74 Cal. 547

PEOPLE v. HOWARD. (No. 20,353.)

(*Supreme Court of California. January 25, 1888.*)

CRIMINAL LAW—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

Where, upon an application for new trial in a criminal cause, upon the ground of newly-discovered evidence, it does not appear that the party applying might not, with the exercise of reasonable diligence, have discovered and produced on the trial the evidence claimed to be newly discovered, or that such newly-discovered evidence might cause a different verdict to be rendered, it is not an abuse of discretion to refuse such application.

Commissioners' decision. In bank. Appeal from superior court, Fresno county; *M. K. HARRIS, Judge.*

Eva Howard, having been convicted of grand larceny, applied for new trial on the ground of newly-discovered evidence. The application was refused, and defendant appeals.

S. W. Geiss, for appellant. *R. B. Terry*, Dist. Atty., and *Geo. A. Johnson*, Atty. Gen., for respondent.

FOOTE, C. The defendant was convicted of grand larceny. From the judgment entered in the cause, and an order refusing her a new trial, she has appealed.

We cannot agree with the defendant's contention that the evidence was insufficient to justify the verdict of the jury.

It is urged further, in her behalf, that the newly-discovered evidence which she proposed to introduce if granted a new trial is shown by the affidavits presented on her part to have been such as would unquestionably have resulted, if put before a jury, in her acquittal, and that she could not, by the exercise of due diligence, have discovered and produced that evidence on the trial at which she was convicted. In order that a party shall have the right to a new trial after conviction of a criminal offense of the kind in hand, on the ground of newly-discovered evidence, it must appear—"First, that the evidence, and not merely its materiality, be newly discovered; second, that the evidence be cumulative merely; third, that it be such as to render a different result probable on a retrial of the cause; fourth, that the party could not with reasonable diligence have discovered and produced it at the trial; and, fifth, that these facts be shown by the best evidence of which the case admits." Hayne, New Trials, § 88. "Applications on this ground are addressed to the discretion of the court below, and the action of the court below will not be disturbed except for an abuse of discretion; the presumption being that the discretion was properly exercised." *Id.* § 87. From the affidavits produced on the hearing of the motion for a new trial, we do not perceive why the defendant might not, with the exercise of reasonable diligence, have discovered and produced on her trial what is now claimed to be newly-discovered evidence; nor can we, with any degree of certainty, declare that it is such as to render a different result probable if a retrial was had. As to what would probably have occurred if a new trial had been granted, the court below was in a better situation to judge than this court can now be. We can perceive no possible prejudice created upon the mind of the court by anything which transpired at the hearing of the motion for a new trial, or that it abused the discretion vested in it by law in denying the motion. It has been repeatedly held by this court that applications for a new trial, urged upon the ground now being considered, are to be regarded with "distrust and disfavor." *People v. Sutton*, 15 Pac. Rep. 86, and cases cited.

There is no prejudicial error shown by the record, and the judgment and order should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

74 Cal. 578

PEOPLE v. RUSSELL *et al.* (No. 11,379.)

(Supreme Court of California. January 25, 1888.)

COUNTIES—BOARD OF SUPERVISORS—ORDINANCES—PUBLICATION.

Act Cal. March 14, 1883, § 26, relating to county and township government, provided that all ordinances passed by the board of supervisors should have an enacting clause in a certain form, and that no ordinance should take effect within less than 15 days after its passage, and before the expiration of the 15 days the ordinance shall be published for one week. *Held* that, under the section cited, the publication of an ordinance without the enacting clause was not a publication of the whole ordinance, and was not, therefore, sufficient to put the ordinance into operation.

In bank. Appeal from superior court, San Luis Obispo county; D. S. GREGORY, Judge.

This was an action against C. J. Russell and R. Brewster to recover a license fee provided for by an ordinance of the board of supervisors of the county of San Luis Obispo relating to licensing business. It appeared that the ordinance in question was published as required by the act of March 14, 1883, but the enacting clause was omitted in the publication. The court gave judgment for the plaintiff, and defendants appealed.

J. M. Wilcoxon, for appellants. *J. N. Turner*, for respondent.

THORNTON, J. The ordinance in this case was published without the enacting clause. By section 26 of the act of March 14, 1883, (St. 1883, p. 309,) entitled "An act to establish a uniform system of county and township governments," it is provided that the enacting clause of all ordinances of the board of supervisors shall be as follows: "The board of supervisors do ordain as follows." This enacting clause is a part of every ordinance. The section above referred to also provides: "On the passage of all ordinances, the votes of the several members of the board shall be entered on the minutes, and all ordinances shall be entered at length in the ordinance book. No ordinance passed by the board shall take effect within less than fifteen days after its passage; and before the expiration of the said fifteen days the same shall be published, with the names of the members voting for and against the same, for at least one week in some newspaper published in the county, if there be one, and, if there be none published in the county, then such ordinance shall be posted at the court-house door at least one week."

We are of opinion that the intention of the law-makers, in enacting that section of the statute, was that the ordinance should not take effect until it was published, and that the publication of the whole ordinance is required; not of a part of it. The publication of the ordinance, as in this case, where the enacting clause was omitted, was not the publication of the whole ordinance, and was not the publication which the law required. The ordinance under consideration, by reason of non-publication, never went into operation, and no licenses could be collected under it.

For these reasons we are of opinion that the judgment of the court below must be reversed, and the cause remanded, with directions to the court below to enter judgment for the defendants on the findings. So ordered.

We concur: SEARLS, C. J.; MCKINSTY, J.; TEMPLE, J.; PATERSON, J.; SHARPSTEIN, J.; MCFARLAND, J.

74 Cal. 567

In re GLENN'S ESTATE. (No. 12,102.)

(Supreme Court of California. January 25, 1888.)

EXECUTORS AND ADMINISTRATORS—ALLOWANCE OF DEMANDS—INTEREST ON CLAIM.

A claim against the estate of a decedent, allowed by the administrator, and afterwards duly approved by the judge of probate, bears interest from the date of approval by the judge of probate. *PATERSON, TEMPLE, and MCFARLAND, JJ.*, dissenting.

Commissioners' decision. In bank. Appeal from superior court, Colusa county; *E. A. BRIDGEFORD*, Judge.

This was a motion by the Consolidated Bank of Manchester, England, for an order that the administrator of the estate of *Hugh J. Glenn* should pay to the said bank interest on a claim allowed and approved against said estate in favor of *N. Ten Bosch & Co.* The order was refused, and claimant appeals.

William Barber, for appellant. *F. C. Lusk*, for respondent.

HAYNE, C. This is an appeal from an order refusing to direct the payment of interest upon a claim which had been allowed by the administrator and by the probate judge, and filed. The claim was for services rendered and money advanced to deceased in his life-time. It was allowed by the administrator on January 22, 1884, and approved by the judge on February 19, 1884. No order in relation to the payment of the claim was made until September 30, 1886, when the court ordered the principal to be paid, but refused to order the payment of interest. The appellant accepted the principal, reserving objections on account of the non-payment of interest. The only question argued is whether the claim drew interest after its allowance and approval.

Section 1504, Code Civil Proc., which in this respect is substantially the same as section 140 of the old practice act, (see *Laws 1851*, p. 465,) provides that "a judgment rendered against an executor or administrator, upon any claim for money against the estate of his testator or intestate, only establishes the claim *in the same manner as if it had been allowed by the executor or administrator and a judge.* * * *" This is an express provision that a judgment upon a claim has the same effect as an allowance of the claim. The converse of such a proposition must be true; that is to say, the allowance of a claim has the same effect as a judgment upon the claim. But a judgment upon a claim draws interest. *Pico v. Stevens*, 18 Cal. 377. Hence an allowed claim must draw interest. This conclusion is in harmony with numerous decisions which hold that for some purposes the allowance of a claim is a judgment. *Deck's Estate v. Gherke*, 6 Cal. 667; *Beckett v. Selover*, 7 Cal. 239; *Estate of Hidden*, 23 Cal. 363; *Estate of McKinley*, 49 Cal. 152; *Estate of Olivera*, 70 Cal. 184, 11 Pac. Rep. 624. It is true that the allowance is not conclusive upon the heirs. Code Civil Proc. § 1636; *Weihe v. Statham*, 67 Cal. 84, 7 Pac. Rep. 143. But this only amounts to saying that for some purposes it is not a judgment. As said in *Magraw v. McGlynn*, 26 Cal. 420: "Claims so allowed and approved pass into judgments of a qualified character only." For the purpose in hand, however, we think, as above stated, that an allowed claim is a judgment, and therefore that it draws interest. The courts of Texas, which are governed by statutes similar to ours, have reached the same conclusion. *Finley v. Carothers*, 9 Tex. 517. And we think the doctrine is a salutary one. The prompt settlement of estates depends to a great extent upon the wishes of the heirs and the executors or administrators. It is not wise to hold out inducements for their delay.

It is said that in *Estate of Selby* a contrary view was taken. As no opinion was written in that case, we are unable to say what was the view of the court. It may be that it supposed other questions were involved. But, however this may be, an unwritten opinion is not entitled to much consideration as authority.

It is proper to add that, since there was no agreement fixing the rate, interest must be at legal rates. As to whether a different rule would prevail where the parties had fixed the rate by agreement, we express no opinion.

We therefore advise that the order appealed from be reversed, with directions to the court below to order the payment of interest on the claim, from the date of its approval by the judge, at legal rates.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is reversed, and the court below directed to order the payment of interest on the claim, from the date of its approval by the judge, at legal rates.

We dissent. *Estate of Selby*, Myr. Prob. 125, affirmed March 26, 1877; *Estate of Olvera*, 70 Cal. 184, 11 Pac. Rep. 624. PATERSON, J.; TEMPLE, J.; MCFARLAND, J.

74 Cal. 571

MCFADDEN *et al.* v. BOARD OF SUP'RS OF LOS ANGELES CO. (No. 11, 833.)

(*Supreme Court of California.* January 25, 1888.)

1. WATERS AND WATER-COURSES—WATER COMPANIES—POWERS OF COUNTY SUPERVISORS. Under the provisions of Const. Cal. art. 14, § 1, and act Cal. March 12, 1885, authorizing the board of supervisors to fix the rates at which water shall be sold, rented, or distributed by a corporation furnishing water to the general public for profit, the board of supervisors of a county have no power to fix the rate at which water shall be sold, rented, or distributed by a corporation organized to furnish water to the stockholders only.

2. CORPORATIONS—STOCKHOLDERS—FAILURE TO SIGN ARTICLES AND BY-LAWS. A stockholder in a corporation is bound by the articles of incorporation and the by-laws of the corporation, whether he has signed them or not.

In bank. Appeal from superior court, Los Angeles county; A. BRUNSON, Judge.

This was a petition for a writ of mandate, brought by William McFadden, John Wagner, and others against the board of supervisors of Los Angeles county, directing them to fix the rate at which water should be furnished by the Anaheim Water Company. The writ was refused, and the plaintiffs appeal.

G. M. Holton and Albert M. Stephens, for appellants. J. G. McCallum, for respondent.

THORNTON, J. Petition for writ of mandate. The answer in this case sets forth that the Anaheim Union Water Company is a corporation formed under the laws of this state on the twenty-ninth of January, 1884, for the purpose of supplying water for hydraulic, irrigating, and domestic use to the owners and occupants of a district of 12,000 acres of land situated in Los Angeles county, and contained within certain limits which are set forth in the articles of incorporation. It further sets forth that the corporation above named duly adopted by-laws; which by-laws, as well as the articles of incorporation, have been signed by the stockholders thereof, except one of the plaintiffs herein named, John Wagner. These articles and by-laws are made part of the petition. By the by-laws, the directors of the corporation are authorized to charge the stockholders such sums for the water as may cover the ordinary expenses of the company. It further appears, from the answer, that the waters were acquired and held to be used on the lands of the stockholders, and not for sale, distribution, and rental or otherwise; and, from the by-laws, that no water shall be sold or used for any purpose on lands not covered by stock of the company, with a proviso allowing a stockholder to use water on other lands

on certain conditions, but the water is to be used by or sold to no one else but a stockholder.

The by-laws adopted, in their scope and extent, do not go beyond the power in the corporation to adopt them. In our view, they are not inconsistent with the constitution or laws of this state.

We think the answer in the particulars above set forth shows that the water was acquired and held for the use of the stockholders of the corporation only, and not for sale, distribution, or rental to the public generally. Nor is it intended that the water, or the agencies used for its distribution, was to be sold or rented or used in any way to accumulate a fund from which dividends were to be declared and paid. Under these circumstances, we do not think that the provisions of the constitution (article 14, § 1,) or of the act of March 12, 1885, (St. 1885, p. 95,) authorized the board of supervisors to fix the rates at which the waters of a corporation like the one involved herein, are to be sold, rented, or distributed. The stockholders have already fixed the mode of regulating what shall be paid for the use of water in the district in which their lands lie, and we are of opinion that the rates so fixed should govern. It will be observed that by these rates it is intended that the stockholders are to be charged such sums only as may cover the ordinary expenses of the company. These ordinary expenses only include the salaries to be paid, and the expense of repairing, and it may be extending, the ditches. The rates to be fixed under the act of 1885 by the board of supervisors of a county are in the cases where the waters controlled by the corporation are to be sold or distributed or rented to the general public for profit, to be distributed as dividends among the stockholders; in which case individuals not stockholders may procure water or not as they choose. In this case it is clearly apparent that the waters under the control of the corporation were acquired to be held and employed for the use of the stockholders only. An individual can certainly acquire water to be used on his own land. With such use a board of supervisors would have nothing to do. We know of no reason why individuals cannot associate themselves, take on a corporate form, and acquire water to be used on their own lands. When this is done, we are of opinion that a board of supervisors can have no more power over the rates to be paid by the stockholders than in the case of individuals.

It does not clearly appear whether John Wagner is a stockholder of the Anaheim Union Water Company or not. If he is a stockholder, he is bound by the articles of incorporation, and by-laws duly and regularly adopted, under section 301, Civil Code (and such we take the by-laws in this case to be,) whether he has signed them or not. As a stockholder, his only control over the fixing of rates is in voting for directors who are authorized to adjust such rates. If not a stockholder, he has no right to interfere in any way in the fixing of rates, or to call on the board of supervisors to fix the rates for water sold or used.

It follows from the above that the answer furnishes a defense in this proceeding; that the demurrer to it was improperly sustained; and that if the averments of the answer are true, no writ of mandate should be granted to the board of supervisors to fix the rates to be charged for water sold or distributed by the Anaheim Union Water Company. The judgment and order must therefore be reversed, and the cause remanded, with directions to the court below to set aside the judgment, and enter an order overruling the demurrer to the answer. Ordered accordingly.

We concur: SEARLS, C. J.; PATERSON, J.; TEMPLE, J.; MCKINSTRY, J.; MCFARLAND, J.

74 Cal. 569

PEOPLE v. YUT LING. (No. 20,344.)

(Supreme Court of California. January 25, 1888.)

1. TRIAL—VIEW OF PREMISES—ABSENCE OF JUDGE.

Defendant is entitled to a new trial where the judge does not accompany the jury upon a view. PATERSON and McFARLAND, JJ., dissenting.

2. SAME—MISCONDUCT OF JURY—SEPARATION.

In support of a motion for a new trial of an indictment for murder, on the ground of misconduct of the jury while on a view, an affidavit alleged that jurymen B. separated and refused to view the premises, and sat down and refused to follow his fellows, and that defendant was then in another part of the building; that affiant heard another jurymen ask to go out, as he did not propose to do any more. The counter-affidavit of the officer having charge of the jury stated that the jury had to pass a certain place one at a time, and affiant believed B. followed; that affiant told B. to follow him around a bunch of weeds, and that another jurymen was then with him; that he said he was sick, and wanted to get in the shade, and was not over 50 feet from affiant; that the rooms were too small to contain all, and while some were inside others were outside looking in at the windows, and others in an adjoining alley, but were never out of sight of each other for any considerable time. *Held*, that the motion was properly denied.

In bank. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

Indictment for murder. Defendant moved for a new trial, on the grounds: (1) That the jury viewed the premises without the presence of the judge or the defendant; (2) misconduct of the jury while viewing the premises. The affidavit of one of defendant's attorneys in support of the motion alleged that he accompanied the jury, "and that while so accompanying them one T. T. Barrett, a member of said jury instructed by said court to view the said premises, and further instructed not to separate from his fellow-jurymen, did separate, and refused to view the said premises, on the ground that he was not going to kill himself smelling around opium dens; and further, affiant heard the said jurymen to ask the sheriff O. J. Meade, to allow him to go out, as he did not pro-

pose to do any more; affiant further states that the said T. T. Barrett sat down and refused to follow his fellow-jurymen in viewing the said premises; affiant further states that while said Barrett was occupying the said seat spoken of that the defendant was not present, but in another part of said building, in charge of a deputy-sheriff." The counter-affidavit of R. H. Gillespie, a deputy-sheriff, says that he had charge of the jury, and Frank Bedford took charge of the prisoner, that "when we got to the railroad, there was a freight train there, and we all had to pass along by the water-tank, and had to go one at a time to get through * * * and I believe Mr. Barrett followed them; when they had got through and had gone on a little piece I halloed. * * * There was a bunch of grass and weeds there, and Barrett went around; and I told him to come this way, it was the best road. *Question.* Who was with Barrett when he went around that way? *Answer.* Mr. Edwards, [a jurymen;] and he said he was sick and had a headache, and wanted to get in the shade of the house. He was not over 50 feet from me." He also states that the China house rooms were too small to contain all the jurymen, and that while some of them were in the house viewing the rooms, some stood outside and looked in the windows, and some were in the alley adjoining, but were never out of sight of each other for any considerable time. The motion was denied, and defendant appealed.

E. D. Edwards, for appellant. *George A. Johnson*, Atty. Gen., for the People.

PER CURIAM. There was no misconduct of the jury in this case. It never separated. When the jury went to view the premises, the judge of the court should have gone along with them. It was the right of defendant to have the judge accompany the jurors when they went to take this view. As the judge did not do this, the judgment and order denying a new trial must be reversed, and the cause remanded, that a new trial may be had. Ordered accordingly.

We dissent: PATERSON, J.; McFARLAND, J.

74 Cal. 549

PEOPLE *ex rel.* MARSHALL, Att'y Gen., *v.* PARVIN *et al.* (No. 11,929.)

(*Supreme Court of California.* January 25, 1888.)

1. CONSTITUTIONAL LAW—TITLES OF LAWS—AMENDMENT BY TITLE.

Under Const. Cal. art. 4, § 24, providing that "every act shall embrace but one subject, which subject shall be expressed in its title. * * * No law shall be revised or amended by reference to its title; but in such case the act revised or section amended shall be re-enacted and published at length as revised or amended," the Cal. act of April 15, 1880, amending by reference to its title, Pol. Code, § 3481, in reference to the organization of swamp and overflowed land districts, and re-enacting and publishing at length said section 3481, as amended, is valid. McFARLAND, J., dissenting.

2. PUBLIC LANDS—SWAMP LANDS—RECLAMATION DISTRICTS—STATUTES—CONSTRUCTION.

Act Cal. April 15, 1880, as amending Pol. Code, § 3481, providing that the owners of more than two-thirds of any body of lands within any reclamation or swamp-land district, and in which the lands have not been reclaimed, desiring to have the said body of lands set off from such district, must show that said body of lands, is capable of independent reclamation, does not authorize the setting off of an independent district within the limits of a reclamation district formed prior to the adoption of the Political Code, and not reorganized under the Code.

In bank. Appeal from superior court, Sacramento county; T. B. McFARLAND, Judge.

This is an action by the people of the state of California, by E. C. Marshall, attorney general, against E. R. Parvin and others, for a judgment declaring that the defendants have usurped, intruded into, held, and exercised powers

and franchises as trustees of the pretended reclamation district No. 366, without authority of law; and that the said pretended district has no legal existence. Decree for plaintiffs in the superior court. Defendants appeal.

A. P. Catlin and McCune & George, for appellants. *G. W. Gordon*, for respondents.

McKINSTRY, J. Section 43 of the act of March 28, 1868, "to provide for the management and sale of lands belonging to the state," provided that swamp and overflowed land districts, previously formed, could reorganize under that act in the manner therein set forth. In pursuance of the section, and on the tenth day of June, 1871, reclamation district No. 3, which was originally formed June 20, 1861, was organized under act of 1868. The Political Code took effect January 1, 1873, when section 3481 of that Code read as follows: "If the holders of certificates of purchase on patents for lands within any district formed prior to May 28, 1868, and in which the lands have not been reclaimed, desire to have their lands set off from such district, they must, in addition to the petition in section 3446, show to the board of supervisors that their lands are capable of an independent reclamation." And April 15, 1880, section 3481 was amended, (if the amendatory act is valid,) so as to read: "If the owners of lands representing more than two-thirds of any body of lands within any reclamation or swamp-land district, and in which the lands have not been reclaimed, desire to have the said body of lands set off from such district, they must, in addition to the petition required by section 3446, show to the board of supervisors that the said body of lands is capable of an independent reclamation." On the twenty-second of July, 1880, the board of supervisors of Sacramento county, wherein the territory included in reclamation district No. 3 is situated, by order set apart a portion of such territory as and for a separate and independent reclamation district, called, and to be called, "Reclamation District No. 366." This action is by the people of the state for a judgment declaring that the defendants have usurped and exercised powers and franchises as trustees of the pretended reclamation district No. 366, without authority of law; that the said pretended district has no legal existence. Decree was entered for plaintiffs in the superior court.

It is contended by respondent that the reclamation district No. 366 (so called) has no legal existence for two reasons: *First*. Because the act of April 15, 1880, is not a valid law, in that the title thereof does not conform to the mandatory requirement of the constitution: "Every act shall embrace but one subject, which subject shall be expressed in its title." Article 4, § 24. *Second*. Because neither section 3481, Pol. Code, as the same read when the Code was adopted, nor the section, as it purports to have been amended by the act of April 15, 1880, applies to, or authorizes a division of, swamp-land districts, created or reorganized under the act of March 28, 1868.

1. The Political Code constitutes a single statute, thus entitled: "Title of the Act: (1) This act shall be known as the Political Code of the state of California." Whether, under the present constitution, the legislature would have power to enact a law so generally entitled, is a very serious question; but under the constitution existing when the Code was adopted the title was sufficient, and the Code continues in force. The section of the constitution, after providing as above quoted, proceeds: "No law shall be revised or amended by reference to its 'title' (that is, by reference to its title *alone*;) but in such case the act revised or section amended shall be re-enacted, and published at length as revised or amended." There is no question here but that section 3481 was "re-enacted and published at length;" and the title of the act amended is very clearly referred to as the "Political Code." With reference to a statute passed since the constitution of 1879 took effect, there can be no doubt that a section of such a statute—the statute itself being properly entitled—may be amended by referring, in the title of the amendment, to the

title of the statute amended, and re-enacting the section as amended. If, in such case, the title of the original statute did not state its "subject," both the statute and any amendment of it would be void. But it is enough if the title of the statute is recited; it is *not* necessary that the subject of the particular section amended shall be stated in the title of the amendatory act. It is to be understood, of course, that if any subject shall be embraced in a section of an act passed under the present constitution, which shall not be expressed in the title of the act, the section is void. Article 4, § 24. It follows, also, that under pretense of amending a particular section, the legislature cannot legislate upon a subject not embraced in the title of the original act. If it be said that the title of the amendatory act of April, 1880, does not express the subject, the reply is that the constitution does not require, in case of an amendment, that the subject shall be any more fully stated than it is stated in the *valid statute* amended.

Each article of the Political Code is preceded by head-notes numbered to correspond with the sections following, and purporting to give, in brief form, the subject of each of such sections. It would sometimes give fuller notice to the members of the legislature if the title to a bill for amending a section of the Code embraced a statement of the matter contained in the appropriate head-note, or its equivalent. The head-note to section 3481, however, is "un-reclaimed lands may be set off in a separate district;" and even this does not indicate that such district may be formed within another already existing. But the constitution only *requires* that the title of the act which it is proposed to amend shall be clearly mentioned or recited in the act amending a particular section. This being done, the sufficiency of the title of the amendatory act depends upon the sufficiency of the title of the original act; and as the title of the Political Code was sufficient under the former constitution, we are not prepared to say that the Political Code is a void act, because its title does not conform to the mandate of the constitution, adopted after the Code became an operative law.

2. We are of opinion the act of April 15, 1880, does not authorize the setting off of a new and independent district, within the limits of a reclamation district formed or organized prior to the adoption of the Political Code, and not reorganized under the Political Code. Section 3478 of the Political Code, provides that districts formed under laws in force prior to May 28, 1868, may reorganize under the provisions of the Code. And section 3489 provides a mode by which any reclamation districts organized or erected prior to the Code, may "reorganize and consolidate" under the Code. The provisions of the Political Code, with reference to the levy and collection of assessments, have no application to reclamation district No. 3. It has been so decided by this court. (*Reclamation Dist. No. 3 v. Kennedy*, 58 Cal. 124.) Why should section 3481 of the same Code be held to apply to and authorize a division of reclamation district No. 3? True, section 3481, as originally adopted, provided for the formation of new districts only within those formed prior to May 28, 1868. But the amendment of 1880 does not necessarily imply an intent to authorize the future formation of new districts within districts formed or organized under the law of 1868. When 3481 was amended, section 3478—which permitted districts formed under laws in force prior to the law of 1868 to reorganize under the Code—was suffered to remain unchanged. We may reasonably presume the purpose of the amendment of 1880 was to provide for the formation of new districts only *within* those formed or reorganized under the Political Code, and not to authorize the formation of new districts within those formed prior to the Code, which were not reorganized under the Code.

Since the amendment of section 3481, the Code is to be read as if the section 3481, as amended, had been incorporated in it from the beginning. So reading it, there is little difficulty in construing 3481 as intended to permit the formation of new, separate or independent districts only within the territory

of the districts formed or reorganized under the provisions of the Political Code

Section 3 of the Political Code expressly provides that no part of it shall be held to be retroactive unless so expressly declared. When the legislature has launched a scheme or system, to be carried into operation in the future, for the acquisition of private rights or the disposition of public property, evidently intended to be exhaustive of the subject of the legislation, the whole plan is to be considered together, and the language used in one portion of the statute (unless the contrary is clearly indicated) should not be given a broader effect than its purpose as part of the scheme. The distribution of the Code is merely arbitrary, and for convenience of reference, and by it no force is added to the suggestion that a particular section is to be given an independent effect, without consideration of the language of the other sections.

The Political Code furnishes a system for the reclamation of swamp and overflowed lands, complete in itself, and differing widely, in various particulars, from the system—also intended to be complete—provided by the act of 1868, or by any other previous act. The provisions of the Code relating to the formation and organization of reclamation districts; to the petition to be presented to the supervisors, its contents, by whom signed and verified and how published; to the order of approval, the action of the register, making of by-laws, election of officers, employment of agents, and their duties; to the levy and collection of assessments, etc.,—in short, to all other of the statutory steps to be taken or acts to be done,—relate to reclamation districts to be formed under the Political Code. In like manner, section 3481, as amended, should be held to relate to a setting off from districts formed or reorganized under the Political Code.

Judgment and order affirmed.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; PATERSON, J.

TEMPLE, J. I concur on the ground that the statute did not authorize the formation of the new districts.

McFARLAND, J. I concur in the judgment upon the second ground stated in the opinion of Mr. Justice McKINSTRY; but I think that the act of April 15, 1880, is void, because there is no "subject expressed in its title." We have in this state a *Code system*, which embraces every imaginable subject of legislation. It is nominally divided into four Codes, to each of which is given a name; but neither is confined to any particular subject or subjects, nor is either complete in itself. They are inseparably interwoven with each other. The Penal Code, for instance, does not define all public offenses; it does not contain a statement of the criminal jurisdiction of the courts; and on the trial of a person charged by indictment or information, recourse to rules and principles stated in the other Codes is constantly necessary. The Code of Civil Procedure and the Civil Code are, of course, indissolubly blended; while the Political Code is a hotch-potch in which a great deal of everything—civil and criminal—substantive law and procedure—is indiscriminately mixed up. Together, however, they form a complete system of laws. But the subjects of legislation embraced in this system are innumerable. Therefore the mere statement in the title of an act of the legislature that it is to amend some section of *this system*, gives no more notion of what the act is about than if the statement were "An act to amend the general laws of the state."

74 Cal. 586

GOLDTREE *et al.* v. SWINFORD *et al.* (No. 12,014.)

(*Supreme Court of California.* January 26, 1888.)

PARTNERSHIP—FICTITIOUS FIRM NAMES—CERTIFICATE OF PARTNERS—EXECUTION BY ATTORNEY IN FACT.

Under Civil Code Cal. § 2466, requiring partners doing business under a fictitious name to file with the clerk of the county where the principal place of business is situated.

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uated a certificate showing the full names of all the partners, and their places of residence, and section 2468, providing that the certificate must be signed by the partners, and acknowledged, and that the partnership can maintain no action on partnership contracts until such certificate is filed and publication made, a certificate to which the names of one of the partners is attached by an attorney in fact, under a power of attorney authorizing him to commence and prosecute suits, and to execute and acknowledge all instruments or power to effectuate all or any of the premises appertaining or belonging to the principal, is sufficient, although the power of attorney was executed prior to the enactment of the law requiring certificates.

In bank. Appeal from superior court, San Luis Obispo county; D. S. GREGORY, Judge.

This was an action by N. Goldtree, I. Goldtree, and M. Goldtree, partners doing business under the firm name of Goldtree & Co. on a promissory note against John M. Swinford and M. C. Swinford. Civil Code Cal. § 2466, provides that, "except as provided in the next section, every partnership transacting business in this state under a fictitious name, or a designation not showing the names of the persons interested as partners in such business, must file with the clerk of the county in which its principal place of business is situated a certificate stating the names in full of all the members of such partnership, and their places of residence, and publish the same once a week for four successive weeks," etc. Section 2468. "The certificate * * * must be signed by the partners, and acknowledged before some officer authorized to take acknowledgment of conveyances of real property. * * * Persons doing business as partners contrary to the provisions of this article shall not maintain any action upon or on account of any contracts made or transactions had in their partnership name, in any court state, until they have first filed the certificate and made the publication herein required." Plaintiffs alleged a compliance with these provisions, which allegations defendants denied, and set up that the name of N. Goldtree was signed by Isaac Goldtree, his attorney in fact. Judgment for defendants, and plaintiffs appeal.

J. M. Wilcoxon, for appellants. *T. H. Laine* and *V. A. Gregg*, for respondents.

SHARPSTEIN, J. In their complaint the plaintiffs, N. Goldtree, I. Goldtree, and M. Goldtree, allege that they are partners doing business under the firm name of Goldtree & Co., and as such partners, prior to the commencement of this action, filed with the clerk of the county in which the principal place of business of said partnership is now and has at all times been situated a certificate, stating the names of the members of said partnership, in full, and each of their places of residence, signed by all the plaintiffs, and acknowledged by them before an officer authorized to take acknowledgments of conveyances of real property, and by such officer certified as required to be certified to acknowledgments of conveyances of real property, and thereafter, and before the commencement of this action, published the same once a week for four successive weeks in a newspaper published in said county. This is followed by allegations sufficient to constitute a cause of action in favor of the plaintiffs against the defendants.

Answering the complaint, the defendants aver they have no information or belief upon the subject as to whether plaintiffs have made, filed, or caused to be published, at any time, the certificate mentioned and referred to in their complaint, and on that ground they deny that plaintiffs ever made, acknowledged, or caused to be published, said certificate.

This is the only issue which it is necessary now to consider. The finding of the court upon this issue is in favor of the defendants. This finding is attacked on the ground that it is not justified by the evidence. The record shows that the plaintiffs introduced in evidence a certificate *personally* signed and acknowledged by all the plaintiffs, except N. Goldtree, who signed and acknowledged the same by Isaac Goldtree, as his attorney in fact. An affidavit of publication of said certificate was also introduced, after which plaintiffs intro-

duced a power of attorney from N. to Isaac Goldtree, and the latter testified that he communicated to the former the fact of his having signed his name to the certificate about March 12, 1881.

Appellants insist that the evidence shows a sufficient compliance with sections 2466-2468, Civil Code, to entitle them to maintain this action. Respondents deny it, and insist that plaintiff N. Goldtree, one of the partners, did not sign or acknowledge the certificate according to the requirements of said sections of the Code; that the requirement "must be signed by the partners" is not satisfied by a signing by an attorney in fact of one of the partners, under a general power such as this is, executed eight years before the passage of the act requiring certificates to be signed, acknowledged, filed, and published, as a condition precedent to the right to maintain an action upon a contract made in the partnership name. This power of attorney is general, and quite full, as the following extract shows: "To commence and prosecute unto final judgment and execution any suit or suits, action or actions, real, personal, or mixed, which he may deem proper for the recovery, possession, or enjoyment of any matter or thing which is or may hereafter be due, payable, owing, belonging, accruing, or appertaining to me, for or by reason of the premises, or any part thereof, and, in any such suits or actions, for me to appear and plead before any court or tribunals having jurisdiction thereof, and all stipulations undertaken, recognizance, and other requisites, in any suits or actions, and any questions arising on the same, by the arbitration or other compromise, and of all receipts and recoveries in the premises, due acquittances and discharges to execute and deliver, and generally to do and perform all matters and things, transact all business, make, execute, and acknowledge all contracts, orders, deeds, writings, assurances, and instruments which may be requisite, or proper to effectuate all or any of the premises or any other matter or thing appertaining or belonging to me, with the same powers, and to all intents and purposes with the same validity, as I could if personally present."

"An agent may be authorized to do any acts which his principal might do, except those to which the latter is bound to give his personal attention." Civil Code, 2304. "Every act which, according to this Code, may be done by or to any person, may be done by or to the agent of such person for that purpose, unless a contrary intention clearly appears." *Id.* 2305. In the clause of the power of attorney above quoted the agent has power to commence and prosecute suits; and to execute and acknowledge all instruments or power to effectuate all or any of the premises, or any other matter or thing appertaining or belonging to the principal. The authority with which an agent is invested is not necessarily confined to the performance of those actions alone which are authorized by the bare words in which an authority is conveyed. On the contrary, it is rarely so confined. *Evans, Prin. & Ag.*, 136. We think the signing and acknowledgment of the certificate in question were within the authority conferred on the agent by the power of attorney. And we think that the certificate so signed and acknowledged satisfied the requirements of the Code. The object of those requirements is doubtless quite as well subserved by having it signed and acknowledged by an agent as it would be if it were personally signed and acknowledged by the principal. And the provisions of the Code, and all proceedings under it, are to be liberally construed, with a view to effect its objects and to promote justice. Civil Code, 4.

We attach no importance to the fact of this power of attorney having been given long before the provisions of the Code requiring certificates to be executed and filed were passed.

Judgment and order reversed, and cause remanded for a new trial.

We concur: SEARLS, C. J.; MCFARLAND, J.; TEMPLE, J.; THORNTON, J.; PATERSON, J.; MCKINSTRY, J.

74 Cal. 590

BURGESS v. RICE. (No. 12,127.)

(Supreme Court of California. January 27, 1888.)

1. EJECTMENT—DEFENSES—PARTNERSHIP IN LANDS ACQUIRED FROM THE STATE.

It is no defense to an action of ejectment for lands purchased from the state that plaintiff and defendant's grantors entered into a partnership to acquire the lands and make improvements thereon, and that he had purchased the interest of his grantors therein, and no settlement of the partnership affairs had been made, especially where it appears that the plaintiff filed on the land in his own name, and paid for the same with his own funds, that it was the understanding of the partners that each should secure and own his own land, and that if any part of the funds used were partnership funds it was a loan by the partnership, and that the improvements made by each claimant were not to be considered a part of the partnership property.

2. SAME—LANDLORD AND TENANT—ESTOPPEL TO DENY TITLE.

In an action of ejectment to recover land purchased by plaintiff from the state against the defendant, who had entered on the premises under a lease from plaintiff, and after the termination of the lease refused to leave the premises, the defendant cannot set up title in himself by purchase from one who claimed to be a partner with plaintiff in the acquisition of the land.¹

Department 1. Appeal from superior court, Trinity county; T. E. JONES, Judge.

Action of ejectment by George W. Burgess against Charles B. Rice. Judgment for plaintiff, and defendant appeals.

Gillett & Johnson and *D. G. Reid*, for appellant. *J. W. Turner*, for respondent.

PATERSON, J. The property in controversy is described as the E. $\frac{1}{2}$ of section 16, township 3 S., range 6 E., H. B. and M. The plaintiff, while in the occupation of the lands on October 15, 1875, filed an application to purchase from the state. In accordance with his application, proof, and payment, a patent was issued to him for the lands in his own name, August 28, 1885. In his answer the defendant denied that the plaintiff was the sole owner of the property; and in his cross-complaint alleged that the land described in the complaint is a part of a tract of land known as the Poison Camp range; that J. C. French, Enos Peabody, and plaintiff, prior to the commencement of this action, formed a partnership for the purpose of raising stock; that these parties built houses, barns, corrals, etc., upon said range, with partnership funds; that afterwards Peabody sold his interest to Burgess and French, and on the twenty-sixth of February, 1883, French sold his interest in the range to defendant; that the defendant entered into possession under his deed from French; that there has never been an accounting of the improvements placed upon said range by any of the partners. Defendant, therefore, asked for a decree adjudging that he is the owner of an undivided half interest in the

¹A tenant is estopped from denying the title of his landlord while retaining possession of the premises. *School-Dist. v. Long*, (Pa.) 10 Atl. Rep. 769; *Rector v. Gibbon*, 4 Sup. Ct. Rep. 606; *Henderson v. Miller*, (Mich.) 19 N. W. Rep. 197; *Jochim v. Tibbells*, (Mich.) 14 N. W. Rep. 690; *Whitford v. Crooks*, (Mich.) 14 N. W. Rep. 675; *Parker v. Nanson*, (Neb.) 11 N. W. Rep. 865; *Bertram v. Cook*, (Mich.) 6 N. W. Rep. 868; *Morrison v. Bassett*, (Minn.) 2 N. W. Rep. 851; *Mauldin v. Cox*, (Cal.) 7 Pac. Rep. 804; *Sawyer v. Sargent*, (Cal.) 7 Pac. Rep. 120; *Gable v. Wetherholt*, (Ill.) 6 N. E. Rep. 453. So is one who enters at the instance and with the consent of the tenant. *Standley v. Stephens*, (Cal.) 6 Pac. Rep. 420; *Pardee v. Gray*, (Cal.) 6 Pac. Rep. 389. So is an assignee of the lessee. *Rector v. Gibbon*, 4 Sup. Ct. Rep. 606. Nor can a tenant acquire and set up a title adverse to that of his landlord without first surrendering possession. *Pengra v. Munz*, 29 Fed. Rep. 880; *Parker v. Nanson*, (Neb.) 11 N. W. Rep. 865; *Lansman v. Drahoss*, (Neb.) 4 N. W. Rep. 956; *Sawyer v. Sargent*, (Cal.) 7 Pac. Rep. 120; *Gable v. Wetherholt*, (Ill.) 6 N. E. Rep. 453. It is not enough that he has abandoned the premises for a time, and afterwards entered under the new title, unless he has given notice of such abandonment to the original landlord. *Juneman v. Franklin*, (Tex.) 3 S. W. Rep. 562. But a tenant may show that since the commencement of the tenancy his lessor has conveyed to some one else. *McGuffie v. Carter*, (Mich.) 4 N. W. Rep. 211.

lands described in the complaint, and that the land be divided between plaintiff and defendant in such manner as may be equitable and just.

It is difficult to perceive upon what theory defendant seeks the equitable relief prayed for or in what respect the facts stated constitute a defense in an action of ejectment. The ranch referred to was a portion of the public domain of the United States until the land in controversy was patented to the plaintiff. Conceding that there was a partnership, as alleged by the defendant, and that houses, barns, and corrals were built upon said range with partnership funds and for partnership purposes, and that no accounting has been had, these facts of themselves would not make the plaintiff a trustee with respect to the title acquired from the state. The facts stated in the cross-complaint, if true, may be sufficient to entitle the defendant to an accounting from the plaintiff, concerning the partnership funds, stock and improvements, but can in no way affect the title of the plaintiff to the real estate in controversy.

However this may be, it is sufficient to say that the findings of the court are in favor of the plaintiff upon every material allegation, and that the evidence is ample in support thereof. The evidence shows that the plaintiff filed upon the land, in his own name, and paid for the same with his individual funds; that it was the understanding of all the partners that each should secure and own his own land, the land claimed by him; that the improvements all rested upon the surface of the ground except the fences, (there is nothing to show the character of the improvements upon the land in controversy;) that if any portion of the purchase price was partnership funds, it was a loan to plaintiff by the partnership; that the improvements on each claim were to be owned by the claimant, and were not considered as a portion of the partnership assets.

It is a conclusive answer to the claim of the defendant, furthermore, that on the ninth day of March, 1883, he entered under a lease by the terms of which plaintiff leased and demised unto the defendant "all of his interest in the lands known as the Poison Camp ranch and range." Also his undivided half of the sheep on said range at "a yearly rent of seventy-five cents per year for each sheep delivered, * * * said lease being for the period of two years from date." The plaintiff testified: "A portion of the premises described in the complaint are the same as those described in the lease,—those 320 acres of land that appeared in the lease. Under the lease Rice entered into the occupancy of the premises now in controversy. He paid me for the first year's rent, and for the second he paid me all except \$12.75. After the termination of the lease I served a notice upon Rice to quit and vacate the premises," etc. The court found the facts above stated to be true,—and the finding is supported by evidence,—and that, at the time of the commencement of this action, the defendant was and still is in the occupancy thereof without the consent of plaintiff, and against his will; and that the defendant, by reason of his leasing the premises from plaintiff and his occupancy under the lease and payment of rent, was estopped from denying the title of the plaintiff, or claiming any interest in the premises adversely to him. Judgment affirmed.

We concur: MCKINSTRY, J.; TEMPLE, J.

74 Cal. 598

DALLEMAND v. ODD FELLOWS' SAV. BANK *et al.*

(MARYE *et al.*, Intervenor.) (No. 12,153.)

(Supreme Court of California. January 27, 1888.)

BANKS AND BANKING—SAVINGS BANKS—REORGANIZATION—SUBSCRIPTION BY DEPOSITORS TO CAPITAL STOCK.

A savings bank being in financial straits, the depositors met and agreed to have it incorporated as a bank of capital. It was agreed to open books for subscription to stock, to give the depositors preference in the subscription, and to accept in pay-

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ment of stock the funds of such as had money in the bank. A considerable amount of stock was taken of which amount nearly all was deposited in bank, including the fund subscribed by depositors; and the parties so subscribing, without waiting for all the stock to be taken had the bank incorporated, organized, and elected officers, and took charge of the affairs of the bank. The subscription to stock was in the ordinary unconditional form. The bank soon suspended, and was turned over to the board of directors for liquidation. The board proceeded to convert the assets into cash, and to pay dividends on the deposits, excluding those whose deposits had been applied on their stock accounts. *Held* that these stockholders were not entitled to come into court and claim that their subscriptions to the stock were on condition that the whole amount of the capital stock be taken, and to be relegated to their rights as depositors.

In bank. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Action by A. Dallemand, for himself and 77 other stockholders, against the Odd Fellows' Savings Bank, and David Hunter and others, directors, George T. Marye, Jr., and others on behalf of himself and all (about 3,700) the other depositors of said bank, intervenor. Judgment for defendants, and intervenors and plaintiffs appeal.

Chas. J. Swift, (*D. M. Delmas*, of counsel,) for appellants. *C. L. Tilden*, for respondents. *Arthur Rodgers*, for intervenors.

SHARPSTEIN, J. The controlling facts of this case are stated with sufficient fullness, we think, in the following extract of an opinion filed by the court below on overruling a demurrer to the plaintiffs complaint:

"In this action, it appears that the corporation defendant was originally a membership savings bank, incorporated October 13, 1866, as distinguished from one based upon the guaranty of a capital stock. In the year 1878, and prior thereto, there was a great stress upon the administration, by reason of repeated runs, occasioned by panics among the depositors. To obviate the perils then threatening the bank's financial existence, at a meeting of the depositors held on the twenty-fourth day of June, 1878, it was determined to make the bank one of capital stock, reorganizing under section 300, Civil Code; it being hoped that such action would enhance the financial repute of the corporation. On the first day of August, 1878, the corporation also resolved to reincorporate. In accordance with the project, it was determined by such of the depositors as were sanguine in that regard, to subscribe themselves, and to open a subscription for capital stock to the amount of \$250,000; to be divided into 2,500 shares of \$100 each; to give the depositors the preference as subscribers; no one person to take more than \$5,000, and to accept as payment the funds of such as had moneys in the bank. The subscription was effected to the extent of about \$133,500, of which amount \$128,975 was actually deposited in bank, including as well funds subscribed by depositors as also moneys actually paid into the bank by others, not depositors, for stock; and the parties so subscribing thereupon, without waiting until the completion of stock had been subscribed, executed the articles of incorporation, reciting that stock had been subscribed, and thereafter organized, elected directors and officers, and passed by-laws, and relieved the old board and depositors of the management of the bank, which was concurred in legally, so far as appears by all parties interested. The bank, however, did little business; some deposits were received; some investments made; but owing to the continued calls of depositors, the bank still declined in business; and, finally, on the fifth day of February, 1879, was forced practically to suspend, the business of liquidation being left to the board of directors. This board proceeded to call in as rapidly as it could the outstanding assets, to reduce them to cash, and to pay dividends, which thus far, have amounted to 65 per cent. of the deposits; the stockholders, who had handed over their deposits on account of stock subscription being excluded from participation in the dividends so declared by the directors. These stockholders now come into court

for relief, claiming that their subscriptions were only conditional on the event of the entire \$250,000 being subscribed; that that amount never actually was subscribed; that the proceedings had in the way of incorporation were inchoate, for the reason of the failure of the condition, and that they, the stockholders, should be relegated to their original *status* as depositors, and should have their share in the dividends thus far declared made good to them, and be put on a standing of equality with the remaining depositors in all respects. On the other hand, counsel representing the depositors, who are not stockholders, claims that the subscription was not a conditional one; that the plaintiff stockholders waived any condition, if such existed, by incorporating by their articles of incorporation, and by their proceeding to manage the bank as if the old association had been merged in the stockholding organization."

The subscription for said capital stock was made by each of the subscribers signing an instrument in writing, of which the following is a copy:

"SUBSCRIPTIONS OF THE CAPITAL STOCK OF THE ODD FELLOWS' SAVINGS BANK.

"Whereas, the Odd Fellows' Savings Bank, a corporation duly incorporated under the laws of the state of California, and having its principal place of business in the city and county of San Francisco, in said state, has resolved at a meeting of said corporation, held this twenty-fourth day of June, A. D. 1878, to create a capital stock for said bank, of two hundred and fifty thousand dollars, (\$250,000) divided into twenty-five hundred shares (2,500) of one hundred dollars (\$100) each, as provided in section 300 of the Civil Code of the State of California.

"Now, therefore, we, the undersigned, do hereby subscribe for the number of shares of said capital stock written opposite to our respective names, and we do hereby agree to pay for the same at the time and in the manner required by said corporation. Dated San Francisco, June 24, 1878. Names,—— No. of shares, —— Amount, —— Residence, ——"

The plaintiff subscribed and paid for 40 shares, \$4,000. After that he availed himself of the rights and privileges of a stockholder, and did not assert or claim that his relation to the corporation was other than that of a stockholder, until he commenced this action. He now contends that he never became a stockholder, because it required a subscription of the entire capital stock provided for in the articles of incorporation, to constitute the Odd Fellows' Bank, an incorporation, and that his subscription was upon the condition that the whole amount should be subscribed.

His subscription was not made on any such express condition, and the law of this state, so far as we are advised, does not make the incorporation of a bank, or its right to commence business as such, depend upon the subscription of the *entire* amount of stock provided for in the articles of incorporation. "The subscription of the entire capital provided by the articles of association or charter of a corporation is ordinarily not a condition precedent to the consummation of the contract of membership and formation of a corporation." 1 Mor. Corp. § 57.

It is not shown that any material errors were committed during the trial of this case, and the findings of fact are justified by the evidence. We think the conclusions of law fully warranted by the facts found.

Judgment and order denying the motion for a new trial affirmed.

We concur: SEARLS, C. J.; McFARLAND, J.; THORNTON, J.; PATERSON, J.

74 Cal. 579

BYRD v. REICHERT, Register of State Land-Office. (No. 12,372.)

(*Supreme Court of California.* January 26, 1888.)

PUBLIC LANDS—UNDER STATE LAWS—RIGHT TO PURCHASE—CONTEST—RES ADJUDICATA.

Where a person has made application to purchase land from the state, and three other persons have made applications, each asking to purchase distinct parcels of

the land described by the original applicant, and all three cases are referred to the same court, the fact that the court decided in favor of the original applicant's right to purchase as to two of the parcels does not entitle him to a peremptory writ of mandate to compel a conveyance of the whole of the tract claimed, before the determination of the right to purchase in the third contest.

Commissioners' decision. Department 1. Appeal from superior court, Sacramento county; J. W. ARMSTRONG, Judge.

Application by Pleasant Byrd for a peremptory writ of mandate to compel Theodore Reichert, register of the state land-office, to convey to him certain swamp and overflowed land. The writ was granted, and Reichert appeals.

Geo. A. Johnson, Atty. Gen., and *Frank D. Ryan*, for appellant. *A. P. Cottin*, for respondent.

BELCHER, C. C. The respondent, Pleasant Byrd, obtained a peremptory writ of mandate, commanding the appellant, as register of the state land-office, to prepare, have signed, and issue to him, respondent, a patent for 960 acres of swamp and overflowed land in Tulare county, described as section 1, and the E. $\frac{1}{2}$ of section 2, in township 21 S., range 21 E., Mount Diablo meridian.

The facts involved in this controversy are as follows: The respondent made application to purchase the above-described section and a half of land, and on the eighth day of April, 1873, received from the register of the state land-office a certificate of purchase for the same. On the third day of April, 1884, one Seth Smith made application to purchase a part of the same land, and on the fifth day of April, 1884, one John H. Harter made application to purchase another part of the same land, and on the first day of February, 1887, one E. O. Miller made application to purchase still another part of the same land. On the sixth day of June, 1884, upon demand of Smith and Harter, the contests arising on their applications were referred for adjudication to the superior court of Tulare county, and on the fourth day of May, 1887, upon demand of Miller, the contest arising on his application was referred for adjudication to the same court. Actions to determine their contests were commenced in due time by both Smith and Harter, and such proceedings were afterwards had in them that final judgment was entered in the Harter case on the fourth day of April, 1887, and in the Smith case on the sixteenth day of May, 1887. These judgments were alike, and by them it was adjudged and decreed that Smith and Harter had no right to purchase any part of the lands applied for by them, but that Byrd, defendant there and respondent here, was entitled to purchase the land described in his certificate of purchase and the whole thereof, and, upon making full payment, to receive from the state a patent for the whole of said lands. Copies of these judgments, properly certified, were filed in the office of the register of the land-office on the twentieth day of May, 1887, and thereupon, having made proof, satisfactory to the register, that full payment had been made, and having surrendered his certificate of purchase, respondent requested the register to take the necessary steps to have a patent for all the land described in the certificate issued to him; but the register refused, and still refuses, to take any steps towards the issuing of a patent for that part of the land which was embraced in Miller's application, and was not embraced in the Smith and Harter applications. Thereupon this proceeding was commenced.

The question for decision is, was the respondent entitled, upon his demand, to have a patent executed and delivered to him for all the land which he claimed? It is insisted for respondent that a similar question was involved in the cases of *Laugenour v. Shanklin*, 57 Cal. 70, and *Cunningham v. Shanklin*, 60 Cal. 118, and that, under the decisions in those cases, he is clearly entitled to the relief which he obtained in the court below. The cases referred to were applications for writs of mandate against the surveyor general of the

state, and the question was whether, after a contest in regard to the right of certain parties to purchase state land had been referred to the proper court and had been there tried and determined, a new party could come in and make application to purchase the *same land* and have his contest referred to the court for trial. It was held that it was the duty of the surveyor general to obey the directions of the court contained in the judgment upon the first contest, and that the state and its officers were estopped from selling the same land to an applicant who filed his claim pending the action, or subsequent thereto, and that the reception and filing of such an application did not create such a contest as authorized a reference to the court under section 3414 of the Political Code. From this statement it is apparent that the questions decided in those cases were not the same as, or similar to, that presented here. The land which Miller made application to purchase was not the *same land* as that involved in the contest of either Smith or Harter. In their cases the only issues presented and tried were whether they, or Byrd, had the right to purchase the parcels of land for which they had made application, and no question was, or could have been, raised as to whether Miller had the right to purchase the parcel claimed by him. The Code provides that, where a contest has arisen in the state land-office between opposing applicants for the purchase of lands belonging to the state, and has been referred to a court for determination, and an action has been commenced to determine it, the production of a certified copy of the order of reference "gives the court full and complete jurisdiction to hear and determine the action." Section 3415, Pol. Code. But if there has been no special order referring such a contest as provided in section 3414 of the Political Code, the courts can acquire no jurisdiction to hear and determine it. *Danielwitz v. Temple*, 55 Cal. 42. Now, when a court has acquired jurisdiction to hear and determine an action of the kind above referred to, it is evident that it can determine only such questions as are involved in the contest on which the action is based. It cannot determine as to other contests or other asserted rights, and in so far as it attempts to do so, its action, being beyond its jurisdiction, is void.

The judgments in the Smith and Hartey cases, although broad enough to cover the land applied for by Miller, must be limited to the parties and the parcels of land before the court. So far as we can see, Miller had a right to make his application, and until that application is in some way disposed of, the appellant should, we think, refuse to issue a patent for the land embraced in it.

It follows that the judgment should be reversed, and the cause remanded, with directions to the court below to dismiss the petition.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed and cause remanded, with direction to the court below to dismiss the petition.

74 Cal. 619

RICE v. WHITMORE. (No. 11,610.)

(Supreme Court of California. January 31, 1888.)

1. LANDLORD AND TENANT—CONTRACT TO LEASE—LAND IN POSSESSION OF ANOTHER—ACTION FOR BREACH.

In California, it is no defense to an action to recover damages for a breach of a contract to lease that, at the time of the making of the contract, the land was in the possession of a tenant of defendant, and that the plaintiff knew that fact, and also knew that the tenant would not give up possession without a lawsuit.

2. SAME—ABANDONMENT OF AGREEMENT—INSTRUCTION.

In an action to recover damages for the breach of a contract to lease land, where defendant claims that he and plaintiff had come to the conclusion that defendant could not give possession in time for plaintiff to put in his crop, and that the con-

tract was mutually abandoned, it is not improper for the court to instruct the jury that if defendant agreed to lease the land on certain terms, which were accepted by plaintiff, and defendant agreed to give him possession on a certain day, then a valid contract was entered into between the parties, the terms of which both were bound to perform, and if either refused or failed to substantially carry out the contract he would be liable to the other in damages for a breach, where the jury had already been instructed that they must find that defendant refused or neglected to perform the contract without plaintiff's consent, and where defendant failed to ask for any more specific instructions in regard to the abandonment.

8. SAME—MEASURE OF DAMAGES—CONFLICTING INSTRUCTIONS.

In an action for damages for breach of a contract to lease premises, where plaintiff alleges that he owned all the necessary teams, etc., for cultivating said ranch, and had commenced to make his preparations to move onto said ranch when defendant refused to carry out the agreement, instructions that plaintiff was entitled to recover as damages for the breach all that he could have made on the ranch during the year; that he was entitled to the value of the crop that an average farmer would have raised, less the cost of raising and harvesting, which cost was to be determined by the evidence; that, if plaintiff had the stock and utensils, etc., to cultivate the ranch, or any portion thereof, without hiring, the jury have the right to take that into consideration,—are not in conflict with an instruction that, in assessing damages, they are not to assess any damages resulting to plaintiff from the loss of his labor or the use of his teams.

Commissioners' decision. In bank. Appeal from superior court, Stanislaus county; J. F. ROONEY, Judge.

Action by T. E. B. Rice against Daniel Whitmore to recover damages for breach of contract to lease certain premises. On the question of damages the court instructed the jury, at request of plaintiff, as follows: "If, then, you find that the contract was entered into substantially as claimed by the plaintiff, and that thereafter the defendant refused or neglected to carry out the terms of said agreement against the will of plaintiff, and you further find that the plaintiff has suffered damages by reason of said breach, then I charge you that the plaintiff is entitled to recover from the defendant all that he could have made on the ranch during that year; that is, he is entitled to the value of the crop that might have been raised on the ranch during that year by an average farmer, less the cost of raising, cutting, harvesting, etc., the same, and the amount raised, its cost of raising, etc., its value, you must ascertain from the evidence in the case. In determining the amount of damages to be awarded plaintiff, if you find in his favor, the jury should take into consideration all the facts and circumstances proven in the case, and if you find that plaintiff had the stock and utensils, etc., to work and cultivate the ranch or any portion of it without hiring it done, that fact you have a right to take into consideration; and, taking all the facts into consideration, the plaintiff is entitled to recover an amount equal to what he would have made had the contract been carried out."

And at request of defendant: "If the plaintiff and defendant entered into the contract set up in the complaint, and you find from the evidence that there was a breach of such contract on the part of defendant, then, in assessing damages for such breach, you must not consider or assess any damages resulting to plaintiff from loss of his labor, or the loss of the use of his teams." Judgment for plaintiff, and defendant appeals.

W. L. Dudley, for appellant. *W. E. Turner*, (*Freeman, Bates & Rankin*, of counsel,) for respondent.

BELCHER, C. C. This is an action to recover damages for an alleged breach of contract.

As stated in the complaint, the contract was made by the parties in September, 1883, and was for the lease of a certain ranch in Stanislaus county, containing about 960 acres of land. It is alleged that the defendant agreed to and with the plaintiff that he "would rent, lease, and farm-let to plaintiff" the ranch for the term of one year from September, 1883, and would forthwith put plaintiff into possession thereof, and would accept as rental there-

for one-fourth of all grain raised on the premises during the ensuing year, to be delivered to defendant by plaintiff at a certain warehouse in Ceres. It is further alleged that plaintiff then and there agreed to accept, lease, rent, and hire said ranch from the defendant, and to occupy and farm the same on the terms and conditions aforesaid, and that the contract then and there became mutual between the parties. It is then stated that plaintiff owned all necessary teams and outfit to cultivate and farm the ranch, and that he at once commenced to make preparations to enter upon the same, but defendant neglected and refused to put him in possession thereof, and on or about the thirty-first of October, 1883, informed him that he would not carry out the terms of the agreement in any particular, and that he would not lease, let, or rent the ranch, or any part thereof, to him; and that by reason of such neglect and refusal plaintiff sustained damages in the sum of \$2,500.

The answer denies that defendant made any contract to lease the ranch to plaintiff, as stated in the complaint, and alleges that at the time of the supposed agreement one Hanscom was in possession of the land as a tenant of defendant, which fact was well known to the plaintiff, and the only agreement made was to the effect that defendant would lease to plaintiff, provided he succeeded in obtaining possession of the land from Hanscom. It is further alleged that at a subsequent time both plaintiff and defendant became satisfied that Hanscom could not be dispossessed in time to rent the land for the ensuing year, and thereupon all negotiations for leasing it were abandoned by consent of the parties, and no lease was made or entered into by or between them. The case was tried by a jury, and the verdict and judgment were in favor of plaintiff. The defendant then moved for a new trial, and, his motion being denied, has brought the case here on appeal from the judgment and order.

1. It is now insisted for appellant that the evidence did not justify the verdict, and a new trial should have been granted for that reason. We have carefully read over all the evidence set out in the transcript, and are of the opinion that it did justify the jury in finding that the agreement constituted a present lease, and was not simply an agreement to make a lease when Hanscom should be dispossessed.

2. But if this be so, it is further claimed that the agreement was void, and damages could not be recovered for its breach, because the defendant was out of possession of the premises, and the plaintiff knew that fact, and also knew that Hanscom would not give up possession without a lawsuit. There is nothing to show that the land was held adversely by Hanscom. On the contrary, he appears to have rented it by the year some 10 years before, and to have held it along from year to year under his original lease. But, however this may be, the rule invoked is the rule of common law, under which property in the adverse possession of another could not be transferred. That rule has been changed here. Under our Code, property of every kind, except a mere possibility not coupled with an interest, may be transferred. Sections 1044, 1045, Civil Code. "A right of re-entry or of re-possession for breach of condition subsequent can be transferred." Section 1046, Civil Code. "Any person claiming title to real property in the adverse possession of another may transfer it with the same effect as if in actual possession." Section 1047, Civil Code. Surely it cannot, then, be said here that a landowner cannot make a valid lease of his land until all former leases have expired, and the tenants have surrendered back to him the possession.

3. The court instructed the jury, at the request of the plaintiff, that if Whitmore, in September, 1883, offered to rent the ranch to Rice upon certain terms, and Rice accepted such terms, and Whitmore agreed to put Rice in possession of the ranch on or before the first of October, 1883, then a valid contract was duly entered into between the parties, the terms of which both parties were bound to perform; and if either party refused or failed to substantially carry out the terms of the contract, such party is, in law, liable to the other in dam-

ages for a breach of the contract. This instruction is said to have been erroneous, for the reason that one of the defenses to the action was that plaintiff and defendant became satisfied that Hanscom could not be dispossessed in time to put in a crop, and therefore all negotiations for leasing were off and abandoned by consent of the parties; that this defense was a question of fact to be determined by the jury, and was wholly ignored by the instruction. The answer is that the court had already charged the jury, as one of the necessary elements of plaintiff's case, that it must be shown that "defendant refused or neglected to carry out the terms of the agreement against the will of plaintiff;" and if defendant desired any further or more explicit instruction in reference to the abandonment of the negotiations for a lease he should have asked for such an instruction. Not having done so, he cannot now be heard to complain that it was not given.

4. It is also claimed for the appellant that the instructions upon the question of damages were conflicting, and therefore erroneous. We are unable to see any necessary conflict in these instructions. They seem to us to have stated the law to the jury quite fully and fairly, and without any substantial error.

We conclude, therefore, that the judgment and order should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

74 Cal. 583

BANCROFT v. COSBY et al. (No. 12,154.)

(Supreme Court of California. January 26, 1888.)

VENDOR AND VENDEE—VENDOR'S LIEN—EFFECT OF TRANSFER OF NOTE—RETRANSFER TO VENDOR.

Civil Code Cal. § 3047 provides that "where a buyer of real property gives to the seller a written contract for the payment of all or part of the price, an absolute transfer of such contract by the seller waives his lien to the extent of the sum payable under the contract; but a transfer of such contract in trust to pay debts, and return the surplus, is not a waiver of the lien." *Held* that, where a vendor indorsed and delivered a purchase-money note to a third person, and the note, not having been paid, was transferred back to the vendor, the lien was suspended only, and revived on such retransfer.

Commissioners' decision. In bank. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

S. A. Holmes, for appellants. *Wharton & Short*, for respondent.

FOOTE, C. This is an action to enforce a vendor's lien for the sum of \$50 and interest. The vendor, after conveying the land to the vendee and receiving the latter's promissory note for the balance due, indorsed and delivered the note to a third person. The note, not having been paid, "came back to the plaintiff's possession as his own." The question is whether a vendor's lien exists. In many of the states, and in California, it is held that the lien is a personal privilege of the vendor, and is not assignable. *Baum v. Grigsby*, 21 Cal. 172; *Williams v. Young*, Id. 227; *Ross v. Heintzen*, 36 Cal. 321. In the latter case the court speaks of the lien being "extinguished" by the transfer; but no such question was before the court, and in all probability it meant only to say that the lien was not assignable. The case is not inconsistent with the theory that upon a transfer of the debt the vendor's right is suspended merely. Lord ELDON said in a leading case that what is called the vendor's lien "goes upon this: that a person having got the estate of another, shall not, as between them, keep it and not pay the consideration." *Mackreth v. Symmons*, 15 Ves. 329. See, also, 2 Story, Eq. Jur. § 1219; *Baum v. Grigsby*, 21 Cal. 172. It is not a specific lien, but is a mere equity capable

of acquiring the force and efficacy of a lien under certain circumstances. *Green v. Demoss*, 10 Humph. 371; *Williams v. Young*, 21 Cal. 228. The right is worked out upon the notion that to prevent so great a wrong to the vendor a court of equity will impress a trust upon the land. *Preston v. Ellington*, 74 Ala. 138.

This trust will not be extended beyond the purpose for which it was raised, viz., the protection of the vendor. But, on the other hand, it ought to be carried as far as is necessary for his protection; in other words, when the vendor after having assigned a note for the purchase money, has been forced to take it up, the lien ought to be revived. Every consideration of justice—every consideration which induced courts of equity to create the lien in the first instance—operates to its application to such a case. For if the note was transferred in satisfaction of a debt, the debt would revive upon the non-payment, and the vendor would be in precisely the same situation that he was in before the transfer; and if he is compelled to pay the note to some subsequent holder he has still stronger grounds for relief. Lord ELDON, in one case, enforced a lien where the vendor had transferred the note, and taken it up again, saying: "That the note was discounted amounts to nothing; it was incidental to the nature of the security, and did not vary what it in substance was,—evidence of an intention to pay at four months. I do not believe that either of the parties had this refined equity in that contemplation; but I do not feel that I can refuse to give effect to it." *Ex parte Loaring*, 2 Rose, 79. See, also, *Cotten v. McGehee*, 54 Miss. 510; and the *dicta* in *Green v. Demoss*, 10 Humph. 375; *Lindsay v. Bates*, 42 Miss. 400, 401; *White v. Williams*, 1 Paige, 506. In some states the question whether the vendor's lien is extinguished by a transfer of the debt is made to turn upon whether the vendor is liable on the note. *Hallock v. Smith*, 3 Barb. 272; *Smith v. Smith*, 9 Abb. Pr. (N. S.) 425, 426; *Bankhead v. Owen*, 60 Ala. 457; *Preston v. Ellington*, 74 Ala. 134; *Shall v. Biscoe*, 18 Ark. 142.

In California, the Civil Code contains the following provision: "Sec. 3047. Where a buyer of real property gives to the seller a written contract for payment of all or part of the price, *an absolute transfer* of such contract by the seller waives his lien to the extent of the sum payable under the contract, but a transfer of such contract, in trust to pay debts, and return the surplus, is not a waiver of the lien." Looking at the mere language of this provision, it might seem that a transfer of a note upon which the vendor is liable as indorser destroys his lien. But this, we think, would be too narrow a view, and one which would defeat what in the light of the decisions seems to us to be the object of the lien. We think it is not doing violence to the language to hold that a transfer of the note by an indorsement which makes the vendor liable for the debt is not an absolute transfer, within the meaning of the section, and that, in such case, the lien is merely suspended, and revives when the note is taken up by the vendor.

With reference to the point as to the homestead it is sufficient to say that we do not think it arises upon the pleadings.

We therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

74 Cal. 593

SUTRO v. DUNN. (No. 12,352.)

(Supreme Court of California. January 27, 1888.)

STATES AND STATE OFFICERS—STATE BONDS—BONA FIDE PURCHASERS—NOTICE.

The state of California, under act of April 25, 1857, issued certain bonds for the payment of expenses of an Indian war, stating on their face that they were payable

"only out of any money hereafter to be appropriated by congress for the payment of such expenses." *Held*, that a purchaser is charged with the knowledge of the provisions of the act of 1857, and the state comptroller cannot be compelled to issue a warrant for their payment until congress creates a fund for that purpose.

Department 1. Appeal from superior court, Sacramento county; J. W. ARMSTRONG, Judge.

Sutro petitioned to compel J. P. Dunn, state comptroller, to issue a warrant to pay Indian war bonds. The petition was denied, and petitioner appealed.

McKune & George, for appellants. *G. A. Johnson*, Atty. Gen., *R. T. Derlin*, and *R. M. Clarken*, for respondent.

PATERSON, J. This is a special proceeding to compel the defendant, Hon. J. P. Dunn, comptroller, to draw a warrant in favor of plaintiff for the sum of \$4,172.56 upon the Indian war bond fund for the payment of certain bonds, all of which are in the following form:

"No. 813. \$1,000.

"Bond of the state of California, for war indebtedness, in conformity with an act authorizing the treasurer of state to issue bonds in payment of the expenses incurred in the suppression of Indian hostilities in certain counties in this state, approved April 25, 1857.

"The State of California promises to pay to the order of the governor thereof the sum of \$1,000, to be paid only out of any money hereafter to be appropriated by congress for the payment of such expenses. This bond is transferable by assignment by the owner thereof, or by his attorney in fact.

"In testimony whereof the treasurer, comptroller, and governor have respectively signed, countersigned, and indorsed these presents, and the governor has caused the seal of the state to be affixed hereto this twenty-first day of May, A. D. 1862.

D. R. ASHLEY, Treasurer.

"G. R. WARREN, Comptroller.

"Indorsed:

[Seal.] "LELAND STANFORD, Governor.

"Issued to A. L. Pardee. Certificate, 1,238."

The plaintiff is an innocent purchaser for value from Pardee, so far as legal or mercantile innocence can be considered in connection with such instruments. The court found that he purchased without notice of any defects or infirmity in said bonds other than those disclosed by the terms thereof, and by the several statutes of the state of California and the act of congress mentioned herein, namely: St. 1857, p. 262; St. 1861, pp. 298, 409; St. 1862, pp. 181, 329; St. 1863, p. 399; St. 1867-68, p. 601; Act Cong. 12 St. at Large 1861, p. 199. The statements in the bonds put the purchaser upon inquiry and he took them subject to all defects therein, and subject to all the conditions imposed by the acts of the legislature and of congress upon the subject referred to in the act of April 25, 1857. Section 3088, Civil Code; *Cagwin v. Hancock*, 84 N. Y. 532; *Craig v. Andes*, 93 N. Y. 405, Daniel, Neg. Inst. §§ 34, 52, 437; *Bank v. Steinmitz*, 64 Cal. 314. It appears from the face of the bonds that payment was dependent entirely upon the condition that congress should make an appropriation therefor. This contingency has never occurred. No fund of the state has ever been pledged for their payment. The bonds are dated May 21, 1862. Congress has not made any appropriation for the payment of claims for the destruction of property. No fund has been created in any way out of which such losses can be paid. The only provision ever made by congress is that found in the terms of the act of March 2, 1861, "for payment for services of volunteers, and for supplies, transportation, and personal service furnished or rendered to said volunteers." The purchaser knew, or was bound to know, that under the statute bonds could issue for two purposes only—*First*, for services, etc.; *second*, for the destruction of prop-

erty. He was charged with the knowledge that the bonds could be paid only out of such appropriations as congress might make therefor. Congress has made an appropriation for the payment of the first class of debts or obligations mentioned, but has made no provision for the payment of the second class. Respondent cannot be compelled to draw a warrant for the payment of the bonds set out in the petition until a fund for the payment thereof has been created by congress.

Judgment affirmed.

We concur: TEMPLE, J.; MCKINSTRY, J.

74 Cal. 603

NATIONAL BANK OF MILLS & CO. v. HEROLD. (No. 11,660.)

(Supreme Court of California. January 27, 1888.)

1. STATES AND STATE OFFICERS—TREASURER—WARRANTS—OFFICIAL DESIGNATION OF PAYEE.

Where a warrant by the state comptroller on the state treasurer showed that it was drawn under a section of the law authorizing issuance of warrants to the clerk of the supreme court only, and was issued to the clerk by name, the omission of his official designation was not material.

2. SAME—NEGOTIABILITY OF WARRANT.

A warrant by a state comptroller on a state treasurer is not negotiable, but may be transferred by delivery, so as to authorize the holder to demand payment, and institute suit thereon.¹

3. SAME—PRESUMPTIONS AS TO AMOUNT CALLED FOR IN WARRANT.

In an action to compel the state treasurer to pay a warrant drawn by the state comptroller in favor of the clerk of the supreme court, it will be presumed that the amounts in the clerk's account have been paid, there being no proof to the contrary by defendant.

THORNTON, J., dissenting.

In bank. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

G. A. Johnson, Atty. Gen., for appellant. *Beatty, Benson & Oatman*, for respondent.

PATERSON, J. This is a special proceeding to compel the defendant, the state treasurer, by mandate to pay a certain warrant issued by the state comptroller. The warrant was first presented for payment to Hon. D. J. Oullahan, who was at that time the treasurer, and upon his refusal to cash the same this proceeding was commenced. Judgment went for petitioner in the court below, Oullahan appealed, and his successor, Herold, has been substituted as defendant herein. The following is a copy of the warrant:

"COMPTROLLER'S WARRANT.

"\$1,213.

SACRAMENTO, CAL., April 10, 1885.

"The treasurer of state will pay out of the general fund, to the order of J. W. McCarthy, one thousand two hundred and thirteen dollars.

"Kind of service, sundries.

"Liability accrued March 6, 1885.

"JOHN P. DUNN, Comptroller.

[Seal.]

"No. 8,706.

"No. 2,001.

"Indorsed:

"Payable out of the appropriation for expenses of the supreme court, under section 47, C. C. P., thirty-sixth fiscal year.

"Indorsed:

"Pay to I. W. Hellman, or order.

J. W. MCCARTHY.

"ISAIAH W. HELLMAN."

¹As to what constitutes a negotiable instrument, see *Hughitt v. Johnson*, 28 Fed. Rep. 665, and note; *Chandler v. Carey*, (Mich.) 31 N. W. Rep. 309, and note.

Appellant claims that he was justified in his refusal to pay the warrant—*First*, because it was not issued to McCarthy, *clerk of the supreme court*, but to J. W. McCarthy, individually; *second*, because such warrants are not negotiable, and they cannot be assigned, at least not without an assignment of the indebtedness; *third*, it is not shown that the parties with whom the clerk contracted, and to whom the several amounts of the account were due, have been paid.

1. It is expressly stated in the answer that "said warrant No. 8,706 was drawn in favor of and delivered to J. W. McCarthy, clerk of the supreme court." The omission of the comptroller, therefore, to describe the official character of McCarthy in the warrant is not material. The warrant shows that it was issued under section 47, C. C. P., which authorizes the issuance of warrants to no one except the clerk. It was a matter of record that the account upon which the warrant was issued had been duly certified to be correct, and that thereafter the amount claimed had been audited, allowed, and approved by the board of examiners. The treasurer knew, as matter of fact, that the McCarthy named in the warrant was the clerk of the supreme court, knew his signature, and unquestionably would have paid the warrant if presented by McCarthy himself.

2. Appellant cites a large number of authorities in support of his proposition that warrants like the one above set forth are not negotiable, and that a purchaser gains no greater rights than the payee of the warrant had. This may be admitted, but what boots it? In the leading case cited by appellant, Mr. Justice FIELD says: "The warrants being negotiable in form are transferable by delivery so far as to authorize the holder to demand payment of them and to maintain in his own name an action upon them. But they are not negotiable instruments in the sense of the law merchant, so that, when held by a *bona fide* purchaser, evidence of their invalidity or defenses available against the original payee would be excluded. The transferee takes them subject to all legal and equitable defenses which existed to them in the hands of such payee." *Wall v. County of Monroe*, 103 U. S. 77. In *Martin v. San Francisco*, it was held, it is true, that even where there was a regular assignment of such a warrant by the person to whom it was issued the assignee could not maintain an action upon it without an assignment of the original indebtedness, (16 Cal. 285,) but it has since been said that an indorsement and delivery of the warrant would be in equity the assignment of the debt, and an authority to the assignee to receive the money. *Dana v. San Francisco*, 19 Cal. 491; *People v. Gray*, 23 Cal. 127.

The answer of defendant alleges two grounds of defense: *First*. That the warrant was issued without authority of law; *second*, that it could not be transferred by indorsement. In what respect it is claimed to be without authority of law we have not been informed. In his brief, appellant makes the following fair statement of the case, which we think is a complete answer to his first ground of defense: "It appears from the petition that said warrant was issued to the said J. W. McCarthy under the authority of section 47, C. C. P. Consequently the amount called for was to have been disbursed by him, as provided for in said section. It also appears that up to the time of drawing the warrant the provisions of said section had been complied with, and that the bill was approved for the full amount by the board of examiners. At the time the warrant was issued, and at the time it was presented for payment there was an appropriation, as provided in section 47, C. C. P., and said appropriation was unexhausted. After the issuance of the warrant, said McCarthy sold the warrant to L. W. Hellman for a valuable consideration, and indorsed on the back of the warrant the following: 'Pay to L. W. Hellman, or order. J. W. MCCARTHY.' Said Hellman afterwards sold the warrant to the plaintiff, and indorsed the same in blank, as follows: 'ISAIAH W. HELLMAN.' The court finds that both said Hellman and plaintiff purchased said warrant in good faith and for value."

3. It does not concern the treasurer whether the parties to whom the several amounts allowed in the clerk's account have been actually paid. If the clerk had presented the warrant in person to the treasurer for payment, the latter would not have troubled himself with such an inquiry, and we see no reason for such an inquiry now. None of the creditors of the clerk under this warrant complain, and the treasurer can scarcely be expected to constitute himself their guardian.

If it be conceded that the fact of non-payment by the clerk, if shown, would be a defense to this proceeding, it is sufficient to say that in this case, *prima facie*, the warrant is good, the presumption being that the officer has done his duty, and if there are any creditors remaining unpaid it devolved upon the defendant herein to prove the fact. No attempt was made to plead or prove it. Judgment affirmed.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; MCFARLAND, J.

I dissent: THORNTON, J.

74 Cal. 614

MCKINNIE v. SHAFFER. (No. 12,222.)

(Supreme Court of California. January 28, 1888.)

QUIETING TITLE—RIGHT TO MAINTAIN—ACTION—HOLDER OF HOMESTEAD.

Action may be brought by the holder of a homestead interest to quiet title thereto.

In bank. Appeal from superior court, Los Angeles county; B. T. WILLIAMS, Judge.

This is an action brought against the defendant, Shaffer, by Mrs. A. K. McKinnie, a widow, to quiet title to her homestead interest in property which, at the death of her husband leaving no minor heir, was community property. The demurrer to the complaint was overruled, and defendant appeals.

Bicknell & White, for appellants. *P. W. Dooner*, for appellee.

THORNTON, J. The demurrer to the complaint was properly overruled. We see no reason why a party owning a homestead is not entitled to have his or her title to it quieted against the claims of others. Whatever interest the plaintiff has may be quieted. If a title in fee, such interest may be quieted; if a less interest, the less interest may be likewise quieted. Such we understand to be the rulings of this court. *Stoddart v. Burge*, 53 Cal. 394; *Pierce v. Felter*, Id. 18.

We will say further that, under the statute as it stood in 1879, when the order setting apart the homestead was made, the decedent having left a widow and no minor child, and the property of which the homestead was set apart being community property, the homestead so set apart became the property of the widow, A. K. McKinnie. In other words, she became the owner in fee of the property thus set apart. Code Civil Proc. 1468. It having thus become her property, there was no necessity for calling in aid an adverse possession under the statute of limitations. We cannot see how a widow can acquire title to such property by adverse possession as against an heir. Conceding that an adverse possession by the widow is averred, if we reject such portion, the complaint still states facts constituting a cause of action. Judgment affirmed.

We concur: SEARLS, C. J.; TEMPLE, J.; MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.; MCKINSTRY, J.

Cal.Rep. 16-19 P.—12

74 Cal. 614

BERNIAUD *v.* BUCHER. (No. 12,378.)

(Supreme Court of California. January 30, 1888.)

APPEAL—REQUISITES—BOND—FOR SEVERAL APPEALS.

An undertaking, filed upon appeal from a judgment and from an order denying a motion for a new trial, is insufficient for both appeals unless it states that an appeal has been taken from both judgment and order.

In bank. Appeal from superior court, San Joaquin county. J. G. SWINERTON, Judge.

J. A. Louttit, for appellant. S. D. Woods and A. L. Livinsky, for respondent.

PER CURIAM. Motion to dismiss appeal from an order denying a new trial. In this cause there is a notice of appeal from the judgment, and from the order denying a motion for a new trial. In the undertaking on appeal, there is no recital that an appeal has been taken from the order. The undertaking only states that an appeal from the judgment has been taken. The motion to dismiss the appeal from the order is made on the ground that the appeal is not recited in the undertaking on appeal, and therefore the undertaking is not sufficient. In our judgment the undertaking is insufficient. Though we have held that but one undertaking on appeal is required when the appeal is from the judgment, and an order denying a new trial, we cannot hold the undertaking on appeal from the order is sufficient, when no statement that such appeal has been taken, is made in the undertaking. The act of 1861, referred to by defendant, is not in force since the adoption of the Code of Civil Procedure.

The appeal from the order denying a new trial must be dismissed; and it is so ordered.

74 Cal. 642

PEOPLE *v.* GIANCOLI. (No. 20,236.)

(Supreme Court of California. January 31, 1888.)

1. CRIMINAL LAW—TRIAL—COMMENTS OF THE COURT.

Where the court, in the trial of an indictment for murder, in admitting evidence of defendant's flight, said to counsel, "flight is an evidence of guilt," and afterwards correctly instructed the jury as to the purpose and effect of evidence of flight, the jury could not have been misled.

2. SAME—FLIGHT AS AN EVIDENCE OF GUILT—INSTRUCTIONS.

In the trial of an indictment for murder an instruction that if the defendant fled from the scene of the homicide, and was captured 20 miles away two days thereafter, it was a circumstance to be considered as tending to prove consciousness of guilt, was not error.

3. SAME.

In the trial of an indictment for murder, an instruction that flight is not an inference of guilt, and the timid might seek safety thereby, while innocent, was properly refused.

4. SAME—REFUSAL TO GIVE INSTRUCTION.

A refusal to give an instruction for defendant, substantially embraced in instructions previously given for him, is not error.

5. HOMICIDE—SELF-DEFENSE—INSTRUCTION.

In the trial of an indictment for murder, an instruction giving the law of justifiable homicide under the Code, but omitting to say anything about defendant's being the assailant, is not error, when it is in evidence that deceased made the attack.

6. SAME—INDICTMENT—FINDING AND FILING—DEGREE OF CRIME.

Where the testimony before the magistrate tends to support a theory of murder, the determination of the district attorney to charge the offense of murder is conclusive, so far as the validity of the information is concerned.

Commissioners' decision. In bank. Appeal from superior court, Mendocino county.

Louis Giancoli was tried for murder, was convicted of manslaughter, and appeals.

J. A. Cooper, for appellant. *George A. Johnson*, Atty. Gen., and *J. M. Marmon*, for the People.

BELCHER, C. C. The defendant was convicted of manslaughter, and sentenced to serve a term of four years in the state prison. He moved for a new trial, and has appealed from the judgment and order denying his motion. The homicide was committed on the twenty-second day of May, 1887, in Mendocino county. Immediately after its commission defendant fled, and was arrested two days afterwards, while traveling down the coast in Sonoma county. It is not claimed that the evidence was insufficient to justify the verdict, but it is insisted that several erroneous rulings were made by the court, which necessitate a reversal of the judgment. After a careful examination of the record, we fail to see that any such errors were committed as will justify a reversal.

1. The remark of the court that "flight is an evidence of guilt" was made to counsel in explanation of the ruling admitting evidence of defendant's flight, and was followed by the statement: "The court does not intimate at all that he is guilty, or that there is any evidence of guilt, but if there should be evidence of guilt, this might be given in evidence." The jury were afterwards correctly instructed as to the purpose and effect of evidence of flight, and we are therefore unable to see how they could have been misled by the remark complained of.

2. The answer of the witness who arrested defendant, that "I started to arrest him for murder, which I supposed it was," was given in explanation of the arrest, and not to prove the commission of the crime. The witness did not pretend to know anything about the facts of the case, and told only why he pursued, and when and where he arrested, defendant. His supposition, therefore, as to the nature of the offense could not, and evidently did not, influence the jury in making up their verdict, which, as we have seen, was only for manslaughter.

3. Upon the subject of flight the court, at the request of the district attorney, instructed the jury as follows: "The flight of a person suspected or charged with a crime is a circumstance to be weighed by the jury, as tending in some degree to prove a consciousness of guilt, and if you find from the evidence that the defendant fled from the scene of the homicide after its commission, and was captured some two days afterwards at a distance of twenty miles from the place where the killing occurred, I charge you that this is a circumstance to be considered by you in arriving at a verdict." This instruction was proper. The part of it objected to was taken from the opinion of this court in *People v. Stanley*, 47 Cal. 118, where the rule announced is said to be "well settled." See, also, *People v. Vasquez*, 49 Cal. 560, where it was held that the court may instruct the jury that testimony has been introduced *tending* to prove a certain matter. The instruction asked by defendant upon the subject of flight was properly refused. It was apparently drawn rather as an argument in defendant's favor than as a statement of the law upon the matter in hand. If given it would have told the jury that: It (flight) is by no means an inference of guilt. Many men are naturally of weak nerve and timid, and, under certain circumstances, the most innocent person might seek safety in flight. A person, however conscious of his innocence, might not have the courage to stand a trial, but might, although innocent, think it necessary to consult his safety in flight. These were considerations which it was the province of counsel, and not of the court, to present to the jury.

4. Instruction No. 10 asked by defendant, conceding it to be a correct statement of the law applicable to the case, was substantially embraced in the previous instructions which were given at defendant's request. We think, therefore, that its refusal was not a material error.

5. In its charge to the jury the court stated at length the law of justifiable

homicide, as declared in the Code, and in doing so used these words: "But if such person is engaged in mortal combat, he must really and in good faith have endeavored to decline such struggle before the homicide is committed." This language is objected to because "nothing is said in the instruction as to whether the defendant was the assailant or not." The provision of the Code is "but such person, or the person in whose behalf the defense was made, if he was the assailant or engaged in mortal combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed." Pen. Code, § 197, sub. 3. Defendant was not the assailant, but was assaulted and knocked down by the deceased without cause or provocation. After he was down, deceased stood over him and struck him several blows on the face. Deceased had no weapon, but struck with his fist. When deceased stopped his battery, and had stepped aside, defendant arose, and, as he did so, drew a knife, and with it stabbed deceased, inflicting a mortal wound. With these facts before the jury, it was not necessary for the court to say anything to them about defendant's being the assailant. The only question was whether he was at the time in such real or apparent danger of receiving great bodily injury as to justify the killing. The instruction was authorized by the Code, and was broad enough to cover the case in hand.

6. The defendant was held to answer before the committing magistrate for manslaughter, but in the information filed against him was charged with murder. The point is made that the information should have charged only manslaughter, and that defendant was prejudiced by the charge of a higher offense. Counsel do not question the correctness of the rule laid down in *People v. Lee Ah Chuck*, 66 Cal. 665, 6 Pac. Rep. 859, and *People v. Vierra*, 67 Cal. 234, 7 Pac. Rep. 640, to the effect that, when the testimony has been taken down and returned by the magistrate, the responsibility is thrown upon the district attorney to determine therefrom the offense to be charged; but it is insisted that the testimony returned by the magistrate clearly showed that no higher crime than manslaughter had been committed. There was, however, some evidence tending to support the district attorney's theory, and, when such is the case, we think that the determination of the district attorney is conclusive, so far as the validity of the information is concerned, however erroneous that determination may be. And if the information was valid, there can be no question of prejudice to the defendant. There could be no prejudice other than such as must result from any lawful accusation of crime.

We find no material error in the record, and, in our opinion, the judgment and order should be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

74 Cal. 78

CHAMPION MIN. CO. v. CONSOLIDATED WYOMING GOLD MIN. CO.
(No. 12,085.)

(Supreme Court of California. January 31, 1883.)

1. MINES AND MINING—UNITED LEDGES—LOCATION OF MINE.

By Rev. St. U. S. § 2336, where two quartz veins unite, the prior location takes the vein below the point of junction. In an action for trespass upon a ledge formed by the union of that of plaintiff and that of defendant, the court found plaintiff's claim to have been located in 1879, while defendant's patent dated 1874. *Held*, that such finding not being shown clearly contrary to evidence, it would not be disturbed on appeal; and that in view of such finding it was immaterial whether evidence offered by defendant to show a location prior to 1874 was properly or improperly admitted.

2. SAME—RIGHT TO FOLLOW LEDGE UNDER VACANT GROUND.

Plaintiff claimed that between the line of defendant's patent and that of S. there was a piece of ground not included in either of those patents, and that defendant was not entitled, as against plaintiff, to follow a ledge under such vacant piece, or to a united ledge, if found there. The court found that the locations of defendant and S. were prior to that of plaintiff; that defendant's ledge crossed at a point at which its line was identical with the line of S. *Held*, that defendant and S. were owners of the ledge between the extremities of their patents, and had the exclusive right to follow its dips and angles laterally; and that they had the right, as against the owner of a subsequent location, to divide the work of a ledge under the triangular piece of ground formed by the divergence of their lines.

3. SAME—TRESPASS—INJUNCTION.

Plaintiff claimed that defendant's ledge passed through the side line of defendant's patented ground into plaintiff's ground, thus making the side line in law an end line. The court found such line not to be an end line, and that there was no sufficient evidence to show where the ledge crosses the lines of defendant's patent; that the location of defendant's mine was prior to that of plaintiff; and that defendant had not mined nor threatened to mine any ground claimed by plaintiff, except a united ledge to which defendant had title. *Held*, that plaintiff had no claim for an injunction or for damages.

In bank. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

The Champion Mining Company, the plaintiff below, appeals from a judgment for defendant, and from an order denying a new trial.

Edward Lynch, for appellant. *Gaylord & Searls* and *Van Clief & Gear*, for respondent.

McFARLAND, J. This action was brought to recover damages for alleged trespasses by defendant upon the mining claims of plaintiff, and to obtain an injunction against similar trespasses in the future. The answer admits that defendant, by accident, took from plaintiff's claims gold-bearing quartz of the value of \$120, but denies the other material averments of the complaint. The court below (sitting without a jury) found in favor of defendant; gave judgment for plaintiff for said \$120, but for no more: and denied the prayer for an injunction. Plaintiff appeals from the judgment, and from an order denying a new trial.

The transcript is very lengthy; containing a great many exceptions, about a dozen maps, and several hundred pages of oral testimony and documentary evidence. The briefs (filed in addition to the oral argument) are exceedingly elaborate and able, and very ingenious. The whole record presents a formidable mass somewhat discouraging to one seeking to know what there is in it. Upon a thorough examination, however, many of the apparent difficulties vanish, and the case is resolved into a few main propositions.

Each of the parties is a mining corporation, and each owns a body of quartz mining claims. The surface ground of each party adjoins that of the other. In the ground of plaintiff there is a quartz ledge called the "Phillip" ledge, and in the ground of defendant there is a ledge called the "Wyoming." After the respective rights of the parties to these ledges had vested, it became

known, for the first time, that at various levels beneath the surface, and at a general average depth of about 500 feet, these two ledges (the Phillip and Wyoming) *united*, and from thence downward formed only one ledge. Defendant, by accident or mistake, took \$120 worth of quartz out of the Phillip ledge at a point above its junction with the Wyoming, for which judgment was confessed; but the real trespass complained of was that the defendant took gold-bearing quartz out of the united ledge *below* the junction. And so the main question in the case is, who owns the united ledge?

The *rule* by which such a question must be determined is stated in section 2336, Rev. St. U. S., and is as follows: "Where two or more veins unite, the oldest or prior location shall take the vein below the point of junction, including all the space of intersection." Consequently the main question depends upon the underlying question, which party holds under the older location? and the most important exceptions which appear in the record were to rulings of the court as to the admissibility of evidence offered upon this question of prior location.

The grantors of defendant received a United States patent for the Wyoming ledge (or, at least, for the ground in which the apex and upper part of the ledge are situated) on the nineteenth day of September, 1874. The plaintiff has not a patent for the land in which the Phillip ledge is situated, but holds a possessory title thereto under general mining customs and the laws of the United States and of this state upon the subject. And this latter kind of title is, of course, as good, for the purpose of a suit like the present one, as a patent. The defendant, for the purpose of showing a valid location of the Wyoming ledge at certain periods prior to the date of the patent, introduced, against the objections and exceptions of plaintiff, the preliminary papers and proceedings filed and had in the United States land-office upon which the patent was based. These papers and proceedings, if properly admitted, showed, or intended to show, first, that the official survey of the Wyoming mine, as afterwards incorporated into the patent, was made December 10, 1872. The application for the patent, which was filed March 8, 1873, stated that the mine was located in 1851 or 1852 by persons then unknown, and that, if recorded, the record was destroyed by the fire which burned the court-house in Nevada City in 1856; and also, among other things, that the applicants were in the quiet and actual possession of, and that there had been no opposing or adverse claim to, the premises "for two years last past," that being the statutory period of limitation for actions relative to mining claims. The court below seemed to take the view that these proceedings in the land department of the United States constituted an authoritative adjudication of the truth of the statements in the application, which bound the plaintiff. And counsel for defendant strenuously argues that, as the law of congress provides that actual possession, without any adverse claim, during the period of statutory limitation, gives a right to a patent, and as the application in question put the right to a patent on that ground, therefore it should be held to have been conclusively adjudicated that the Wyoming claim was located at least two years before the date of the application, which would be March 8, 1871.

If the determination of this appeal necessarily involved the correctness of the ruling of the court below on this point, a very grave question would be presented. Where an application for a patent to mining land has been filed in the United States land-office, and notice thereof given as required by statute, and no adverse claim has been filed, and the proceedings have regularly culminated in a patent, it may be said generally that the proceedings are conclusive against a third person as to those things with respect to which he might have filed an adverse claim. But, with respect to the united ledge which was afterwards discovered to be a union of the Wyoming and the Phillip, there was nothing in the application for a patent to the Wyoming claim which called for any contest by the owners of the Phillip. The application for the Wyo-

ming claim, if granted, would result in a patent for only the surface ground claimed, and the ledges whose apexes were within it. If it should turn out that a ledge within that ground united with another ledge, the property of an adjoining owner, the ownership of the united ledge would have to be determined upon the principle of priority of location. Moreover, at the time of the Wyoming application and patent, the union of the two ledges at a great depth in the earth was entirely unknown, and not even suspected. The owners of the Phillip ledge, therefore, with respect to the present claim to the united ledge, would and could not have had any standing in the land department as adverse claimants to the Wyoming application. It is therefore somewhat difficult to see how the question of priority of location between the Phillip and Wyoming ledges could be adjudicated in a proceeding in which the location of the Phillip ledge was not involved at all; or how *ex parte* proof, offered in the Wyoming application for the satisfaction of the United States government, is admissible in the case at bar, where the contest is about something not appearing on the face of that application, or involved in that proceeding. If, therefore, the determination of this appeal necessarily depended upon the correctness of the ruling of the court below, admitting the proceedings in the land-office in evidence, we would be strongly inclined to hold such ruling to have been erroneous. In the view which we take of the case, however, it is not necessary to pass conclusively upon that question.

The court below found that there was no valid location of the Phillip ledge until 1879,—about five years after the issuance of the Wyoming patent. The finding is “that no boundaries of said location [the Phillip] were ever marked upon the ground so that the same could be readily traced prior to March 25, 1879.” This is a *finding of fact*; and, unless it can be successfully attacked as not being supported by the evidence, then it is immaterial whether the admission of evidence to show a location of the Wyoming claim at a date prior to the patent was erroneous or not; for, of course, the title of defendant would be good, at least from the date of the patent, and if at that time there was no location of the Phillip claim, then the Wyoming must be held to have been the prior location. And as to the sufficiency of the evidence to support the finding on this point, we need only say that we could not disturb that finding even though we were to go far beyond the limits of the rule so often laid down by this court for the review here of questions of fact. There was clear proof of a location of the Phillip claim on the twenty-fifth of March, 1879; and the court found that there was a location on that day, but that there was none prior to that time. Now, to upset this finding, it must be affirmatively shown that, under the evidence, it was the clear duty of the court, forced upon it by evidence without material conflict, to find a location of the Phillip claim prior to 1879, and, indeed, prior to 1874,—the date of the Wyoming patent. But such a proposition is clearly not maintainable. We, of course, will not recite the evidence here; and it is sufficient to say that if the court had found the other way it would have done so upon an exceedingly slender basis.

The record shows many exceptions to rulings of the court admitting or rejecting offered evidence; but they mostly relate to evidence offered to prove or disprove a location of the Wyoming at dates prior to the patent. But, as we have stated, these rulings, whether right or wrong, were immaterial. With respect to the rulings of the court upon offers of evidence to prove or disprove the true dates of the locations of the Phillip ledge, and of the other claims of appellant, we see no material error. (What has been said of the Phillip ledge applies equally to the small location claimed by appellant called the “Muller,” and also called the “Ural Extension.” It is in the same category with the Phillip, except that the court also finds that it was *never* marked on the ground so that the boundaries could be readily traced, and that no gold-bearing ledge having its apex within the claim was ever discovered.) And, as the alleged trespasses were committed upon the united ledge claimed by ap-

pellant by virtue of its ownership of the Phillip ledge, the above views are determinative of the main controversy in the case against the appellant.

There are two other propositions presented by appellant. The respondent has a patented mine called the "Ural;" and the appellant claims a ledge in its adjoining ground called the "New Year's" and "New Year's Extension." And appellant contends that near the southerly end of respondent's ground the Ural ledge passes through the side line of the Ural patented ground into the New Year's ground; thus making said side line, in law, an end line. But the court finds that said line is not an end line of the Ural ledge of respondent, and that there is no sufficient evidence to show where said ledge crosses the lines of the Ural patent. It finds, also, that the location of the Ural mine was prior to that of the New Year's claims of appellant. Moreover, it finds that respondent has not mined, and does not threaten to mine, any ground claimed by appellant, except the united ledge formed by the junction of the Phillip and the Wyoming as above stated. And these findings are sustained by evidence. There is therefore no basis here for an injunction or damages.

At the northern end of the Wyoming patented ground there is another patented claim called the "Schmidt Claim," owned by the Nevada City Mining Company. And appellant contends that the north line of the one was not identical with the south line of the other; that is, that between the north line of the Wyoming, as patented, and the south line of the Schmidt, as patented, there was a small piece of ground not included within the lines of either patent; and that, therefore, the respondent would not be entitled, as against the owners of the Phillip, to follow the Wyoming ledge under this piece of land, or to the united ledge if found there. But the court found, upon sufficient evidence, that the Wyoming and Schmidt locations were both long prior to that of the Phillip; that they always adjoined each other on the north and south; that the south-west line of the Schmidt patent was for a long distance identical with the north line of the Wyoming patent; and that, *where these two lines were thus identical*, the Wyoming ledge crosses over the Wyoming patented ground into the Schmidt patented ground, leaving no intermediate ground between the two claims. This undoubtedly gave to the owners of the Wyoming and Schmidt claims the entire ownership of the ledge from the northerly end of the one to the southerly end of the other, with the exclusive right to follow its dips and angles laterally. It appears that at a point a considerable distance easterly of the point where the ledge crosses the line common to the Wyoming and the Schmidt, as aforesaid, the northerly patented line of the Wyoming, and the southerly patented line of the Schmidt, diverge; leaving a small triangular piece of ground between; and the two companies, by agreement, divided this piece of land—or, rather, the right to work the ledge under it—between them. This they had the right to do, as against any third party subsequent in location.

From a thorough examination of the whole case we find no reason to disturb the judgment of the court below. Judgment ordered and affirmed.

We concur: PATERSON, J.; SHARPSTEIN, J.; THORNTON, J.; TEMPLE, J.; MCKINSTRY, J.

SEARLS, C. J., having been of counsel in the court below, did not participate in the decision.

74 Cal. 625

SOUTHERN CAL. LUMBER CO. *v.* SCHMITT *et al.* (No. 12,009.)

(Supreme Court of California. January 31, 1888.)

MECHANICS' LIENS—LIABILITY OF OWNER TO MATERIAL-MEN—FAILURE TO RECORD CONTRACT.

Code Civil Proc. Cal. § 1183, provides that contracts for building a house shall be in writing, and before the work is begun, shall be filed with the recorder, other-

wise to be void and no recovery had thereon, and that labor done and materials furnished by others than the contractor shall be deemed furnished at the instance of the owner, and be a lien. *Held*, that when the original contractor had not filed his contract, and the material-man had not filed any lien under the statute, the owner of the building was not liable for material furnished which he had not purchased.

Commissioners' decision. In bank. Appeal from superior court, San Diego county; JOHN D. WORKS, Judge.

The Southern California Lumber Company sued to enforce a lien for material furnished a contractor against Charles T. Schmitt, owner of the building, and Elizabeth T. Randall, mortgagee. A nonsuit was granted, and plaintiff appeals.

Collier & Collier, for appellant. *W. J. Hunsaker* and *J. R. Jones*, for respondents.

FOOTE, C. This action was, according to the original complaint filed therein, initiated for the purpose of obtaining a judgment against one Gorey, a contractor, for the amount of a bill for materials furnished him by the plaintiff, and against Charles T. Schmitt, to foreclose a mechanic's lien on his building, which Gorey had contracted to build, and in the construction of which the materials bought by Gorey from the plaintiff had been used. Elizabeth T. Randall was also made a party to the suit as a mortgagee of Schmitt. Finding that the contract between Gorey and Schmitt was void because it had not been filed in the office of the county recorder before the commencement of the building, as is requisite to its validity under chapters 1, 2, 3, tit. 4, Code Civil Proc., the plaintiff filed an amendment to the first complaint, in which, setting out the fact that the contract aforesaid was void, it is sought to hold Schmitt and Gorey both personally liable for the amount of the indebtedness contracted by Gorey, and to enforce a lien in favor of the plaintiff as against Schmitt's building. Upon the evidence which was introduced before the court, a motion was made by Gorey and Schmitt for a nonsuit, which was granted, and judgment entered accordingly, from which this appeal is prosecuted.

The only point made by the appellant in favor of a reversal of the judgment is that the court erred in refusing to render a personal judgment against Schmitt, instead of granting the nonsuit as to him. It is not controverted that the evidence shows that both the contract of Gorey with Schmitt, because not filed according to law, and the lien of the plaintiff, because the affidavit attached to it was deficient, were void; but it claimed, although no lien exists on the building as to the contractor, and those who may claim under him, and none as to the material-man, that nevertheless, according to section 1183, Code Civil Proc., that the plaintiff ought to have had a personal judgment against Schmitt, with whom he never had any contract to furnish the building materials. The language of the statute under which this contention is made, speaking of the contracts between contractors and owners of buildings, is: "All such contracts shall be in writing when the amount agreed to be paid thereunder exceeds \$1,000, and shall be subscribed by the parties thereto, and shall, before the work is commenced, be filed in the office of the county recorder of the county, or city and county, where the property is situated, who shall receive \$1 for such filing; otherwise they shall be wholly void, and no recovery shall be had thereon by either party thereto; and in such case, the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof." Section 1183, Code Civil Proc.

We cannot agree with the appellant in a case where neither the contractor nor the material-man has filed any lien, such as is given them by statute, that under the section, *supra*, a personal judgment for the value of the materials furnished may be had against the owner of the building, who did not

purchase them, and who was under no contract with the material-man, either express or implied, to pay for them. That section, as it seems to us, means to preserve the right of the material-man who has duly filed his lien according to the statute, in cases where the contractor has failed by reason of not filing his contract to preserve the material-man's rights thereunder; and the language of the statute announces the law to be that where such is the case the material-man may duly file his lien, and enforce it just as if the owner of the building had bought from or contracted for the materials with the material-man in the beginning, instead of the contractor.

It follows that the judgment should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

74 Cal. 608

HAGLE v. HAGLE.¹ (No. 12,101.)

(*Supreme Court of California*. January 28, 1888.)

DIVORCE—DESERTION—EVIDENCE.

In an action by the husband for divorce for desertion, the wife answered, charging that the husband's cruelty forced her to leave. There was no evidence to support plaintiff's testimony, except that defendant lived at some distance in a house owned by plaintiff, and had said she was not coming back to his farm, and also the record of a former suit by the wife for divorce for cruelty, where it was found he was not guilty of cruelty, and the divorce was denied, but the wife was allowed \$25 per month. *Held* not sufficient to warrant a divorce under Civil Code Cal. § 130, providing that a divorce cannot be granted on the uncorroborated statements, admissions, or testimony of the parties.

In bank. Appeal from superior court, Sacramento county; T. B. MCFARLAND, Judge.

Grove L. Johnson, for appellant. *Clinton L. White*, for respondent.

PATERSON, J. The plaintiff, John Hagle, seeks in this action to obtain a divorce from his wife, Julia A. Hagle, on the ground of desertion. The defendant denied that she had deserted the plaintiff, and alleged that she had lived separate and apart from him for about three years without any fault on her part, but because of the cruel treatment she had received from him. The parties were married in 1869. They owned and lived on a farm in Sacramento county until July, 1882. They also owned a dwelling-house in the city of Oakland. The plaintiff introduced in evidence the judgment roll in an action commenced on the fifth of October, 1883, by the defendant against the plaintiff in this action for a divorce on the ground of extreme cruelty. It appeared from the record in that case that the defendant had not been guilty of any of the acts of cruelty alleged in the complaint. The application for a divorce was, therefore, denied. The court found, however, that "his conduct as a husband was cold, harsh, and disagreeable, making it unpleasant for plaintiff to live with him. Plaintiff's conduct as his wife was also not free from blame. The marriage was an unhappy one from the beginning. Plaintiff is several years older than defendant, and for a long time their relations to each other have been unpleasant. From the evidence and the conduct of the parties in court there is now no love or affection between them. * * * There is no probability of the parties ever living together again as husband and wife. Plaintiff will soon be getting too old to earn a living by work, being now about fifty-four years old. Twenty-five dollars per month would be a reasonable sum under the circumstances to be provided by the defendant for the maintenance of plaintiff." And, as a conclusion of law, it was found that "defendant

¹For appeal of former case of Hagle v. Hagle, see 9 Pac. Rep. 842.

should pay to plaintiff for her maintenance under the provisions of section 136 of the Civil Code, the sum of twenty-five dollars per month." It was accordingly "ordered, adjudged, and decreed that until the further order of this court the said defendant, John Hagle, do pay to the plaintiff, Julia A. Hagle, for her maintenance, the sum of twenty-five dollars per month, payable on the first day of each and every month, commencing on the first day of March, A. D. 1884." From the judgment so entered against him, the defendant appealed to this court, where the judgment was affirmed. *Hagle v. Hagle*, 68 Cal. 588, 9 Pac. Rep. 842.

The plaintiff testified that the defendant left him in July, 1882, and went to their house in Oakland, but returned twice after that, the last time in July or August, 1883, when she remained seven or eight days cooking for the men; that she then went away again without his consent, and has never since returned; that she had told plaintiff she would not stay on the ranch any longer because she could make her living easier; that he sent word to her to return home; if she could not make her own living to come back on the ranch, because he could not keep up two places. Other witnesses testified that the defendant had said "she was not going to work herself to death on the ranch any longer." Judgment of nonsuit was entered. The plaintiff then moved for a new trial, and his motion being denied, he appealed from the judgment and order.

1 It is claimed that the decision in *Hagle v. Hagle*, 68 Cal. 588, 9 Pac. Rep. 842, in effect establishes the right of the superior court to require support for the wife when she is living separate and apart from her husband without grounds for divorce, and against his will and consent; and that there could be no desertion on the part of the wife while living separate and apart from her husband under the decree that was entered in the former suit. It is said in the findings in that case that "there is no probability of the parties ever living together again as husband and wife." The divorce was not denied for any of the causes stated in section 111, Civil Code; and there is nothing in the judgment roll which shows that they were not then living together in the same house, or, if living apart, that the separation was not by mutual consent. There is nothing in the decree which requires the defendant therein to support his wife while she is living separate and apart from him without statutory grounds for divorce and against his will and consent. If there were, it would be sufficient to say that there is no authority for such a judicial separation. We are not called upon to determine the power of the court under section 136, in cases of recrimination and other statutory defenses and excuses for absence from the domicile. There is in this state no such thing as divorce *a mensa et thoro*. Section 136, Civil Code, does not authorize the allowance of support for the wife, and at the same time a release from her marital obligations. In the absence of a statute authorizing it there is no limited divorce. If the legislature had intended to provide for the support of the wife by the husband when she is living separate and apart from him, without grounds for an absolute divorce or statutory excuse for absence from his home, it would have specified the grounds upon which the separation might be declared. It surely was not intended that it should be left to the superior judge in his discretion to say what is a sufficient cause for a divorce from bed and board. A provision similar to that contained in section 136, Civil Code, was construed in *P—— v. P——*, 24 How. Pr. 197. And this case is cited by the Code commissioners in support of the rule. Annotated Civil Code, § 136. See, also, Proposed Civil Code of New York, § 68, note. The objects of the provision evidently are to enable the court in a proper case to aid in a restoration of domestic harmony, to prevent the breaking up of the family—especially where there are children of tender age and delicate health—and to require penurious husbands to furnish decent support for their wives, and for the care and education of the children, where the parties have no cause

for divorce on statutory grounds, or where the innocent party has condoned the offense.

It may be that when the allowance was made to Mrs. Hagle in the former action she was living apart from her husband through no fault of his, but that he was willing, indeed anxious, that she should remain away. In that case, he could not refuse to comply with the order made by the court, simply because of her absence from his house; but the indulgence of her husband in that regard for any length of time would not relieve the wife from her marital obligations to live with him, when required, unless his conduct was such as the statute declares to be a lawful excuse for absence from the dwelling-place. We do not say that support can be required only when the parties are living together. See sections 97-99, 104, 107, 111, 124, 128, Civil Code. The decision in *Hagle v. Hagle*, 68 Cal. 588, 9 Pac. Rep. 842, when read in the light of the facts of the case, and the questions there before the court, is in harmony with what has been said herein.

2. The respondent contends that the general effect of all the evidence is to establish that the plaintiff and defendant were living apart by mutual consent. However this may be, the judgment of the lower court in cases of this kind should not be reversed unless the evidence is so clear that this court can declare it to be the inevitable duty of the court below to render a different judgment. We cannot say that the court below abused its discretion in considering or weighing the evidence introduced by the plaintiff. The parties had a ranch in the country, and a house in Oakland. There was evidence from which the court might have found that, for a time at least, both parties contemplated making the house at Oakland their residence; that there was a mere quarrel as to where they should live; that they resided at different places for a certain time, by mutual consent; and that there was not that corroboration of the testimony of the plaintiff which is required by section 130, Civil Code. We cannot say that the court below was bound to grant a divorce.

Judgment and order affirmed.

We concur: SEARLS, C. J.; MCKINSTRY, J.; SHARPSTEIN, J.

McFARLAND, J. I concur in the judgment; but I dissent from the view that a decree in a divorce case directing the husband to furnish certain support to the wife can be valid only when the parties lived together. I do not think that such is the law, because section 136, Civil Code, makes no such distinction. Moreover, that section provides that the allowance for maintenance may be made "in an action for divorce" when "judgment for divorce is denied;" and how could there be a *bona fide* action for divorce while the parties were living together? It is true that in this state there can be no divorce *a mensa et thoro*; but a decree *a mensa et thoro* is a very different thing from the mere *fact* of married people living apart. Burrill, Law Dict. 504.

2 Cal. Unrep. 806

In re KNAPP. (No. 12,050.)

(Supreme Court of California. September 21, 1887.)

ATTORNEY AND CLIENT—DISBARMENT.

Charges against an attorney for the purpose of disbarring him held not sustained by the evidence.

In bank.

Proceedings for the disbarment of E. G. Knapp, attorney at law.

Complainants, who were the debtors of a client of respondent on a judgment confessed by them April 6, 1886, in about \$10,000, charged respondent as follows: (1) With having, through the agency of his client, the complainants' creditor, induced them to confess this judgment by promising to stay execution thereon for one year, and with having violated this promise by issu-

ing and levying execution on said judgment, thereby defrauding them; (2) with having misled the superior court of Stanislaus county by a false statement of fact regarding the evidence of one Joseph Lord, a witness in a case brought by complainants to stay this execution; (3) with having, by an artifice, secured the deposition of one T. Vinzent before a notary in the city and county of San Francisco, without proper notice, and by an improper use of the notary's subpoena; (4) with having induced one E. Donovan to make an affidavit contrary to the fact. The petition was verified by the five complainants. Respondent denied the truth of the allegations of the petition. The evidence was taken orally before the court in bank on May — and May —, 1887.

D. S. Terry and *W. E. Turner*, for complainants. *Warren Olney*, for respondent.

PER CURIAM. This is a proceeding under chapter 1, tit. 5, Code Civil Proc., for the removal of respondent as an attorney and counselor. We think the evidence insufficient to sustain any of the charges preferred against him. Therefore the proceeding is dismissed.

75 Cal. 86

BELL *et al.* v. BEAN. (No. 12,112.)

(Supreme Court of California February 2, 1888.)

1. NEGOTIABLE INSTRUMENTS—CONSIDERATION—INNOCENT PLEDGEEES.

Where a promissory note, drawn payable to "B. or bearer," for \$2,500, was pledged to plaintiffs as security for a debt of \$200.14, and upon the trial it was shown that the note was without consideration, *held*, that plaintiffs, as innocent pledgees for value, can only recover against the maker the amount of the debt secured.

2. SAME—ACTIONS ON—EVIDENCE—HARMLESS ERROR.

Upon the trial of an action by an innocent pledgee for value of a promissory note, payable to "B. or bearer," against the maker, the admission of evidence tending to limit defendant's liability, and showing no consideration, was harmless, where judgment was rendered for pledgee for full amount of his claim.

Commissioners' decision. Department 2. Appeal from superior court, Sierra county; F. D. SOWARD, Judge.

Action by H. C. Bell & Co. against Joel Bean, upon a promissory note for \$2,500 payable to Philander C. Bean or bearer, and assigned to plaintiffs. Judgment for plaintiffs for \$200.14. Motion for a new trial overruled, and plaintiffs appeal.

Hundley & Gall, for appellants. *P. Van Clief*, for respondents.

FOOTE, C. This is an action brought by the plaintiffs as the assignees of a certain promissory note made and executed by the defendant for the sum of \$2,500, payable to his brother, Philander C. Bean, or bearer. The cause was tried by the court without a jury, and judgment rendered for the plaintiffs in the sum of \$200.14 with interest. From that, and an order refusing the plaintiffs a new trial, this appeal is taken.

The findings show that the defendant was the superintendent and agent of a certain mining corporation engaged in the prosecution of its business in the county of Sierra, in this state. That Philander C. Bean was an employe of that corporation, acting under the orders of the defendant, as superintendent aforesaid. That the defendant had no sort of authority or right from that corporation to make any promissory note which would bind it in any way, nor any authority whatever to settle or compromise any claim or demand for damages which any of the employes or laborers for that corporation may have sustained by any negligence or other wrongful act of it or its agents. That before the twenty-second day of February, 1883, the defendant as such agent of the corporation had employed his brother, Philander C. Bean, Lewis Nevins, David Lewis, and others to work in the capacity of miners of the same

class, and about the same business, and that in their employment the defendant exercised ordinary care in their selection as men competent for the duties falling to them in said business and employment. That on the twenty-second day of February, 1883, the mine belonging to the corporation was being worked by the hydraulic process, and the water and *débris* which was thereby discharged passed through an under-ground bed-rock tunnel. That the tunnel became clogged and obstructed, as it had often before been, so that it would not discharge the water and *débris*; whereupon Philander C. Bean, Lewis Nevins, and two Chinamen were sent to clear the tunnel of its obstructions in the ordinary and proper way, and in the same mode in which such clearance had been frequently before that time effected; in which operation there was no danger existing to the workmen if they exercised proper care, and the supply of water let into the tunnel was properly regulated by the men at work therein. That, for the purpose of regulating the water as directed by those thus working, the defendant and one David Thomas remained on the outside of the tunnel. The upper end of the tunnel connected with a vertical shaft, through which the water and *débris* entered the tunnel. If the water should rise in the shaft to any considerable extent, there was more or less danger that the pressure caused thereby would break the obstruction in the tunnel, and permit the water so to rush out through the tunnel as to cause injury to the workmen engaged therein.

The men in the tunnel having been for some time at work, the defendant sent David Lewis to them to see how they were progressing in their undertaking, and if they were in want of anything. On arriving at the tunnel, Davis was told by Nevins and Philander C. Bean to go out and tell the defendant to put on a large head of water, as it was their opinion that the tunnel was then in a condition to receive it. The defendant went to comply with this request; leaving Lewis and a boy on the watch, so that if the water should rise too rapidly in the shaft they could turn it off. After his departure, Lewis disobeyed instructions, and without the authority or knowledge of the defendant, or any one acting for the corporation, left his station, leaving the boy to watch the shaft. The boy, finding the water rising too fast, tried to notify Lewis in time so that danger to the workmen might be averted, but, before this could be accomplished, the obstructions in the tunnel were broken, the water rushed through, and severely injured Philander C. Bean. This was before any water turned on by the defendant, as requested by Philander C. Bean, ever reached the shaft. It is also found that neither the defendant, nor the corporation for which he acted, was guilty of any negligence or want of care tending or contributing in any degree to the injury of Philander C. Bean.

It appears that, after this, one Proseus and Philander C. Bean met at the defendant's house, Proseus professing to act as the attorney of P. C. Bean, for the purpose of conferring about the injury which the latter had suffered; the result of which was, they induced the plaintiff to execute a promissory note for \$2,500, contemporaneously with a written agreement limiting the defendant's responsibility thereon to a sum much less than the note called for. It seems that at that interview no one pretended to assert that the defendant was in any way responsible for P. C. Bean having been injured, or that the defendant or the corporation were under any obligation to pay P. C. Bean any money whatever. But it seems Proseus threatened that if the defendant did not settle the matter as proposed, that he would sue him, and put him to as much cost as it would suffice to pay what he would have to pay by reason of giving the promissory note and agreement. The defendant being influenced by the threat, and having a sympathy for his brother's misfortune, and hoping that his making the note might induce the company he represented to pay P. C. Bean some money by way of compensation for his injury, executed the note and agreement, when there was no real claim for damages existing in

favor of P. C. Bean, either as against the defendant or the corporation. There was in fact no consideration whatever to support the note and agreement. The defendant not paying the first obligation, Proseus requested him to renew it by making the note sued upon. But no consideration whatever existed to support the second note, which Proseus afterwards gave in pledge, but did not actually assign, to the plaintiffs, as security to them for a debt of \$200.14 which Proseus owed the plaintiffs, which was unpaid at the time this action was brought.

Upon these findings, which are fully supported by the evidence, the court gave judgment for the plaintiffs, as innocent pledgees of the note, for the amount of Proseus' indebtedness to them, with interest.

We do not perceive how that tribunal could have rendered any other judgment than it did. The letter of Burgess introduced in evidence, against the plaintiff's objection, was simply for the purpose of showing that the corporation had refused to pay P. C. Bean any damages; and this was material, under the agreement made contemporaneously with the first note, which limited the defendant's liability very largely in the event that the corporation could not be persuaded to pay anything; and it was material as going to show what sort of a claim, whether *bona fide* or pretended, was the consideration of the note. In no event can we perceive how its admission worked any injury to the plaintiffs. The claim made against the defendant and the corporation was baseless, and did not furnish any consideration sufficient to support the contract sued on, except as to the innocent pledgees for value. They are fully reimbursed for all they can claim by virtue of the security they held; and neither Proseus nor P. C. Bean have ever had any claim, legal or equitable, against the defendant growing out of the transaction. The judgment and order should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

74 Cal. 628

BYRNE v. ALAS *et al.* (No. 11,885.)

(*Supreme Court of California.* January 31, 1888.)

PUBLIC LANDS—MEXICAN GRANTS—RIGHTS OF MISSION INDIANS.

Defendants, Mission Indians, and their ancestors, had been in continuous, open, and notorious peaceable and exclusive possession and use of certain lands since 1815, included within the boundaries of a Mexican grant, made December 31, 1842, which grant was confirmed by the United States, and a patent issued therefor, under which plaintiff held; but the Indians had never presented their claim to the board of land commissioners appointed by the act of congress, passed March 3, 1857, entitled "An act to ascertain and settle the private land claim in the state of California." *Held*, in an action of ejectment, where no statute of limitations was relied on, that the Mexican grant conveyed the fee to the grantee, subject to the right of possession in the Indians acquired under the laws of Spain and Mexico; and these rights were not impaired by the acquisition of the territory by the United States, nor by a failure to present their claim to said board.

In bank. Appeal from superior court, San Diego county; W. T. McNEALY, Judge.

Action of ejectment by M. Byrne against Antonio Alas, and about 20 others, Mission or Pueblo Indians. There was judgment for plaintiff below, and defendants appeal. The facts sufficiently appear in the opinion.

Shirley C. Ward, Special U. S. Atty., for Mission Indians, (*Wicks & Ward*, of counsel,) for appellants. *A. B. Hotchkiss*, for respondent.

PATERSON, J. The complaint in this action is in the usual form in ejectment. The defendants—over 20 in number—are Mission or Pueblo Indians,

claiming the land by virtue of their possession, and the continuous, open, and exclusive use and occupancy by their predecessors and ancestors ever since the year 1815. The plaintiff had judgment in the court below upon the following agreed statement of facts: "*First.* That the premises here in controversy are included within the exterior boundaries of the Mexican grant of the San Jacinto *rancho*, made December 31, 1842; that said grant was duly confirmed by the United States courts, and that a United States patent issued therefor January 17, 1880; that at the time of the commencement of this action plaintiff held legal title to the premises in controversy as the legal successor of the patentee from the government. *Second.* That the defendants here are Mission or Pueblo Indians; that their ancestors and predecessors have been in the continuous, open, and notorious peaceable and exclusive possession, occupancy, and use of the premises in controversy, claiming adversely to all the world ever since, and for a long time prior to, the establishment of the Mexican republic, to-wit, ever since the year 1815; that the defendants never presented their claim to the land in controversy to the board of land commissioners appointed by the act of congress passed March 3, 1851, and entitled 'An act to ascertain and settle the private land claim in the state of California.' It is further agreed that all defense of the statute of limitations is hereby waived on the part of the defendants herein."

1. The questions presented for our consideration upon these facts are difficult and important. The civilized and Christianized Indians of the Californias, and, indeed, of all the Spanish colonies, seem to have been treated as the special and favorite wards of the Spanish sovereigns. Their moral and spiritual welfare and improvement were regarded as matters of great interest to the country, and their personal security, peace, prosperity, and rights of property were most jealously guarded through legislation and by those in authority. In these respects the contrast between the policy of the Spanish and Mexican governments towards their aborigines, and that manifested in some of the English colonies during contemporaneous reigns, is quite marked. Early in the sixteenth century King Philip commanded that settlements on and apportionments of the new territories should be without damage to the Indians, and "that the farms and lands which shall be given to the Spaniards shall be without prejudice to the Indians, and that those which have been given to their prejudice and damage shall be returned to whom by law they may belong." 2 White, Rec. 51. It was made the special duty of local judges to visit the farms of the Indians, without previous request so to do, and ascertain whether the Indians had suffered any injury in person or in property; and, if deemed best, after due notice, to remove them to some other place. It was provided that "the Indians shall be left in possession of their lands, hereditaments, and pastures in such manner as that they shall not stand in need of the necessities of life." No compositions were admitted of lands which Spaniards had acquired from Indians illegally; and the protectors were commanded to procure all illegal contracts to be annulled. "The broad field of Spanish jurisprudence bristled all over with fortifications for the protection of the Indians. The government of Spain, while careful of their proprietary rights, expended much for their conversion to Christianity. As soon as the Indians became sufficiently pacified, the governors (*adelantados*) were to distribute them among the colonists, who were to take charge of them, and watch over their welfare, as provided in book 6 of the *Recopilacion de las Indias*. Laws were provided for the founding of Indian pueblos or towns. It is clear from the whole tenor of the Spanish and Mexican laws, whether in the form of *pueblos* or *ranchos*, that the Indians are entitled in equity and in good conscience, and even according to the strict rigor of the laws, to all the lands they have, or have had, in actual possession for cultivation, pasture, or habitation, when such domain can be ascertained to have had any tolerably well-defined boundaries. Both Spain and Mexico have acknowledged

this principle to be a just one." Hall, Mex. Law, §§ 38, 40, 151, 153-155, 159-161; also, 1 White, Rec. 411; 2 White, 24, 34, 48, 53, 54, 59, 703.

At first the Indians were permitted, in the presence of the judge, to sell their real and personal property at public auction; but in 1781 a decree was published prohibiting the Indians from selling their real estate without license from the proper authority. This remained in force until the independence of Mexico, which made all inhabitants of the Mexican nation equal before the law. The plan of Iguala, adopted in February, 1821, (when the relation between Mexico and Spain ceased and the sovereignty became vested in the Mexican nation,) declared that "all the inhabitants of New Spain, Africans or Indians, are citizens of this monarchy, * * * and that the person and property of every citizen shall be respected and protected by the government." These principles were reaffirmed by the treaty of August 24, 1821, between the Spanish viceroy and the revolutionary party, and the declaration of independence, issued on the twenty-eighth of September, 1821, reaffirmed the principles of said plan. After the acquisition of California from Mexico, the United States was bound, under the treaty of Guadalupe Hidalgo, to respect and protect all titles, both legal and equitable, acquired previous to the cession; and it devolved upon congress to prescribe methods and steps necessary to a just, speedy, and effective determination of the rights of claimants. Much perplexity existed as to how this was to be accomplished, owing to ignorance as to the condition of land titles here at that time. In July, 1849, William Carey Jones was appointed a "confidential agent of the government to proceed to Mexico and California for the purpose of procuring information as to the condition of land titles in California," to aid, no doubt, in securing intelligent legislation upon the subject. His report was made in March, 1850, to the secretary of the interior, who laid the same before congress. After an extended consideration of this report in congress, the act of March 3, 1851, entitled "An act to ascertain and settle private land claims in the state of California," was passed. In this report Mr. Jones thus speaks of the rights of Indians: "I am also instructed to make an inquiry into the nature of Indian rights (to the soil) under the Spanish and Mexican governments. It is a principle constantly laid down in the Spanish and colonial laws that the Indians shall have a *right* to such land as they need for their habitations, for tillage, and for pasturage. * * * Special directions were given for the selection of lands for the Indian villages in places suitable for agriculture, and having the necessary wood and water. * * * Agreeably to the theory and spirit of these laws, the Indians in California were always supposed to have a certain property or interest in the missions. * * * We may say, therefore, that however maladministration of the law may have destroyed its interest, the law itself has constantly asserted the rights of the Indians to habitations and sufficient fields for their support. The law always intended the Indians of the missions—all of them who remained there—to have homes upon the mission grounds. The same, I think, may be said of the large *ranchos*—most or all of which were formerly mission *ranchos*—and of the Indian settlements or *rancherías* upon them. I understand the law to be that whenever Indian settlements are established, and the Indians till the ground, they have a right of occupancy in the land they need and use, and whenever a grant is made which includes such settlements, the grant is subject to such occupancy. This right of occupancy, however, at least when on private estates, is not transferable, but whenever the Indians abandon it, the title of the owner becomes perfect. Where there is no private ownership over the settlement, as where the lands it occupies have been assigned it by a functionary of the country thereto authorized, there is a process, as before shown, by which the natives may alien their title. I believe these remarks cover the principles of the Spanish law in regard to Indian settlements, as far as they have been applied in California, and are conformable to the customary law

that has prevailed there. The continued observance of this law, and the exercise of the public authority to protect the Indians in their rights under it, cannot, I think, produce any great inconvenience, while a proper regard for long-recognized rights and a proper sympathy for an unfortunate and unhappy race would seem to forbid that it should be abrogated unless for a better. * * * In the wild or wandering tribes the Spanish law does not recognize any title whatever to the soil."

It was held in *Leese v. Clarke*, 3 Cal. 17, that every Mexican grant must be determined and its validity established by the fundamental law of the Mexican congress, passed in 1824, the regulations of 1828, and the ordinances of the departmental legislature consistent therewith. Under these laws and regulations the territorial governors were authorized to grant—with certain specified exceptions—vacant lands. Hall, Mex. Laws, 504; *Ferris v. Coover*, 10 Cal. 590, note. If it be true that under the laws of Mexico only vacant lands could be granted, and that grants were to be without prejudice to Indians, it would seem that the lands in controversy, having been in the undisturbed possession of defendants and their ancestors ever since 1815, were not subject to grant so as to cut off the right of occupancy; and, as it is expressly provided in the grant before us, that "he (Estudillo) shall in no way disturb nor molest the Indians who are established or living thereon at the present time," the patentee and his grantee, under the law and the terms of the grant, took the fee, subject, at least, to the right of occupancy by the Indians; and those rights are still preserved, unless the Indians forfeited them by failure to present their claims to the board of land commissioners appointed by the act of March 3, 1851.

The nations of Europe, in whose behalf discoveries and settlements were made on this continent, established among themselves by common consent the principle that discovery gave title to the government by whose subject or authority it was made. The relations between the discovering nations and the natives were matters of regulation, but it became the universal rule that, where the lands were in the actual possession of Indians, the ultimate fee (incumbered with the Indian right of occupancy) should be considered to be in the discovering sovereign, and its successors, with the condition attached that the political power alone—the legislative or executive department—might extinguish the Indian right of occupancy, and leave the fee unincumbered to pass to the grantee or patentee of the government. *Clark v. Smith*, 13 Pet. 195; *Johnson v. McIntosh*, 8 Wheat. 575. With the question of extinguishment the courts have nothing whatever to do except to inquire whether the right of occupancy has been extinguished by the legislative or executive department. Of course, the dominant powers were not *required* to recognize any right in the natives to the soil which the former had acquired by conquest. But, while claiming the right to acquire and dispose of the soil, the discoverers recognized the right of occupancy,—a usufructuary right in the natives. They accordingly made grants of land occupied by Indians, and these grants were held to convey a title to the grantees, subject only to the Indian right of occupancy. *Buttz v. Railroad Co.*, 7 Sup. Ct. Rep. 100; *Beecher v. Wetherby*, 95 U. S. 517.

Among all the sovereigns who established a foothold on this continent, none manifested so great an interest in the Indians, so great a solicitude for their welfare and happiness, as the Spaniards. The kings of Spain recognized in the Indian an inferior man, committed by Divine Providence to their benevolent charge, and to be elevated by their kindness and instruction to the dignity and condition of a Christian. 2 White, Rec. 40-48. *Pueblos* or settlements were established for them. They were given the right of possession within them. Full provision for this was made prior to 1815, when the ancestors of these defendants took possession, and of course prior to the adoption of the plan of Iguala. Not only is the law for the establishment of the *pueblos*

older than the title of Mexico, but the actual establishment of the Indians in *pueblos* and the settlement of the ancestors of the defendants thereon antedated the succession of Mexico. The Mexican nation was bound to respect the rights of the Indians, for under the plan of Iguala "the person and property of every citizen (African or Indian) shall be respected and protected by the government." And that these rights were respected is apparent from the terms of the grant to Estudillo. In the petition of Estudillo to the governor, he promises not to molest the Indian inhabitants. The petition was referred to the prefect for proceedings to be had, inquiring especially as to the wish or desires of the Indians. A return was made that the Indians were "willing that the applicant should settle upon the place, the mentioned Indians offering furthermore that, as soon as the land will be occupied, those of them who are moving about will get together and live contented; that the land, formerly a part of the mission of San Luis Rey, is now vacant;" and in the grant the first condition imposed is that he shall in no way disturb or molest the Indians who are established or living thereon. It is provided: "*Fifth*. If he contravene these conditions, he will forfeit his right to the land, and it shall be open to denouncement by another party." It must be presumed that all these inquiries and conditions were made in accordance with the principles of existing law, and that the grant in pursuance thereof protected the possession of the Indians as against the proprietary ownership of the grantee. There is nothing in the colonization laws of 1824 or the regulations of 1828 indicative of a purpose by Mexico to depart from the traditional policy of the Spanish government. This grant shows that the same old rights were recognized and adhered to,—the right of Indians to occupy lands upon which they had been placed,—and that the fee should be granted, if at all, subject to such right of occupancy. The grant did not annul the rights of the Indians, or estop them from claiming the same; on the contrary, it by its terms expressly preserves those rights.

From the examination we have been able to give the Spanish and Mexican laws, we think that the statement of William Carey Jones, which we have quoted above, is fully sustained by the authorities. If there has been any act of the legislative or executive department of either the Spanish or Mexican government for the extinguishment of the usufructuary interest of the defendants or their ancestors, we have been unable to find any record of it. The grant, being a part of the Mexican archives, is a public document. *Rhodes v. Bell*, 2 How. 405; *Romeo v. U. S.* 1 Wall. 742.

2. It becomes necessary to inquire to what extent, if at all, the confirmation of the Estudillo grant and the United States patent affected the claim of these defendants. The fifteenth section of the act of March 3, 1851, provides that the decrees, or any patent issued under the act, "shall be conclusive between the United States and claimants only, and shall not affect the interests of third persons." Under this clause the rights of the Indians were preserved without presenting their claims. The patentee took the title in fee, subject to the Indian right of occupancy. The rights of the defendants and their ancestors, existing before the change of sovereignty, were preserved to them. The confirmation of the grant to Estudillo was also a confirmation of defendants' rights. Estudillo took all he was entitled to, and no more,—the legal title. That was all the United States could give him. The right which the defendants and their ancestors held, and could have enforced at the time of the treaty of Guadalupe Hidalgo as against a Mexican grantee, passed to Estudillo in trust for them, by the decree of confirmation and the patent. The patent was based upon a Mexican grant. The land never was any part of the public domain of the United States, although held subject to the trust of protecting the interests of claimants under the former sovereign. The patent, therefore, passed the legal title to the patentee burdened with whatever equities existed at the time of the cession of California

in favor of third persons. Under the treaty the government of the United States stood in the place of the Mexican government. Its patent confirmed the grant; proclaimed it to be good; neither added to nor detracted from it in any way. It left the title of Estudillo just as it was at the time of the treaty, so far as the Indians were concerned, and it remained thereafter as to them just as it would have remained if the treaty had not been made. If the Indians were entitled to possession before the date of the patent, they were entitled to it afterwards, so long as any of the community remained in actual possession. So far as we have been able to learn, nothing remained for them to do under the laws of Spain or Mexico to complete their right of possession. Neither was there any act or writing required on the part of the government. Their right was therefore complete. *Leese v. Clark*, 3 Cal. 17; *Teschemaker v. Thompson*, 18 Cal. 11; *Boggs v. Mining Co.*, 14 Cal. 297; *Waterman v. Smith*, 13 Cal. 415; *Beard v. Federy*, 3 Wall. 489. Furthermore, section 16 of the act of March 3, 1851, provides "that it shall be the duty of the commissioners herein provided for to ascertain and report to the secretary of the interior the tenure by which the Mission lands are held; and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind; also, those which are occupied and cultivated by *pueblo* or *rancheros* Indians." This language indicates that Congress did not intend that the rights of the Indians should be cut off by a failure on their part to present their claims, but that it should be the duty of the commissioners to ascertain and report the tenure by which they held their lands; and this is in harmony with the suggestions made in that behalf by Mr. Jones.

Inasmuch as the rights of the Indians were valid rights, existing at the date of the treaty of Guadalupe Hidalgo,—rights which came to them by virtue of the laws of Mexico and of Spain,—the patent was conclusive only as between the United States and the grantee; and in view of the nature of their claim, and the time when their rights attached, we think they are third persons within the meaning of section 15 of the act. *Teschemaker v. Thompson*, *Beard v. Federy*, *supra*; *U. S. v. White*, 23 How. 253; *Adam v. Norris*, 103 U. S. 593; *Miller v. Dale*, 92 U. S. 473. The legal title secured to Estudillo and his grantees must be held by them charged with the right of occupancy by the defendants. Where a claim was held subject to any trust before presentation to the board, the trust was not discharged by a confirmation and subsequent patent. The confirmation inured to the benefit of the confirmer only so far as the legal title was concerned. The confirmation established the legal title in Estudillo, but did not determine the relation between him and third persons. The trust was not stated, but the legal title was none the less subject to the same trust in the hands of the claimant. *Townsend v. Greeley*, 5 Wall. 335; *Hart v. Burnett*, 15 Cal. 530. The defendants, under our system of pleadings and practice, are permitted to show in ejectment that the plaintiff holds the legal title, burdened with the Indian right of occupancy. *Fulton v. Hanlon*, 20 Cal. 480.

3. Respondent relies upon the case of *Thompson v. Doaksum*, 68 Cal. 594, 10 Pac. Rep. 199. That case differs from the one at bar in several respects. No claims whatever was ever presented to the board of land commissioners for confirmation. Section 13 of the act of March 3d provided that "all lands, the claims to which shall not have been presented to the commissioners within two years after the date of the act, shall be deemed, held, and considered as part of the public domain of the United States." The lands claimed by these defendants are within the boundaries of a Mexican grant confirmed by the board of land commissioners to Estudillo, it is true, but, as we have seen, this confirmation relieved the defendants of the necessity of presenting their claims, and conclusively adjudicated the fact that the lands were private property, and no portion of the public domain. The Indians interested in that case were not *pueblo* or *rancheros* Indians, and no duty of ascertaining their

rights devolved upon the land commission. The Indians therein mentioned were never wards of the government. Furthermore, there was, in that case, a pre-emption claim filed under the land laws of the United States, and the patent purported to convey both the legal and the equitable title against the government and against all the world; and, of course, could not be attacked in a collateral proceeding. The title to the lands in controversy was never in the United States. The patent determined the rights of the government and the patentee, but not the rights of third persons. If there was anything in the nature of a trust before the claim was presented to the board, that trust was not discharged by the action of the land commissioners, or the officers of the land department. There is nothing to show that the Indians referred to in the case of *Thompson v. Doaksum* were civilized or Christianized. Under the authorities quoted above, to be sure, they had the right of occupancy, but that right continued only so long as it was recognized by the political power, —the executive or legislative departments of the government. Of course, the possession, when abandoned by the Indians, attaches itself to the fee without further grant; and this is true, whether there be any record evidence in favor of the Indians or not. Their right exists only so long as they actually occupy the land. So long as the defendants and their ancestors were in possession of the lands in controversy, there remained nothing to be done by them under the laws of Mexico in order to confirm their right, nor was there anything to be done by the Mexican government, or the officers thereof. The rights of the Indians had been completely established. We think that, upon the facts agreed to in this case, the defendants are entitled to judgment for their costs. Judgment reversed, and cause remanded, with directions to enter judgment in favor of defendants for their costs.

We concur: SEARLS, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; MCKINSTRY, J.; TEMPLE, J.

75 Cal. 93

EATON v. ROCCA *et al.* (No. 12,186.)

(*Supreme Court of California.* February 4, 1888.)

MINES AND MINING—LIENS—ENFORCEMENT—PLEADING AND PROOF.

The complaint alleged that defendant A. was the owner of a mine, and that defendant B. claimed "some interest" therein, and claimed to recover against A. for services as miner, and for board of laborers, contracted by B. as A.'s agent; and sought to establish a lien on the mine. The evidence showed that A. had taken from B. an assignment of a mortgage upon the mine, in satisfaction of a debt, and had bought the mine at foreclosure sale; that A. had agreed that if the mine should be sold B. should have the proceeds above the amount necessary to reimburse A.; that B. was not the agent of A., and contracted the debt individually. *Held*, that as the evidence showed A. to be the owner, and not a mortgagee, of the mine, that under neither the complaint nor the evidence could there be any recovery against B., and that plaintiff was not entitled to a lien on the mine.

Commissioners' decision. Department 1. Appeal from superior court, Tuolumne county; J. F. ROONEY, Judge.

Eaton, the plaintiff below, appeals from a judgment for defendants, and from an order refusing a new trial.

E. P. Otis and *D. F. Nicol*, for appellant. *Frank W. Street*, for respondents.

FOOTE, C. The plaintiff, Eaton, instituted this action against John Rocca and J. B. Richeri, for the purpose of obtaining a judgment against Rocca for money alleged to be due the plaintiff for work and labor performed by him as a miner in and about a mine alleged to be the property of Rocca, and for the value of the board of certain laborers, etc. The complaint further sought to enforce the lien of Eaton as a miner upon the mine mentioned therein as the property of Rocca. It was also alleged in that pleading that Richeri claimed

"some interest" in the mine, and that the debt due to the plaintiff had been contracted with Richeri, as the superintendent of the mine, acting as the duly-empowered agent of Rocca. According to the evidence, the plaintiff had been employed by Richeri, in his individual capacity, to work as a miner, and to board certain laborers, etc. With this contract, and the work done under it, Rocca had nothing whatever to do, and was in no way privy thereto. It was a matter exclusively between Richeri and the plaintiff. The only interest which Richeri had in Rocca's mine was that Rocca had agreed that if the mine should be sold that he, Richeri, should have from the proceeds thereof any balance that was left after Rocca had realized from the sale of his own property what he should be out of pocket by reason of his former advancements to Richeri, by the transfer of certain mortgages upon the mine, which last was bought by Rocca at a foreclosure sale had under and by virtue of those mortgages. The hope that something valuable might be developed in the mine by working it to some extent, seems to have animated Richeri to employ the plaintiff to work it on certain conditions; and it seems to have been Richeri's expectation that in some way the mine might be advantageously sold, Rocca be reimbursed for all that the mine had cost him, and he, Richeri, and the plaintiff get something out of it. But with all this the defendant Rocca had nothing to do; never having known of it, and never having empowered Richeri to act as his superintendent or agent, or held him out as such.

The evidence is conflicting and the findings should not be disturbed. According to them, the allegation in the complaint that Rocca is the owner of the mine, was fully proved. But the allegations that the plaintiff was employed by Richeri as Rocca's duly-authorized agent, and the superintendent of his mine, are not proved, but the contrary is shown; and it is found that the plaintiff made his contract with Richeri, not acting as agent or superintendent aforesaid, but in his own behalf solely, he, Richeri, having no real interest in the mine upon which it is sought to enforce a miner's lien. The plaintiff contends, in one part of his brief, that according to the evidence Richeri was the true owner of the mine, and not Rocca; that Rocca was only a mortgagee of the mine in controversy; and that as the facts show the contract to have been made with Richeri, by Eaton, the work done in and about the mine, and the laborers boarded, and the other things done by the plaintiff at the special instance and request of Richeri, that the court should have so found, and given judgment against Richeri that he pay the debt alleged to be due the plaintiff; and that Eaton's miner's lien therefor be enforced as against the mine described in the complaint. But this contention cannot be sustained. The plaintiff cannot be heard in this court for the first time to urge the rendition of a judgment in his favor in direct contradiction to the allegations of his complaint filed in the trial court. There he informed the defendants, by the allegations in his complaint, that he would prove that Rocca was the owner of the mine, and Richeri his agent and superintendent; that the debt due him, the plaintiff, was from Rocca as the owner of the mine, and that he claimed the right to enforce a miner's lien against Rocca's mine. The only allegation made as to Richeri, attempting to make him responsible as a party defendant, is that he claims some interest in the mine; but it is nowhere alleged that he contracted the debt upon his own account. The court has found upon sufficient proof that Rocca was the owner of the mine, that Richeri was not his agent or superintendent, and that Rocca was in no way responsible to the plaintiff. The evidence that Rocca was the owner of the mine was introduced to some extent by the plaintiff, and the defendants were informed by the plaintiff's pleading that Rocca was such owner. The debt was claimed to be due from Rocca, and not Richeri. Now, as it is alleged and proved that Rocca was the owner of the mine, and as it is not alleged in the complaint that Richeri either contracted for himself or owed the debt, it is difficult to perceive upon what reasonable ground the plaintiff can claim a judgment against Richeri.

The evidence shows that Rocca was the owner of the mine, and not a mortgagee. He had taken, in satisfaction for a debt due him from Richeri, an assignment of two mortgages on the mine in controversy. He bought the mine at a foreclosure sale, and had a sheriff's deed for it. There being no debt due him from Richeri, he had the absolute title to the mine. The fact that he verbally agreed with Richeri that if the mine was sold, that after he, Rocca, had realized sufficient money therefrom to reimburse him fully for all money which he lacked by reason of the advancements he had made to Richeri, he would give Richeri the balance, did not alter in any way the legal title which Rocca held to the mine under the foreclosure sale, for he no longer held any debt against Richeri. *Henley v. Hotaling*, 41 Cal. 28; *Manasse v. Dinkelspiel*, 68 Cal. 404, 9 Pac. Rep. 547. Rocca was the real owner of the mine, and as he has been found not to have made, through himself or agent, any contract, either express or implied, with the plaintiff, he is neither indebted to the latter, nor can his mine be subjected to the alleged miner's lien. There could be no judgment whatever rendered against Richeri for any debt due to the plaintiff, for no facts are alleged in the complaint which set up any such demand or claim. There could be no enforcement of any lien against the mine, as Richeri's, because it is alleged in the complaint, and shown by the evidence to belong to Rocca.

There is no merit whatever shown in the plaintiff's contention as exhibited here. It is certainly not permissible to frame a complaint and try a cause upon one alleged state of facts, and then to press upon this court the propriety of considering another state of facts, which do not, in fact, exist, as entitling the appellant to a reversal of a judgment, which latter state of facts, as alleged to exist, are contradictory of the allegations of his complaint.

For these reasons the judgment and order denying a new trial should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

75 Cal. 91

SEARS *et al.*, v. STARBIRD. (No. 12,379.)

(Supreme Court of California. February 4, 1888.)

APPEAL—BRIEFS—GROUNDLESS CHARGES AGAINST JUDGE'S MOTIVE.

A judgment roll having been admitted in evidence to prove dissolution of a firm, the judge treated it as also proving other facts. Appellant's brief, commenting on this point, stated that "the court, out of the fullness of his love for a cause, the parties to it, or their counsel, or from an overzealous desire to adjudicate all points, could not, with propriety, patch up" plaintiff's case. *Held*, to be a groundless charge against the judge's purity of motive, constituting a contempt of court, for which appellant's brief should be stricken from the files, and the submission of the cause set aside.¹

Commissioners' decision. Department 1. Appeal from superior court, Tuolumne county; J. F. ROONEY, Judge.

Sears and Smith sued Starbird for a claim growing out of a partnership formerly existing between the three. On the trial, plaintiffs introduced in evidence a judgment roll in an action between the same parties, for the purpose of proving dissolution of the firm. The judge treated it as also proving other facts pertinent to the case. Judgment being for plaintiffs, Starbird appealed.

F. D. & G. W. Nicol, for appellant. *F. W. Street*, for respondents.

¹For a discussion of the subject of contempt of court, see note in *Re Cary*, 10 Fed. Rep. 629-633.

HAYNE, C. The brief of the counsel for appellant contains the following: "The court, out of the fullness of his love for a cause, the parties to it, or their counsel, or from an overzealous desire to adjudicate 'all matters, points, arguments, and things,' could not, with any degree of propriety, under the law, patch and doctor up the case of the plaintiffs, which perhaps the carelessness of their counsel had left in such a condition as to entitle them to no relief whatever."

Here is a distinct intimation that the judge of the court below did not act from proper motives, but from a love of the parties or their counsel. We see nothing in the record which suggests that such was the case; on the contrary, the action complained of seems to us to have been entirely proper. See *Sill v. Reese*, 47 Cal. 340. The brief, therefore, contains a groundless charge against the purity of motive of the judge of the court below. This we regard as a grave breach of professional propriety. Every person on his admission to the bar takes an oath to "faithfully discharge the duties of an attorney and counselor." Code Civil Proc. § 278. And among such duties, as defined by statute, is "to maintain the respect due to the courts of justice and judicial officers." Id. § 282. Surely, such a course as was taken in this case is not a compliance with that duty. In *Friedlander v. Mining Co.*, 61 Cal. 117, the court said: "If, unfortunately, counsel in any case shall ever so far forget himself as willfully to employ language manifestly disrespectful to the judge of the superior court,—a thing not to be anticipated,—we shall deem it our duty to treat such conduct as a contempt of this court, and to proceed accordingly;" and the briefs in the case were ordered to be stricken from the files.

We therefore advise that the submission of this case be set aside, and that the brief of counsel for the appellant be stricken from the files; and that, if a proper brief on behalf of appellant be not filed within 30 days from the entry of the order, the appeal stand dismissed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, ordered the submission of the cause is set aside, and brief of counsel for appellant stricken from the files of this court; and if, within 30 days from the filing of this order, a proper brief on the part of appellant be not filed herein, the appeal will be dismissed.

2 Cal. Unrep. 841

HUGHES v. THOMPSON. (No. 12,214.)

(Supreme Court of California. February 6, 1883.)

APPEAL.—REVIEW.—DEFECTS NOT APPARENT ON THE RECORD.

On appeal from an order of court granting a new trial, where no briefs are presented, and there is nothing to show upon what grounds the court granted the motion, the order will be affirmed.

Appeal from superior court, Fresno county; R. E. ARICK, Judge.

Terry & Terry, for appellant. *H. S. Dixon*, for respondent.

BY THE COURT. The appeal is from an order granting plaintiff's motion for a new trial. No briefs have been filed. There is nothing to show upon what grounds the court below granted the motion. We do not feel called upon to search the record for the purpose of determining whether the court erred. We presume that a new trial was properly ordered. Order affirmed.

75 Cal. 102

HOUGHTON v. ALLEN et al. (No. 12,047.)

(Supreme Court of California. February 7, 1883.)

MORTGAGES.—MORTGAGEABLE INTEREST.—AGREEMENT FOR PURCHASE OF LAND.

A purchaser made an agreement for the purchase of land, paying part cash, and the balance in deferred payments, agreeing that, if he failed to make either of the

payments at the time specified, the owner should be discharged of any claim for the performance of the contract; it also being provided that, upon the failure of the purchaser to make the payments, the owner should sell the lots at auction, and pay the surplus to the purchaser. The purchaser went into possession, and mortgaged the lots, which mortgage was duly recorded. Upon default in the payment, the original owner sold the lots to a third party: the deed reciting the contract, and the assent of the original purchaser to the sale. *Held*, that the mortgagee could not foreclose his mortgage as against the second purchaser. *PATERSON, J.*, dissenting.

In bank. Appeal from superior court, Yolo county; *C. H. GAROUTTE*, Judge.

Foreclosure proceedings by *J. F. Houghton*, plaintiff, against *Thomas Allen* and *William Dresbach*. Judgment for defendants. Plaintiff appealed.

Beatty, Denson & Oatman, for appellant. *A. P. Catlin*, for respondent.

McFARLAND, J. After a full consideration of this case in bank, we have reached the conclusion that the judgment of the court below should be affirmed. The action is brought by plaintiff, Houghton, to foreclose a mortgage executed to him on April 6, 1871, by defendant Allen. The mortgage includes certain land not in contest here; and also lots 6, 7, and 8,—the premises in controversy. The court below rendered judgment foreclosing the mortgage as to the other land, but refused to include lots 6, 7, and 8 in the decree. From the last-named part of the judgment plaintiff appeals.

The complaint is in the usual form, and proceeds upon the theory that Allen was the owner in fee of the lots in question. The averments as to those lots are the same as the averments as to the other property included in the mortgage. If the theory of the complaint had been carried out in the judgment, all right of defendant Dresbach in the said lots would have been foreclosed, and, as against him, the purchaser at the foreclosure sale would have taken an unincumbered fee-simple title. But Allen was not the owner of the lots. On the twenty-second day of August, 1870, these lots were owned in fee by John P. Jackson; and on said day Jackson made a written contract with Allen by which he agreed to convey them to Allen on the twenty-second day of August, 1872, provided Allen would pay him \$50 in cash, and \$100 on August 22, 1881, and \$100 on August 22, 1882,—the two deferred payments to bear interest at 12 per cent. per annum. It was provided that time should be considered as of the essence of the contract; and that, if Allen failed or neglected to make either of the payments, Jackson should be wholly released and discharged of any claim, at law or in equity, for a performance of the contract, etc. Allen paid the \$50, and went into possession. While in possession, and on April 6, 1871, he executed to Houghton the mortgage above referred to, which included these lots. But, when the first \$100 became due, Allen failed to pay any part of it, and has totally neglected to pay any part of either of the deferred payments. And Houghton never paid, or offered to pay, anything on the contract. On the twelfth day of January, 1872, Jackson, for a consideration of \$250, conveyed the lots to the defendant Dresbach. The contract between Jackson and Allen was not recorded until July 9, 1872; but, when Jackson conveyed to Dresbach, Allen, being in default, consented to the conveyance, and to deliver the possession to Dresbach. The deed to Dresbach recited that there had been a contract with Allen, and that the conveyance was made at Allen's request. This was the first notice, so far as it appears, which Dresbach had of the character of Allen's possession.

If there were nothing in the contract more than as above stated, it would be clear that no interest of any kind in the lots in question remained in Allen or Houghton. There was another clause, however, which provided that, upon the failure of Allen to make any payment, "it shall be the duty" of Jackson to sell the lots at public auction for cash, and of the proceeds to retain the amount due him on the contract, with the expenses of sale, etc., and pay the overplus, if any, to Allen. No demand was ever made upon Jackson or Dres-

back to sell the lots. But it is contended that, as the property was not sold at auction, therefore, in some way or other, the title passed to Allen, and that Houghton can subject it, free from any other claim whatever, to the payment of his demand against Allen; that is, that Houghton can get the lots, by virtue of his mortgage, without paying for them.

Admitting, for the present, that Allen, as against Houghton, could not waive the sale of the lots at auction, and that no demand for such sale was necessary; and admitting, further, that if Houghton had foreclosed whatever interest Allen had in the lots by virtue of the contract, and purchased at the foreclosure sale, he might have maintained an action against Dresbach for the direct purpose of compelling a sale at auction, and the appropriation of the surplus, if any, over the contract debt to Houghton,—still it seems clear that in this present action the title of Dresbach cannot be foreclosed and cut off. The rights only of those who hold or claim under the mortgagor can be determined in an action to foreclose a mortgage; a title claimed adversely to the mortgagor cannot be thus litigated. *Croghan v. Spence*, 53 Cal. 15; *Marlow v. Barlew*, Id. 456; *San Francisco v. Lawton*, 18 Cal. 465. Dresbach did not hold or claim under the mortgagor, Allen; he held under Jackson, and stood in the latter's shoes. He was therefore not a proper party to the action. Having been made, however, a defendant, under the general averment that he had or claimed some interest in the mortgaged premises, which was "subsequent and subject" to the mortgage, he was forced to answer. His answer set forth the nature of his interest, and denied that it was subject to the mortgage. The court sustained his defense, and we think correctly. Judgment affirmed.

We concur: SEARLS, C. J.; MCKINSTRY, J.; THORNTON, J.; SHARPSTEIN, J.

PATERSON, J.; I dissent. Allen held a mortgageable interest. Section 2947, Civil Code; *Jones v. Lapham*, 15 Kan. 540; *Laughlin v. Braley*, 25 Kan. 147; *Crane v. Turner*, 67 N. Y. 437. He mortgaged that interest to plaintiff for a valuable consideration. The mortgage was recorded April 7, 1871, nearly a year before Dresbach purchased. This record, and Allen's request, while in possession, that Jackson should convey to Dresbach, gave the later full notice of Houghton's claim. He knew that Allen had mortgaged his interest in the property. He saw Allen in possession of the premises, and was bound to know what interest Allen held, and, having notice of the facts, he could not defeat Houghton's lien. Jackson could not have conveyed to Dresbach, so as to deprive Allen of his interest under the contract, without Allen's consent. Allen's interest did not cease upon the failure to pay the installment due August 22, 1872. So long as Jackson was satisfied to allow Allen to remain in possession without payment of the installments, there was no determination of the interest held by Allen. After pledging all the rights he held under the contract to Houghton, as security for the payment of his obligation, Allen could not in equity destroy the effect of that security by a voluntary surrender or waiver, which had neither consent nor consideration to support it, so far as Houghton was concerned. Certainly, the rights of Dresbach could not be enlarged over those of Jackson, under the circumstances, in consequence of the deed from the latter to the former, (*Baker v. Bishop Hill Colony*, 45 Ill. 264;) and Allen, Jackson, and Dresbach "could not covertly, or without notice to them, (mortgagees,) defeat their mortgage, or, rather, deprive them of their equities," (*Sinclair v. Armitage*, 12 N. J. Eq. 177.) There can be no question that among the equities secured to Houghton by his mortgage is the right to have the property sold at auction to the highest bidder, and, after payment of the balance due upon the contract, to have the overplus, if any, applied to the satisfaction of his mortgage. Plaintiff had

the right to assume that the contract would be carried out in all respects; and the purchaser, not being in default at the time of the execution and delivery of the mortgage, could not, after receiving plaintiff's money (\$921.75) upon the faith and security of the contract, stipulate away this right. If Jackson had retained the ownership of the property, he would have been in duty bound to sell the lots at public auction for cash, and out of the proceeds retain the amount due him on the contract, with the expenses of sale; and the overplus, if any, would have been subject, in equity, to the satisfaction of Houghton's lien. Dresbach stands in no better position than Jackson would, under those circumstances; and, if he stands in Allen's shoes, he is not entitled even to be first paid out of the proceeds of the purchase money advanced.

Assuming his rights equal to those of Jackson, the decree should be modified so as to include lots 6, 7, and 8, and to have the proceeds of the sale, or so much as may be necessary, applied to the satisfaction of plaintiff's mortgage, after retaining out of the proceeds the amount which was due on the contract at the time of the purchase by Dresbach, together with interest and the expenses of sale. The execution of such a decree would be a substantial compliance with the terms of the contract, and secure the rights of all parties without further litigation.

2 Cal. Unrep. 837

MALLAGH v. MALLAGH *et al.* (No. 11,859.)

(*Supreme Court of California.* February 4, 1888.)

1. TRUSTS—RESULTING TRUSTS—ESTABLISHMENT BY PAROL.

Plaintiff made a deed to her son of real property, with an understanding that he should satisfy her debts, and reconvey the remainder to her. In effecting a compromise with certain parties, the son, in consideration of a deed of certain other of plaintiff's property, procured the property in dispute to be conveyed to him. Civil Code Cal. § 852, enacts that no trust of real property is valid unless created by writing or operation of law. In an action to have the heirs of the son declared trustees, *held*, that parol evidence was admissible to show the nature of the dealings between plaintiff and her son, and to establish a trust in her favor.¹

2. SAME—LACHES.

Plaintiff had owned the beneficial interest in property, and had been in possession thereof since 1879, and was in possession in 1883, when she brought action to have defendants, who held the naked legal title, declared trustees for her. *Held*, that the plaintiff was not guilty of laches in asserting her rights.²

SEARLS, C. J., MCKINSTRY and TEMPLE, JJ., dissenting.

Commissioners' decision. In bank. Appeal from superior court, San Luis Obispo county; D. S. GREGORY, Judge.

Juana Corrillo de Mallagh brought this action against Isabel Roco de Mallagh and Edna Mallagh, the widow and infant child of her son, David Mallagh, to establish a trust in plaintiff's favor of certain land of which said David Mallagh died seized. Plaintiff, being financially embarrassed, with a view to making a settlement with her creditors, made a conveyance in July, 1877, to her son, said David Mallagh, of property, which was subsequently sold under foreclosure proceedings, and purchased by the trustees of the estate of one Thompson, but plaintiff retained possession. It was claimed that the foreclosure suit was irregular, and that the grantee's under the sheriff's deed acquired no title. A compromise was effected, whereby the purchasers at the foreclosure sale were to convey to the plaintiff the property in dispute, and were to receive a conveyance of certain other of plaintiff's property. David

¹ A resulting trust in real estate may be proved by parol testimony, but such proof must be full and clear. *Lofton v. Sterrett*, (Fla.) 2 South. Rep. 837; *Walton v. Karnes*, (Cal.) 7 Pac. Rep. 676. Respecting resulting trusts, see *Smith v. Brown*, (Tex.) 1 S. W. Rep. 573; *Bedford v. Graves*, (Ky.) 1 S. W. Rep. 534, and note; *Ward v. Matthews*, (Cal.) 14 Pac. Rep. 604, and note; *Carter v. Challin*, (Ala.) 3 South. Rep. 313.

² As to what is such lapse of time as will preclude equitable relief, and what are circumstances sufficient to rebut the imputation of laches, see *Hoffert v. Miller*, (Ky.) 6 S. W. Rep. 447.

Mallagh procured a conveyance to be made to himself of the property plaintiff was to receive under this agreement, but plaintiff did not become aware of it until the month of January, 1882. David Mallagh died in March, 1883, leaving him surviving the defendants, his only heirs at law, and shortly afterwards this action was brought. The judgment of the court below was in plaintiff's favor. Defendants appeal. Civil Code Cal. § 852, referred to in the opinion, reads as follows: "No trust in relation to real property is valid unless created or declared (1) by a written instrument, subscribed by the trustee, or by his agent thereto authorized by writing; (2) by the instrument under which the trustee claims the estate affected; or (3) by operation of law."

Venable & Goodchild and W. H. Spencer, for appellants. Graves, Turner & Graves, for respondent.

FOOTE, C. This is an action to establish and enforce a trust. It appears that the plaintiff has been divorced from her husband; and being largely in debt, and her property mortgaged, desired to effect some compromise with her creditors whereby she might retain for herself some part of her estate. With that end in view, and acting in perfect good faith, she made to her son, David Mallagh, a deed of the property set out in the complaint herein. This son was a person in whom she reposed the utmost confidence, and she always acted as he advised her to do. Proceeding under his advice, she executed to him a deed to her property, with the understanding and agreement that he should satisfy the claims of her creditors, and, if anything remained after that, he was to reconvey it to her. The creditors sold the property (which had been mortgaged to them) at a foreclosure sale, and purchased it. A dispute arose as to whether or not that sale was good, and gave the purchasers a perfect title to the plaintiff's property. She retaining possession of it, her son, David, effected a compromise and agreement with the purchasers at the foreclosure sale that they should accept from him for his mother a deed to a portion of her property, and should then deed to her the property now in dispute. He deeded that which he had promised to the creditors, but, instead of having them (as had been agreed upon) to convey the property now in dispute to his mother, he took from them a deed of it to himself. His mother remained in ignorance of that fact until a short time prior to his death. Then she, having discovered what he had done, applied to him to make her a conveyance of the property, which he refused to do, and never did so convey it. There is nothing to show that in making the deed to the creditors he either had repudiated, or intended to repudiate, his mother's right. For all that appears to the contrary, he at that time intended to act fairly by her; in other words, that he made the conveyance as her agent. In this sense, what the creditors accepted as the consideration of their deed, came from the plaintiff. The court below decreed that David Mallagh was trustee for his mother, and, being deceased, the defendants, his only heirs at law, in privity with him, held the property in trust for the plaintiff, and that equitably it should be conveyed to her. From that judgment, and an order denying a new trial, the defendants have appealed.

It is argued that parol testimony was not admissible to show the facts surrounding the transaction between the parties thereto. But this view, we think, is untenable, for the reason that all the property which remained after the satisfaction of the creditors' claims was held by David Mallagh in trust for his mother. The only consideration which ever passed to the creditors and purchasers under the foreclosure sale for the deed which they executed to David Mallagh, instead of his mother, to whom they promised to convey it, was that which came from the plaintiff. She originally conveyed it to her son, and agreed that he might compromise her debts, and, when he did so by the deed he made to the trustees of the Thompson estate, it was done by him as the agent and trustee of his mother, who thereby furnished the property thus conveyed as a consideration for the creditors to convey to her the property

in dispute, for it is not necessary that money alone should be the consideration in such a matter. *Currey v. Allen*, 34 Cal. 254. The fact that they conveyed to her agent and trustee did not defeat her equitable right to have the title vested in her, as had been agreed upon.

Under our Code, resulting trusts may arise by operation of law, (section 852, sub. 3, Civil Code,) and such trusts may be established by parol, (*Millard v. Hathaway*, 27 Cal. 119; *Bayles v. Baxter*, 22 Cal. 575.) Judge Story, in his work upon Equity Jurisprudence, vol. 2 (13th Ed.) § 1195, declares that implied trusts include both resulting and constructive trusts. This court has held, in common with many others, that parol evidence is admissible to show an implied trust, whether the same be presumed "from the supposed intention of the parties, and the nature of the transaction, when they are known as 'resulting trusts;' or they are raised independently of any such intention, and forced on the conscience of the trustee by equitable construction and the operation of law; and such are distinguished as 'constructive trusts.' These trusts are expressly exempted from the operation of the statute of frauds." *Millard v. Hathaway*, 27 Cal. 119. Upon examination, we think that the evidence supports the findings.

As to the suggestion made by the respondents' counsel that the plaintiff was guilty of laches in failing to assert her rights, it is only necessary to say she had been in possession of the premises in controversy since 1879 and owned the entire beneficial interest therein. The respondents were out of possession, and held the naked legal title for the plaintiff; hence the latter might with safety rest content until the former took some steps to disturb her in the enjoyment of her rights. *Barroilhet v. Anspacher*, 68 Cal. 121, 8 Pac. Rep. 804.

No prejudicial error appearing, we are of the opinion that the judgment and order should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

SEARLS, C. J., MCKINSTRY and TEMPLE, JJ., did not concur in the opinion.

75 Cal. 108

PEOPLE v. DYE. (No. 20,352.)

(Supreme Court of California. February 11, 1888.)

HOMICIDE—TRIAL—EVIDENCE.

Upon a trial for murder, the prosecution drew out, on cross-examination of witnesses for defendant, that his wife, a witness in his behalf, had had improper relations with a party, and in rebuttal of irrelevant testimony for the defense were allowed to further prove that the wife had stated, in an interview with the party, that defendant had sent her there for the purpose of getting money out of such party, and, having obtained some money, that she wrote defendant to "drop everything; there is no occasion for to make any further trouble." Held, that this evidence was, upon collateral matters, irrelevant, improper as hearsay, and prejudicial to defendant's case, as holding him up to the jury as attempting to make money out of his wife's shame.

Commissioners' decision. In bank. Appeal from superior court, Ventura county; B. F. WILLIAMS, Judge.

Upon an indictment of Joseph F. Dye, for the murder of Herman Haines, defendant appeals from a judgment of conviction of murder in the second degree.

Bicknell & White and *H. T. Gage*, for appellant. *Geo. H. Johnson*, Atty. Gen., for respondent.

HAYNE, C. J. The defendant was convicted of murder in the second degree for the killing of one Herman Haines, and was sentenced to 16 years in the state prison. The shooting occurred in the store of one Cohen, in the town of Santa Paula. The evidence tends to show that the two men met in the store, and that Haines bid the defendant "good morning," as he passed him, whereupon the defendant exclaimed: "You dirty scoundrel, how dare you speak to me," and taking him by the throat, slapped his face several times. Cohen, the storekeeper, then threw his arms around the defendant, and held him, doubtless with a view to put an end to the struggle. Haines then ran to the corner of the store, where he had left his rifle on entering the place, and took it up. In the meantime the defendant had got loose from Cohen, and dodging behind the counter, approached Haines in a stooping posture. The evidence tends to show that Haines had got hold of his rifle, and was pointing or endeavoring to point it at the defendant as the latter approached him. The defendant, before reaching Haines, but when quite close to him, fired two shots with his revolver, and on reaching him took the rifle from him or knocked it out of his grasp. Haines then ran into the street. The defendant followed, and fired a shot as Haines was running away. The defendant's version of the affair differs somewhat from the foregoing. He says that Haines jostled him in passing, and that he did not fire when Haines ran away. Three wounds were found upon Haines—one in the shoulder, one in the abdomen, and one in the thigh. According to a physician, either of the two former were sufficient to cause death, but the wound in the thigh was not dangerous. There is some evidence to the effect that the wound in the shoulder was from the first shot, but there is nothing to show the order of the other wounds. Haines died in three or four days after being shot.

The defense was that the shooting was necessary for the defendant's protection. He gave evidence tending to show that Haines had threatened to kill him, and that he had been informed of such threats, and introduced evidence tending to show the following facts: Haines and his son, a boy about 16 years old, were in defendant's employ upon a ranch which he was managing. One day, a short while before the shooting, he intercepted a letter from Haines to his (defendant's) wife. This letter was as follows: "Mrs. Dye, meet me at the barn to-night, or I will tell Joe about that medicine. Answer. H. HAINES." Underneath this, on the same paper, was written: "I return your insult, and I say to you for the last time, never come upon this ranch or speak to me again. G. L. DYE. Aug. 19, '86." This letter was brought to Mrs. Dye by Haines' son. On taking it from the boy the defendant gave him a whipping, and the next day paid off and discharged both him and his father, and wrote to Haines never to speak to him again. This evidence, as a matter of course, was not admissible to justify the taking of Haines' life. But it was admissible in connection with Haines' threats, for the purpose of showing that the threats were not mere idle vaporings, but came from a man who had, or thought he had, a grievance, and were therefore to be heeded.

During his testimony as to the above matters, the defendant stated that after the affair of the letter his wife left the ranch to visit her mother in San Francisco. This seems to us to have been an irrelevant circumstance. We cannot see what the movements of Mrs. Dye, after the difficulty as to the letter, had to do with the defense made. When she came on the stand, and had testified concerning the affair of the letter, the prosecution drew from her on cross-examination the information that she had not gone to visit her mother in San Francisco, but had gone to Los Angeles, and went on to cross-examine her, against the objections of the defense, as to her movements there—eliciting the statements that she staid at Stone's lodging-house, and that on one occasion she had gone to Congress Hall saloon to see the proprietor, one Baker, and had seen one Crow there. She was also cross-examined as to whether her

husband had sent her to see Crow, but she denied that he had. This seems to us to have been irrelevant matter, and not proper cross-examination. We are not prepared to say, however, that of itself it had a tendency to injure the defendant. After this cross-examination, the defendant introduced evidence tending to show that, at the time of the affair of the Haines letter, he discovered that his wife had had improper relations with the Crow mentioned in the cross-examination above referred to, and that a correspondence had been kept up between them through the medium of Haines, the letters to her coming under cover to Haines, who thought "it was rather dangerous business, but he would do it, anyhow." We hardly see why the defense should have wanted these facts in evidence. But they were admissible, on behalf of the defendant, upon the same principle that the Haines letter was admissible, viz., in connection with the threats of Haines, and to show that there was a grievance between the two men, and that the threats were in earnest, and therefore to be heeded.

The defendant went on to introduce a letter from his wife to Crow, written about three days after the Haines letter affair, in which she stated that she was in trouble, and asked him to send her \$50 by registered letter, under cover to Haines. The prosecution then drew out on cross-examination that at the Congress Hall saloon interview she demanded \$1,000 from Crow. Not getting that, she demanded \$300. She got \$40 or \$50. In this connection she testified: "My husband and I had separated at that time." She denied that the defendant had told her to make the demand upon Crow, or to go to see Baker. This was all irrelevant matter. It made not the slightest difference in the case before the court whether the witness had endeavored to get money from Crow or not. In rebuttal, the prosecution was allowed, against the objection of the defendant, to go into the Congress Hall saloon interview, and to prove that Mrs. Dye there stated that the defendant had sent her there *for the purpose of getting money out of Crow*, and that when she got some money she wrote to the defendant to "drop everything; there is no occasion for to make any further trouble."

We have been thus particular in stating the proceedings in order that it may be seen how far away the court traveled from the issue it was trying, viz., whether the killing of Haines was justifiable. Mrs. Dye's attempt to get money out of Crow had nothing to do with this issue. The fact that the evidence in rebuttal tended to contradict some of the things she said on cross-examination, did not make it proper to extend the investigation, as was done here. A party cannot cross-examine his adversary's witness upon irrelevant matters for the purpose of eliciting something to be contradicted; and if such matters are drawn out, the court should stop the inquiry there. It is well settled that a witness cannot be impeached by contradicting him upon collateral matters. *People v. Webb*, 70 Cal. 120, 11 Pac. Rep. 509; *People v. Furtado*, 57 Cal. 346; *People v. Devine*, 44 Cal. 458. Nor does it make any difference that the subject of the relations of Crow with defendant's wife was commenced by the defense. The defendant's evidence on this point stopped far short of the testimony complained of; and, conceding a great part of it to have been irrelevant, it furnished no justification for the course taken by the prosecution. The introduction of irrelevant evidence by one side does not justify the introduction of further irrelevant evidence by the other. *Donnelly v. Curran*, 54 Cal. 282. Any other rule would destroy the law of evidence, and make trials interminable.

The irrelevant evidence, so introduced by the prosecution, was very prejudicial to the defendant's case. It held him up to the jury as attempting to make money out of his wife's shame. The prosecution might, with equal propriety, have undertaken to get a verdict by proving that he was a horse-thief or a black-leg, or any other thing calculated to expose him to contempt. In a case which is at all doubtful such a course would be almost certain to produce a

conviction from an average jury. It is contrary to the first principles of justice to try a man for one crime and convict him of that, because he may be guilty of another, or because he may be a low specimen of humanity. The fact, therefore, which was sought to be shown was not proper for the consideration of the jury. But if it had been, the mode of showing it was improper. It consisted in proving that, at the time she demanded the money, Mrs. Dye said that her husband had sent her to do so. There was no other evidence of the fact beyond such declaration. But any rogue may use the name of an honest man to facilitate his roguery. It is well settled that the mere declaration of an alleged agent is not evidence of the existence of the agency. *Grigsby v. Water Co.* 40 Cal. 396; *Loan Soc. v. Gerichten*, 64 Cal. 521, 2 Pac. Rep. 405; *Brigham v. Peters*, 1 Gray, 145; *Lambert v. People*, 76 N. Y. 228, 229; Whart. Crim. Ev. (9th Ed.) § 695.

There are other matters argued which will probably not arise upon a retrial; but we deem it proper to say that it is an exceedingly doubtful matter whether the witness Granger should have been permitted to testify as to the genuineness of the Haines letter. We think also that the following part of the charge is somewhat confused: "The law does not require demonstration in evidence to establish a fact; that is, such a degree of truth as, excluding the probability of error, produces absolute certainty, because such proof is rarely possible. Moral certainty only is required," etc. If "the probability" of error need not be excluded, then evidence is sufficient although it leaves error probable. This hardly amounts to moral certainty or proof beyond a reasonable doubt. The word "possibility" would be better in this connection. So, it was not accurate to tell the jury that the defendant was justified in the killing, "if necessary for his own protection," etc. It would have been better to have said "if actually or apparently necessary," etc. See *People v. Gonzales*, 71 Cal. 577; 12 Pac. Rep. 783; *People v. Flahave*, 58 Cal. 249. So we think it would have been better to have given the instruction on pages 481, 482 of the record referred to on pages 43, 44 of appellant's brief.

We advise that the judgment be reversed and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.;

PER CURIAM. For the reasons given in the forgoing opinion the judgment is reversed, and cause remanded for a new trial.

71 Cal. 94

LODTMAN *et al.* v. SCHULTER. (No. 11,058.)
(Supreme Court of California. September 24, 1886.)

JUDGMENT—BY DEFAULT—SETTING ASIDE—DISCRETION OF TRIAL COURT.

Where a suit was dismissed for want of prosecution, upon motion of two of the defendants, the discretion vested in the trial court was properly exercised in setting aside the judgment of dismissal, on condition that plaintiffs should pay to defendants \$80, upon affidavit by plaintiffs' attorney, showing that his absence on the day set for the hearing was unavoidable, because of prior important professional engagements, of which defendants' attorneys had notice, and that one of the defendants had not been served with process, although due diligence had been used.

Commissioners' decision. Department 2. Appeal from superior court, Stanislaus county.

Appeal from an order of the superior court setting aside a judgment of dismissal in a suit brought by Ernest Lodtman and others against J. S. Schultzer and others. Defendants appeal.

W. L. Dudley, for appellants. *Lesser & Hall*, for respondents.

FOOTE, C. This action was dismissed by the court below for want of prosecution, upon the motion of two of the defendants, Barnett and Burt. There-

after, upon motion made by the plaintiffs, and due notice thereof, the court made and entered an order setting aside and vacating its judgment of dismissal, upon the condition attached that the plaintiffs should pay to the defendants the sum of \$80. From the last-mentioned order this appeal is prosecuted.

The affidavit of merits made by the principal attorney for the plaintiffs is as follows:

"J. M. Lesser, being duly sworn, says that he is one of the attorneys for the plaintiffs, and has had full, sole, complete, and absolute charge of said action, and the only attorney of plaintiffs who has or ever had any knowledge of the action. That about the seventh day of June, 1884, the affiant received a letter from W. L. Dudley, announcing to him that the trial of said cause was set for June 16, 1884; which said letter is hereto attached, and made a part hereof: " 'STOCKTON, CAL., June 5, 1884.

"*J. M. Lesser, Esq., Santa Cruz*—DEAR SIR: Am in receipt yours second inst. Last Monday, when the calendar was called in Judge HEWEL's court, our *Lodtman-Schulter Case* was set for trial, at my request, Monday, sixteenth inst. My clients are insisting upon a trial, and will not consent to any further delay. If they would consent to postponement, I should have no objection to comply with your request, but they will not, and therefore I hope you may arrange your engagements so as to try the case on the 16th.

" 'Truly yours,

W. L. DUDLEY.'

"That affiant is a resident of Santa Cruz county, and in active practice in said county. That the first Monday in June, 1884, was the day on which causes were set for trial in the superior court of Santa Cruz county for the month of June, and on said day a number of cases in which affiant was attorney were set for trial and hearing. That among the cases so set for trial was the case of *Ashley v. Ferguson*, on which the argument was set for hearing on June 17, 1884. That in said cause of *Ashley v. Ferguson* a large amount of money was involved, and the same presented very intricate questions of law, and the same was under the sole control and charge of affiant. That in such action was also involved the ownership of some thirty head of horses, which were then, and had been for some time, in the possession of the sheriff, thereby causing great expense to the parties litigant, and the court was anxious and desirous of hearing said cause. That the argument of said cause required careful and extensive preparation, occupying more than four days of affiant's time, and the trial thereof occupied three days, and the affiant's argument one day. That when said action of *Ashley v. Ferguson* was set for hearing, as aforesaid, affiant had not been informed of the time of the hearing of said action of *Lodtman* against *Schulter*, and immediately upon receiving the information he endeavored to displace the case of *Ashley v. Ferguson*; but the superior judge of Santa Cruz county informed the affiant that it would take its vacation on the twentieth day of June, 1884, and no business would be done in said court until August 1, 1884; that, if said action of *Ashley v. Ferguson* was not heard on the appointed day, it would not be heard for over two months thereafter. That thereupon, and about one week before the sixteenth day of June, 1884, affiant wrote or telegraphed to W. L. Dudley, Esq., that it would be impossible for affiant to be in Modesto on the sixteenth day of June, 1884, and received no answer to such letter or dispatch, and affiant firmly believed that said cause would not be heard on said day last aforesaid, but that the same would be continued. Affiant also telegraphed to the judge of said superior court of Stanislaus county that it would be impossible for him (affiant) to attend said superior court on said day; and affiant, having taken all those steps, believed that the cause would not be tried in his absence. Affiant never received any notice of motion, or any intimation that said action would be dismissed for want of prosecution. Affiant further states the defendant *Schulter* has never been served with process in said action; that, after

the service on the defendants who have appeared herein, affiant took pains to find out the whereabouts of said Schultzer, and has written, and caused to be written, a large number of letters to find the whereabouts of said Schluter, but to all of them has received answer that Schultzer cannot be found. He has been informed within the last five months that said Schultzer is confined in one of the state insane asylums, and has made inquiries relating thereto, but has not been able to obtain a definite knowledge on the subject, though he has communicated with the authorities of the various insane asylums of the state. Affiant further states that the only information he has had about the setting of said cause for trial is by the letter hereto attached. Affiant further says that plaintiffs are anxious to prosecute said action; that he has informed them and believes that they have a good and substantial cause of action on the merits of the case. J. M. LESSER."

By it such circumstances appear as might at least have warranted the judge in hesitating to deny the motion to vacate the judgment of dismissal for want of prosecution of the action. In such cases this court has held it to be permissible that, upon proper conditions, such a judgment may be set aside. *Watson v. Railroad Co.*, 41 Cal. 17-21. We do not therefore perceive that, as to the case in hand, the judge below abused the discretion which was vested in him by law. The order appealed from should be affirmed.

BELCHER, C. C., and SEARLS, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

76 Cal. 597

BLISS v. JOHNSON. (No. 11,540.)

(*Supreme Court of California.* February 10, 1888.)

WATERS AND WATER-COURSES—OBSTRUCTION OF STREAM.

It is no defense to an action by one riparian owner against an upper riparian owner, for obstructing by a dam the flow of water in a natural water-course, that the defendant had erected the dam for the purpose of protecting land from an increase in the volume of the water in such water-course, and the exclusion of evidence tending to show such increase in the volume of water, and the injury that would be caused to the defendant by removing such dam, is not error.

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

An action by Bliss, plaintiff, against Johnson, defendant, to restrain the diversion of water from its natural channel. Judgment for plaintiff. Defendant appeals.

Brown & Daggett, for appellant. *Eugene R. Garber*, for respondent.

THORNTON, J. This action was brought to restrain the diversion of the waters of Outside creek, and to have removed from the channel thereof obstructions to the free flow of the waters of said creek. The court below gave judgment for plaintiff, from which defendant appealed. The defendant moved for a new trial, which was denied, and from the order denying the new trial defendant also appeals.

The defendant urges a new trial on account of insufficiency of the evidence to sustain the decision of the court, but as there is a substantial conflict in the evidence on the material issues, we cannot, on such ground, in accordance with the well-settled rule of this court, reverse the order of the court below.

Several points are reserved upon the rulings of the court in regard to the evidence offered, which we proceed to consider. It is urged that the court erred in sustaining the objection of plaintiff to the following question put to a witness, Samuel Fowler: "State to the court, now, what work you did,

what the condition of the country was before you commenced work, and what work you did in the shape of digging an artificial channel, if you dug one." The witness had just stated that he knew of and had constructed an artificial channel called the "Fowler Cut." The purpose for which this question was put was to show that by means of the Fowler cut the water which flowed in Johnson's slough was increased, and that such increased quantity of water would overflow and injure defendant's land, if the same was not taken from Johnson's slough by means of an embankment and an artificial cut. It should be remarked here that there was evidence tending to show that Johnson's slough was a branch or affluent of Outside creek, and that the court so found. On this creek plaintiff was a riparian owner. It appeared that there was evidence admitted, subsequently given by the same witness, that by means of the Fowler cut and the People's ditch an increased quantity of water was turned and did flow into Johnson's slough and Outside creek, and therefore the defendant suffered no injury by the rejection of the question. The plaintiff, being an owner of lands on Outside creek, below the dam or obstruction put in by defendant, which was complained of, had a right to the free flow of the water to his land without obstruction. The dam cut off the flow of the water entirely, and granting that the defendant had a right to protect his land from any injury which the additional quantity of water may have produced, still he had no right to resort to a dam, a mode of protection which entirely obstructed and cut off the water of the stream from flowing to plaintiff's land. The defendant might, by embankments or levees on the side of the stream, have fully protected his land from injury, without interfering with the usual flow of water in the channel of the stream. For the damage caused by the additional quantity of water turned in by the means above referred to, defendant has his action against the parties who so turned it in, and could have enjoined them from so doing when it was done. The right claimed by defendant herein goes far beyond this. The claim herein preferred is to obstruct the flow of all the water in the stream, under the pretext of protecting his land from injury by the water added to that which was the normal flow. We see no reason for allowing such claim, and the strongest reasons why it should not be allowed.

For the same reasons the court did not err in sustaining the objection of plaintiff to the following questions put to defendant: "If this dam you speak of and referred to in the complaint is torn out, what will be the effect upon your land?" "Will or will not the removal of this dam, referred to in the complaint and answer, result in turning a large body of water down upon your land, to places where water is not accustomed to run?" "State to the court what the result of pulling out that dam was." The questions were all propounded on the theory that because the water which flowed in the channel of the stream, whether water added by the Fowler cut and People's ditch or not, sometimes injured the defendant's land, that the defendant had a right to obstruct entirely the flow of the stream which resulted, and prevented it from reaching the riparian lands on the stream. This, as we have seen, the law disallows.

We see no relevancy to any issue in the case of the following question put to Johnson: "State whether or not the plaintiff, Bliss, through your license and permission, has cut a channel from the People's ditch, or rather from that portion of Johnson's slough that is used as a part of the People's ditch, for the purpose of carrying water out of the People's ditch into Outside creek." The main issues in the cause were whether Outside creek was a natural water-course, and whether defendant had obstructed the flow of water therein. If the above question had been answered in the affirmative, we cannot see that it would have tended to disprove these issues.

Upon an examination of the photographic views offered and excluded, we cannot see that the defendant was injured by their being ruled out. There

was primary evidence as to the ground by witnesses who testified from their personal knowledge of it. The views offered were in the nature of secondary evidence, as to which the best evidence had been offered, viz., that of persons conversant with the topography involved in the inquiry.

We have considered the other questions, and find no error in ruling on them. The judgment and order must be affirmed. So ordered.

We concur: SEARLS, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; MCKINSTRY, J.

75 Cal. 98

PEOPLE v. RILEY. (No. 20,366.)

(Supreme Court of California. February 6, 1888.)

1. ROBBERY—INDICTMENT—DESCRIPTION OF OFFENSE.

Under Pen. Code Cal. § 211, defining robbery to be the felonious taking of *personal property against the will* of the person robbed, an indictment charging the defendant with taking, "by means of fraud and force, * * * \$160 lawful money of the United States, said money being the property of one M.," is sufficient.¹

2. DEPOSITIONS—OATH BY STENOGRAPHER.

A stenographer appointed in a criminal action, under the authority of Pen. Code Cal. § 869, by the magistrate before whom the examination is had, to take depositions, need not be sworn to faithfully perform his duty, nor need the fact that he was sworn appear in the depositions.

3. SAME—CERTIFICATE OF STENOGRAPHER.

Pen. Code Cal. § 869, sub. 5, provides that a deposition taken down by a stenographer, and written out in long-hand, and certified as being a correct statement of the testimony and proceedings, shall be *prima facie* evidence thereof. *Held*, that a certificate that the "foregoing is a correct transcript of the examination in the above-entitled case," is sufficient upon which to admit a deposition in evidence.

4. SAME—WHEN MAY BE READ—WITNESS ABSENT FROM STATE.

Pen. Code Cal. § 1345, provides that a deposition may be read in evidence on the trial of an indictment upon its appearing that the witness is unable to attend by reason of death, insanity, sickness, or infirmity, or continued absence from the state. Where it appears that a witness, whose testimony was taken and reduced to writing at the examination before the magistrate, has been sought in several counties and cities of the state, and there is no direct evidence that he is in the state, or that any facts have come to the knowledge of those desiring to use the deposition tending to show the whereabouts of the witness that have not been acted upon in good faith, or that he had gone to any county to which a subpoena had not been sent, the court is justified in finding that the witness could not, with due diligence, be found within the state.

5. SAME—OBJECTION TO QUESTIONS—GROUNDS.

Pen. Code Cal. § 869, sub. 3, provides that in taking depositions to be used in a criminal action, if a question put be objected to and overruled, that fact, with the ground on which the question was overruled, must be stated. *Held*, that the ground of objection is sufficiently shown if it appear that the question was overruled as being "immaterial and irrelevant."

6. CRIMINAL LAW—TRIAL—EVIDENCE—IDENTITY OF PERSON.

On the trial of an indictment a deposition was read in evidence in which the defendant was referred to by name, without further description. The court charged the jury that "identity of person is presumed from identity of name." *Held* that, as no evidence was introduced to overcome the presumption, the giving of the instruction was error without prejudice.

In bank. Appeal from superior court, San Bernardino county; H. M. WILLIS, Judge.

James Riley was indicted for robbery. On the trial the testimony of the prosecuting witness, which, at the examination before the magistrate, had

¹An indictment for a statutory offense, which charges the offense in words equivalent to those employed in the statute, is sufficient. *U. S. v. Wilson*, 29 Fed. Rep. 286; *Franklin v. State*, (Ind.) 8 N. E. Rep. 695; *Graeter v. State*, (Ind.) 4 N. E. Rep. 461; *State v. McGaffin*, (Kan.) 13 Pac. Rep. 560, and note; *People v. Edson*, (Cal.) 10 Pac. Rep. 192; *State v. Sparks*, (W. Va.) 3 S. E. Rep. 40; *Ex parte Hutchings*, (Cal.) 16 Pac. Rep. 234.

See, also, *People v. West*, (N. Y.) 12 N. E. Rep. 610, and note; *State v. Brady*, (La.) 2 South. Rep. 557; *State v. Tisdale*, Id. 406, and note.

been reduced to writing by a stenographer, was introduced in evidence. The defendant was therein referred to by name, without further description. The court instructed the jury that "identity of person is presumed from identity of name," to which instruction defendant excepted. The other facts sufficiently appear from the opinion. There was a verdict of guilty, and defendant appeals.

Baker & Blair and Zue G. Peck, for appellant. *Geo. A. Johnson*, Atty. Gen., for respondent.

MCKINSTRY, J. The defendant was convicted of robbery, in San Bernardino county, and has appealed from the judgment and from an order denying a new trial. It is contended the motion in arrest of judgment should have been granted because the information does not aver that the \$160, lawful money of the United States, "said money being then and there the property of one Christian Meyers," was "personal" property. The point is not well taken. The information charges that the defendant, on a day named, etc., did "unlawfully, willfully, and feloniously, and by means of fraud and force, take from the person, possession," etc. It is claimed the judgment should have been arrested because the information is fatally defective, in that it omits the statutory words, "and against his will." Pen. Code, § 211. But the information is sufficient. Pen. Code, § 960. A robbery "accomplished by means of force and fear" must have been accomplished "against the will" of the person robbed.

It is urged as error that the court below charged: "Identity of person is presumed from identity of name." Identity of person is a deduction which the law expressly directs shall be made from identity of name, (Code Civil Proc. §§ 1959, 1963, subd. 25;) and while, under our constitution, which prohibits the courts from charging upon matter of fact, a court cannot instruct a jury that any fact is an "inference" from another fact,—as an inference is defined by section 1960, Code Civil Proc.,—the court is authorized to declare a presumption of law. It is true that a presumption of identity of person from identity of name is a *disputable* presumption which may be controverted by other evidence, (Code Civil Proc. 1963;) but the defendant introduced no evidence to overcome it, and no injury could have accrued to him by the omission of the court to add that identity of name only created the presumption *prima facie*.

At the trial, the prosecution offered in evidence the deposition of Christian Meyers, (prosecuting witness,) taken at the examination before the committing magistrate. The deposition was admitted over the objections of the defendant. To the deposition the defendant objected that it does not show the "grounds or reasons" on which the magistrate sustained an objection to a question put to the witness on cross-examination; but the objection to the question was that it was "irrelevant and immaterial," and the objection, as made, was sustained. It would be difficult to state more clearly "the ground on which the question was overruled." Pen. Code, § 869, subd. 3. As to the alleged refusal of the witness to answer questions, the magistrate, in one instance, directed him to answer, and in others the recalcitration of the witness was waived. Besides, the "ground" on which the witness declined to answer questions does appear in the deposition, from the statement of the witness itself.

Appellant further objects that it was not made affirmatively to appear that Joseph E. Rich, whose certificate, as stenographer, is attached to the deposition, was sworn faithfully to discharge his duty. The defendant proved by Rich that he was appointed to take the testimony by the magistrate. The statute neither requires that the short-hand reporter shall be sworn, nor that the fact that he was sworn shall appear in the deposition; and the testimony, as written out in long-hand by the short-hand reporter, is only evidence

prima facie of its correctness. Pen. Code, § 869. The deposition is certified: "*State of California, County of San Bernardino*: I hereby certify the foregoing to be a correct transcript of the examination in the above-entitled case. [Signed] JOSEPH E. RICH, Stenographer." The statute provides: "When written out in long-hand, and certified as being a correct statement of such testimony and proceedings in the case shall be *prima facie*," etc. Pen. Code, § 869, sub. 5. It is, of course, always better to follow the language of the statute, but we think the certificate substantially complies with the law. In *People v. Morine*, 54 Cal. 575,—referred to by counsel,—there was no certificate.

Defendant also objected to the deposition on the ground that the preliminary evidence was not sufficient to show that the witness, Christian Meyers, was either dead, insane, or absent from the state. Subpoenas were sent to different counties for service. One Neil, an acquaintance of Meyers, gave information that he was at a certain place in San Diego county; but he could not be found there. There was evidence that he had been sought for "pretty much all over" San Bernardino and San Diego counties; that inquiries had been made for him in Sacramento, San Francisco, Stockton, San Jose, Lathrop, Woodland, Oakland, and "at all those places along the line of the S. P. R." There was no direct evidence that he *was* in the state, nor any evidence that facts had come to the knowledge of the prosecution tending to prove the whereabouts of the witness, which had not been acted upon in good faith, or evidence indicating that the witness had gone to any county to which subpoena was not sent for service. The court was fully justified in finding that the witness could not, with due diligence, be found within the state, and, as an inference, that he was not in the state. *People v. Gannon*, 61 Cal. 476. Judgment and order affirmed.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.; THORNTON, J.

75 Cal. 98

AUSTIN v. ANDREWS. (No. 11,216.)

(*Supreme Court of California*. September 24, 1886.)

1. APPEAL—REVIEW—WEIGHT AND SUFFICIENCY OF EVIDENCE.

A new trial on the ground of insufficient testimony will not be granted on appeal, where the record shows evidence tending to establish the findings of the court below.

2. SAME—OBJECTIONS TO EVIDENCE.

Testimony objected to at the trial, but to which no exception was taken, will not be reviewed on appeal.

3. BOUNDARIES—EVIDENCE—DECLARATION OF GRANTOR.

Declarations made by the owner of land to a purchaser at the time he sold as to the boundary lines thereof, are admissible in evidence against a person claiming title from such purchaser.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county.

Austin brought ejectment against Andrews, and was defeated on the merits. He then moved for a new trial, which was denied, and he appealed.

J. A. Louttit and *Woods & Levinsky*, for appellant. *W. L. Dudley* and *S. A. Booker*, for respondent.

BELCHER, C. C. This is an action of ejectment, to recover possession of a small piece of land situate in San Joaquin county. The case was tried by the court, and judgment rendered in favor of defendant, from which, and from an order denying a new trial, the plaintiff appealed. The court found that the plaintiff was not the owner of the land when the action was commenced, nor when it was tried, and that the defendant was the owner of it, and entitled to its possession.

There was testimony tending to support the findings, and, under the well-established rule in this court, we cannot say that a new trial should have been granted for insufficiency of evidence.

There was no error in admitting in evidence the deed dated December 4, 1872, from Marrow to Groves and the defendant. That deed conveyed to the grantees named a section of land, with the exception of a piece lying in the south-west corner of the south-west quarter of the section on which was situated the village of Farmington, and which had been previously deeded away. The land in controversy was within the west half of the section, and, according to the undisputed testimony of the defendant and Groves, was not within the village of Farmington. There was also no error in admitting in evidence the deed of October 1, 1874, from Groves to the defendant. That deed conveyed to the defendant all the interest in the section of land referred to, acquired by Groves under the deed from Marrow. The defendant offered in evidence several tax receipts showing that he had paid taxes on all the west half of the section referred to, except the lands in the town of Farmington. The plaintiff objected to these receipts being received in evidence, and his objections were overruled; but he took no exception to the rulings, and therefore cannot now be heard to complain of them as erroneous. There is nothing in the point that the court erred in permitting McCulloch to testify as to what Witham said in reference to the lot in controversy prior to his purchase of it. The plaintiff claimed title through deeds from McCulloch to Witham, and Witham to himself. McCulloch was called as a witness for defendant, and was asked to state if, at the time he sold to Witham, Witham said anything to him about the northern boundary of the lot. He answered that when Witham came to see him about trading for the place, he asked how far the lot extended north, and witness replied that it extended to a certain fence, which he pointed out. In this question we see nothing objectionable. Any statement made by McCulloch, while an owner, as to the boundaries claimed by him, was admissible, and it was proper to show how the statement came to be made. The facts in the case of *Sheils v. Haley*, 61 Cal. 157, upon which appellant relies, are not like the facts in this case. There the court found "that, by mutual mistake, defendant had been in possession, without claim or right of title thereto," of the property in question. Here there is no such finding, and no evidence to warrant such a one.

The appeal from the judgment, it having been taken more than a year after the judgment was entered, should be dismissed, and the order denying the motion for new trial should be affirmed.

SEARLS, C., and FOOTE, C., concurred.

PER CURIAM. For reasons given in the foregoing opinion the appeal from the judgment is dismissed, and the order is affirmed.

75 Cal. 114

SCOTT *et al* v. SUPERIOR COURT OF YOLO CO. (No. 12,422.

(*Supreme Court of California*. February 11, 1888.)

MANDAMUS—TO COURTS—TO COMPEL THE ADMISSION OF EVIDENCE.

A *mandamus* will not be granted to compel the superior court to reverse its ruling as to the admissibility of offered evidence, especially after the cause has been tried and judgment rendered.

In bank. Original proceeding in *mandamus*.

Application for *mandamus*, by H. H. Scott and others, to compel the superior court of Yolo county to admit certain matters in evidence.

J. Lambert, for petitioners.

McFARLAND, J. This is a proceeding in *mandamus*, commenced in this court. An alternative writ (by some inadvertence) was issued. The peti-

tion shows that one Hays obtained judgment against petitioners in a justice's court for \$57.50 and costs; that Hays appealed to the superior court, where, on a trial with a jury, he obtained a judgment against petitioners for \$70 and costs; that in the superior court petitioners filed a supplemental answer, showing that they had paid the amount of the judgment rendered in the justice's court, and that the superior court (respondent herein) refused to admit evidence tending to prove such payment. The prayer is that said superior court be commanded to permit petitioners to introduce such evidence.

All this simply means that this court should, by a writ of mandate, compel a superior court to reverse its ruling on a question involving the admissibility of certain offered evidence; and this, too, in a case where the superior court is the highest appellate court. Such a question, of course, cannot be reached by a writ of mandate, though it be stretched beyond the point to which the most extreme case has ever carried it. And it is difficult to understand what benefit petitioners could expect to derive from the writ in this case, even if it should be granted. After a case has been tried, a verdict rendered, and judgment entered, there is nothing upon which such a writ could operate. The prayer of petitioners is denied and the proceeding dismissed.

We concur: SEARLS, C. J.; THORNTON, J.; SHARPSTEIN, J.; PATERSON, J.; MCKINSTRY, J.

75 Cal. 115

KNESS v. HERSHEY. (No. 12,240.)

(*Supreme Court of California.* February 14, 1888.)

APPEAL—REVIEW—ERRORS NOT APPARENT ON RECORD.

The decision of the trial court, on a motion for new trial on the ground of errors of law and insufficiency of evidence, will not be reviewed on appeal, where the statement filed with the motion in the trial court contains no specification of particular errors, as required by Code Civil Proc. Cal. § 659, subd. 3.

Commissioners' decision. Department 2. Appeal from superior court, Yolo county; C. H. GAROUTTE, Judge.

D. N. Hershey sued A. Kness, constable of Grafton township, in Yolo county, for the recovery of the possession of a certain quantity of cheese and clover seed, of the aggregate value of \$463.31, levied upon and seized by the defendant under an attachment issued out of the justice's court of said township, in a suit therein pending wherein one Silvas was plaintiff, and one J. N. Elliott defendant. By consent of parties, the cause was tried by the court, which found for the plaintiff, and entered judgment accordingly. Defendant gave notice of motion for a new trial on the grounds of the insufficiency of the evidence and errors of law arising on the trial. The statement made by the court upon the hearing of the motion, pursuant to Code Civil Proc. Cal. § 659, subd. 3, contained no specification of the particulars in which the evidence was insufficient, or of the errors of law upon which defendant would rely. The motion was overruled, and defendant appealed. An assignment of errors by defendant's counsel was printed as part of the statement in the record of the cause sent up to appellate court, but, upon motion, was stricken out as an interpolation.

R. Clark, for appellant. Hudson Grant, for respondent.

HAYNE, C. All the appellant's specifications were stricken from the transcript for the reason that they were mere interpolations, and not a part of the statement as settled by the judge of the court below. This took away all right to be heard on the motion for new trial. The appellant's objections to the sufficiency of the complaint are without merit. We therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

79 Cal. 90

HUTSON v. WOODBRIDGE PROTECTION DIST. *et al.* (No. 12,842.)

(*Supreme Court of California.* February 14, 1888.)

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—SUMMARY PROCESS FOR COLLECTION OF TAX.

The California act of April 15, 1880, providing for the protection of lands from overflow, provides for the establishment of districts and appointment of trustees; that the county supervisors shall appoint three commissioners resident of the district to view and assess on each tract of land a sum in proportion to the benefit to be derived from the protection; that upon the filing of their report the supervisors shall give notice when they will meet and review and adopt the report; that at that meeting the sums stated in the reports shall be adopted as the basis of the assessments; that the trustees shall take such basis and levy their assessment and file the lists with the county treasurer; and that from and after such filing the assessment shall be a lien on the land; that the treasurer shall give notice that the assessment has been filed, and if the assessments are not paid within a specified time, the treasurer shall turn them over to the collector, who shall proceed to collect them, and may do so by sale. *Held* that, as the act provides no opportunity for the owner to be heard as to the validity of the assessment, and provides a summary process for collection by sale, it is a taking of property without due process of law, and void.¹

Department 2. Appeal from superior court, San Joaquin county.

Hutson brought action to quiet his title to land, and to remove the cloud created by a certificate of tax sale, and joined as defendants the purchaser and also the taxing officers, basing his claim on the unconstitutionality of act Cal. April 15, 1880, under which they had proceeded. He obtained judgment in the court below, and defendants appealed therefrom.

Joseph H. Budd, for appellant. *J. B. Hall*, for respondent.

THORNTON, J. This action involves the constitutionality of certain provisions of the act of April 15, 1880, entitled "An act to provide for the protection of lands from overflow other than lands recognized as swamp lands." See St. 1880, p. 55. The work to be done under the act for protecting land from overflow is to be paid for by assessments on the lands included within a certain district, to be constituted in the mode provided for in the first, second, and third sections of the act. Three trustees of the district are to be elected, who are to be notified of their election. See third section. The act further provides that within 20 days after the trustees are notified of their election, they shall meet and organize as a board by the election from their number of a chairman and secretary, and enter upon the discharge of their duties. This board is to have charge of all the works of protection, and shall superintend the construction or repair of the same, and shall have power to do all other acts necessary for the accomplishment of the objects for which the district was organized. The board is empowered to employ competent engineers, and is required to proceed to survey, mark out, and locate the necessary work of protection for the district; to provide plans and specifications for the same and estimates of the cost of construction, and submit the same to the board of supervisors, by whom the district was formed, for their approval, modification, or rejection. See fourth section.

The fifth and sixth sections are as follows: "Sec. 5. Upon the adoption of a plan of protection, said board of supervisors shall appoint three disinterested persons, residing in any county in which some part of the district is situated, as commissioners, who shall, on being notified in writing of their appointment by the clerk of the board of supervisors, proceed to view each 40-acre tract, or

¹See note at end of case.

fraction thereof, and each town lot or parcel of land within the district, and levy and fix against each such sum for protection purposes in proportion to the whole expense and to the benefits to be derived from such proposed works of protection, in gold coin of the United States, and report to said board of supervisors as follows: *First.* A description by the smallest legal subdivisions or natural boundaries of each tract, and number and block of each town lot in the district. *Second.* The number of acres in each tract or parcel of land, and the size of each town lot. *Third.* The names of the owners of each tract or lot, if known; and if not, as unknown. *Fourth.* The sum levied or fixed against each tract, parcel of land, or town lot.' Said commissioners shall be entitled to receive a sum not to exceed \$5 per day each while performing said duties, to be paid out of the proper protection fund. Sec. 6. Upon the filing of the report of the commissioners, as aforesaid, with the clerk of the board of supervisors, said board shall give notice in some newspaper printed in the county, that they will, upon a day named in such notice, which day shall not be less than five days from the date of publication, meet and review, correct, and adopt said report; and upon the day thus fixed, the board of supervisors shall meet, review, correct, and adopt said report; and their decisions in the premises shall be final. The sums thus fixed against each tract, parcel of land, or town lot in said report, as adopted, shall be the basis of all assessments within the district for a term of ten years thereafter, unless legally changed as hereinafter provided. The words 'tract' or 'parcel of land' shall include all railroad beds within the district."

It will be observed that the action of the commissioners under the fifth, and the board of supervisors under the sixth, section, is to prepare, not an assessment, but the basis of an assessment, which basis may continue as such for the term of 10 years. The levy of the assessments is to be made under the seventh section by the board of trustees of the district. The section just mentioned is as follows: "Sec. 7. The board of trustees of any protection district formed under this act shall have power to levy assessments on or against each tract or parcel of land or town lot in the approved report of the commissioners for such district. On making such assessment, said trustees shall make a list of the sums assessed against each tract or parcel of land or town lot in the district, and file the same with the county treasurer of the county in which the district was organized; and from and after the filing thereof, the charges against any tract or parcel of land or town lot contained therein shall become a lien thereon; provided, that if any such land be situated in different counties, the trustees shall cause the same to be filed in each county where the land is situated." The list of assessments thus levied by the board of trustees under section 8, when prepared and filed with the county treasurer, is to remain in the office of the treasurer for 30 days, or longer, if so ordered by the board of trustees, and during this period any person may pay the charges so assessed to the officer last named. When the list is filed in the office of the treasurer, he is to give notice, by publication in a newspaper printed in the county, that the assessment has been filed in his office, with the date of the filing; that the amounts entered thereon are due and payable; and that if not paid on or before the first Monday of January next ensuing, the same will become delinquent, and will be turned over to the tax collector for collection. The treasurer is to note on the lists all assessments paid, and shall, on the day above named, turn said list over to the tax collector of the county, who shall proceed to collect the assessments which are delinquent, and may collect by sale of the assessed lands.

It is argued that the owner of the land assessed has no opportunity under the act to be heard in regard to the assessment, and that on non-payment his land will be sold without any opportunity to be heard as to this charge, which is declared to be a lien on his land, and that he will thus be deprived of his property without due process of law. We think the point well taken. No

provision is made anywhere in the statute for any hearing by the land-owner whose land is to be charged. No notice is to be given him when the board of trustees is to levy the assessment, and if he appears when such assessment is to be levied by the board of trustees, no hearing by the board is provided for in the act. The collection provided for is summary and without suit brought at which the property owner can be heard. The assessment is by the terms of the act made an absolute lien on his property, without any provision or opportunity allowed him to show its illegality or unconstitutionality. For these reasons, we are of opinion, according to well-settled rules, that the act is unconstitutional, and the assessment and sale under it cannot be valid.

The judgment and order must be affirmed. So ordered.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

NOTE.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW. In a proceeding at common law, a citizen of the United States cannot be divested of his property except by verdict of a jury, under due process of law, in a proceeding in which he is in some manner a party, having opportunity to be heard, and having a day in court. *The J. W. French*, 13 Fed. Rep. 916. A statute authorizing the judge to commit to jail a party who refuses to obey an order, in proceedings auxiliary to execution, directing him to turn over property in his possession to the court, held not to be a violation of the provisions of the Iowa constitution, which provide for the right of trial by jury, and that no person shall be deprived of life, liberty, or property without due process of law. *Eikenbury v. Edwards*, (Iowa,) 25 N. W. Rep. 892. The right of trial by jury in chancery cases not being guaranteed by any constitutional provision, and the courts of chancery in Iowa having had, prior to the enactment of the statute regulating the sale of intoxicating liquors, a well-settled jurisdiction of suits to abate nuisances, that statute is not unconstitutional because it denounces the illegal sale of intoxicating liquors as a nuisance, and provides for its abatement by proceedings in chancery; nor is it unconstitutional as depriving the guilty person of his property without due process of law,—the proper and orderly proceedings of a court of chancery being “due process of law,” within the meaning of the constitutional guaranty. *State v. Jordan*, (Iowa,) 34 N. W. Rep. 285. A statute regarding the forfeiture of liquors unlawfully kept is not unconstitutional in giving to district courts power to condemn prohibited liquors, whatever their value may be, because the right of trial by jury is not invaded; the act reserving a right of appeal to the court of common pleas. *State v. Fitzpatrick*, (R. I.) 11 Atl. Rep. 773. One who instigates a criminal prosecution maliciously, and without probable cause, and who is committed to jail until he pays the costs of the prosecution, by order of the municipal judge, under a statute authorizing such order, cannot complain that the proceeding is without due process of law, or that trial by jury has been denied him. *State v. Smith*, (Wis.) 26 N. W. Rep. 258. The fourteenth amendment to the constitution of the United States, which provides that a state shall not “deprive any person of life, liberty, or property without due process of law,” does not preclude a state from giving jurisdiction to a court of equity of a suit brought by the owner of an equitable interest in land to establish a trust in the holder of the legal title, because it deprives the latter of a right to trial by jury, which he would have in a suit at law. *Church v. Kelsey*, 7 Sup. Ct. Rep. 897.

2 Cal. Unrep. 821

PEOPLE v. KELLEHER. (No. 20,328.)

(Supreme Court of California. December 1, 1887.)

CRIMINAL LAW—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

Defendant, being convicted of an offense, filed, in a motion for a new trial, the affidavits of himself and two others to the effect that he was in a certain saloon when the alleged offense was committed, that another person had admitted that he did the act, and that defendant did not know of such evidence until after the trial. *Held*, that a new trial was improperly refused.

In bank. Appeal from superior court, Contra Costa county; JOSEPH P. JONES, Judge.

This was an information against Cornelius Kelleher for an assault with intent to commit rape on the person of Kate Halpin. Defendant was convicted, and moved for a new trial, on the ground of after-discovered evidence; and in support thereof filed the affidavits of himself and two others alleging that defendant was in the saloon of John Lyons, waiting upon customers, when the alleged offense was committed; that one Lucey had admitted that he had taken hold of the woman at the time alleged in the information, and that she screamed, whereupon he ran away; and that defendant was not aware of the existence of such evidence until after the trial. The motion was overruled, and defendant appeals.

E. R. Chase and *T. R. Whitcomb*, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

PER CURIAM. As stated by the attorney general upon the argument, the evidence upon which a conviction was had in this case is very weak, although there is sufficient to prevent this court from setting aside the verdict. In view of the testimony in the case, however, we think that the affidavits filed in support of the motion for a new trial on the ground of newly-discovered evidence were sufficient to entitle the defendant to a new trial. Judgment reversed, and cause remanded for a new trial.

75 Cal. 124

CHIN KEM YOU v. AH JOAN. (No. 11,042.)

(Supreme Court of California. February 16, 1888.)

ACTION—BY WHOM MAINTAINABLE—PRINCIPAL AND AGENT.

Where it does not appear that one whose business is that of loaning money for a loan company is acting in the capacity of trustee, or that he has any interest in the money loaned, he cannot maintain an action in his own name for the recovery thereof.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Action by Chin Kem You for the recovery of money loaned the defendant, Ah Joan. Judgment was rendered for defendant, and plaintiff appeals.

D. L. Smoot, for appellant. *Frank M. Stone*, for respondent.

BELCHER, C. C. This is an appeal from a judgment of nonsuit. The action was brought to recover the sum of \$500, with interest thereon at the rate of 4 per cent. per month from the fifteenth day of June, 1883, till paid. The complaint alleges that the principal sum was loaned by plaintiff to defendant on the fifteenth day of December, 1882, and that it was then and there agreed between the parties that the money should bear interest at the rate of 4 per cent. per month, payable monthly, and should be repaid three months after the date of the loan. The answer denies all the allegations of the complaint. The material facts proved by plaintiff at the trial are as follows: The plaintiff was a Chinaman, and kept a pawnbroker's shop in the city of San Francisco; the defendant was a Chinawoman, and lived in that city. There was a

Chinese society in the city, known as "Hong Fook Tong." It does not appear how the society was formed, or who were its members, but its business was to receive and loan out money. The plaintiff acted as the agent of the society, or, as one of the witnesses said, "as trustee;" and "the money of the society was under his control and in his custody." In reference to the loan the plaintiff, after stating that defendant applied to him at his shop for a loan of \$500, and after stating the conversation that ensued about the security and the rate of interest, testified as follows: "She asked for the money on December 14, 1882, and I paid it to her on December 15, 1882. I went in company with Chin Suey Tung, and carried the money to her. I wrote out the contract, and when we went up I read it to her. She also got Chin Suey Tung to read it to her. She said: 'That is the contract.' She signed the contract there by putting her finger in the ink and touching it to the paper. That is the contract in the book. That is the spot which she made with her finger near her name. There is in this book a contract as to other money which she borrowed from me signed by her in the same way. After she signed the paper the money was paid to her in gold coin. * * * The contract was written in my store; it was signed at Ah Joan's house. Ah Joan's name was written at her house. She brought out an ink-box and a pen—a Chinese pen. The money belonged to the Hong Fook Tong."

Chin Suey Tung was a witness, and testified: "On December 15, 1882, Chin Kem You came to my store and said that Ah Joan had asked him for a loan of \$500. The money was to come from the Hong Fook Tong. I had an interest in it. He said: 'Ah Joan wants \$500, and if you have time we will give it to her.' * * * I went with Kem You up to Ah Joan's house. I asked Joan: 'Do you want to borrow some of the Hong Fook Tong money?' She said 'Yes.' * * * When it [the contract] was written, Chin Kem You paid Ah Joan \$500, in \$20 gold pieces. The writing is Chinese. The book and writing are the records of borrowed money. This particular writing is the account of money. Chin Kem You read it to Ah Joan. She said that it would do. As she said she could not write she signed by dipping her finger in ink, and therewith making a spot mark near her name. That is the Chinese method of signing when the party cannot write. * * * I had an interest in the society, and an interest in the \$500. The money belonged to the Hong Fook Tong Society, and Chin Kem You attended to their accounts, and lent out their money for them." The contract referred to by the witness, when translated, reads as follows: "Chinese Quong Suey, eighth year, eleventh month, seventh day. Ah Joan borrowed from Hong Fook Tong, \$500. At the term of three months the money must be paid in full with the interest. For every hundred dollars four dollars of interest must be paid each month." Afterwards the plaintiff loaned to defendant \$100 of his own money, and the memorandum of that loan is in the same book, and signed in the same way as the other, and is translated to read as follows: "Quong Suey, eighth year, twelfth month, twenty-fifth day. Ah Joan borrowed \$100 from Chin Kem You. Each month, \$4 interest." Of this loan the plaintiff testified: "The \$500 was not due when I loaned her the \$100. It is a heavier penalty for a person to sign with the finger and not repay the money. Under this contract, signed in this way, I could have anything which Ah Joan possessed to satisfy the debt." It was further proved that the defendant stated in the presence of two of the witnesses that she owed the plaintiff \$600, and that she subsequently repaid the \$100 loan, with the interest thereon, and paid \$120, being six months' interest on the \$500 loan.

One of the grounds upon which the nonsuit was asked and granted was that the plaintiff was not the real party in interest, and so was not authorized to bring the suit in his own name; that the cause of action, if any existed, was in favor of the Hong Fook Tong Society, and not the plaintiff. It is argued for the appellant that he was authorized to bring the action in his own name

because he had a personal interest in the money loaned, and, besides, was the trustee of an express trust. After carefully examining the record, we are unable to find any evidence that the plaintiff had any personal interest in the money, or was a member of the "Hong Fook Tong" Society. It is true, the witness Chin Suey Tung, speaking of the writing made at the time of the loan, said: "My name and that of the plaintiff appear in this writing." But how they appeared there he does not say. He seems to have translated the writing, and, as translated, it does not sustain his assertion. If he meant to say that he and the plaintiff were members of the society, he should have so stated in language which could be understood. We are also unable to find any evidence that the plaintiff made the loan as the trustee of an express trust. "A person with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, and may sue without joining with him the person for whose benefit the action is prosecuted." Section 369, Code Civil Proc. The plaintiff had charge of the Hong Fook Tong Society's money, and loaned it to defendant, but he made the loan in the name of the society, and not in his own name. This is clearly shown by the writing which he drew up and required the defendant to sign, as an acknowledgment that she had received the money and was to repay it at a fixed time, with large interest. The plaintiff seems to us, in his dealings with the defendant, to have acted simply as the agent of the society. The Code says: "An agent is one who represents another, called the principal, in dealings with third persons." Section 2295, Civil Code. But an agent who has loaned out the money of his principal in the name of the principal cannot himself sue to recover it back. *Swift v. Swift*, 46 Cal. 269. We do not consider the statements of defendant that she owed the money to the plaintiff material.

The judgment should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

71 Cal. 214

HILLIKER v. KUHN. (No. 11,571.)

(Supreme Court of California. October 28, 1886.)

PLEDGE—LIEN—CHANGE OF POSSESSION—POSSESSION OF PLEDGE HOLDER.

A threshing-machine, with its appurtenances, having been pledged for a loan, was kept for some time by the pledgeor. It was then given to a third person, who agreed to run it, and pay the net proceeds to the pledgee on account of his claim; the pledgeor agreeing to furnish the necessary labor and supplies, and to obtain work for the machine, and the pledgee reserving the right to resume possession at his pleasure. The pledge-holder not running the machine properly, the pledgeor, without pledgee's knowledge, assisted him at various times. Afterwards the machine was delivered to another pledge-holder, under a similar arrangement. With the possession of this party the pledgeor did not interfere, but the machine was forcibly taken from him by the laborers employed to run it, on account of non-payment of their wages, and then seized on attachment by other creditors of the pledgeor. *Held*, that there had been a sufficient delivery and continued change of possession to sustain pledgee's lien, as against these creditors; the same rule applying to a pledge as to a sale of personal property.

Commissioners' decision. Department 2. Appeal from superior court, Yolo county.

This is an action by L. W. Hilliker against H. Kuhn. Judgment for plaintiff, and defendant appeals.

George P. Harding and *J. W. Goin*, for appellant.

The pledge was not accompanied by a continuous change of possession sufficient to preserve the lien of the pledgee against the creditors of the pledgeor.

Grum v. Barney, 55 Cal. 254; *Bell v. McClellan*, 67 Cal. 283, 7 Pac. Rep. 699; *Stevens v. Irwin*, 15 Cal. 503; Civil Code, §§ 2988, 3440; *Godchaux v. Mulford*, 26 Cal. 317.

C. P. Sprague and *F. E. Baker*, for respondent.

The delivery and change of possession were sufficient. *Woods v. Bugbey*, 29 Cal. 466; *Goldstein v. Nunan*, 66 Cal. 542, 6 Pac. Rep. 451; *O'Gary v. Lowery*, 5 Mont. 427, 5 Pac. Rep. 583; *Macomber v. Parker*, 14 Pick. 497; *Palmtag v. Doutrick*, 59 Cal. 154; *Stevens v. Irwin*, 15 Cal. 503; *Montgomery v. Hunt*, 5 Cal. 366; *Cartwright v. Phoenix*, 7 Cal. 281; *Walden v. Murdock*, 23 Cal. 540, 83 Amer. Dec. 135; *Godchaux v. Mulford*, 26 Cal. 317.

FOOTE, C. Hilliker brought an action against Kuhn, as constable, claiming that the latter was unlawfully about to sell under execution, upon judgments obtained against one Locke, certain property which the plaintiff claimed to have had in the possession of a pledge-holder, to secure an indebtedness due from Locke to him, (the plaintiff.) He prayed for a perpetual injunction to restrain Kuhn from selling said property, and for damages. He obtained judgment enjoining its sale, and for costs. From an order denying his motion for a new trial the defendant has appealed. He claims that the evidence was not sufficient to sustain the findings. There was certainly some conflict in the evidence, but for that reason alone the findings should not be disturbed. They are as follows:

"That all the allegations contained in the complaint are true, except: (1) The allegation that plaintiff is the legal owner of the property described therein is not true; and in relation thereto the court finds that one H. F. Locke, the person named in said complaint as pledgeor, was at all times mentioned therein the owner of said property. (2) The allegation thereof that, prior to the commencement of said action, plaintiff had been damaged by the acts and threatened acts of defendant in the sum of fifty dollars, and in the further sum of two hundred and fifty dollars, expenses incurred for counsel fees, is not true. The allegation in the answer that on June 18, 1884, said Locke was in the actual possession of all said property, and that he thereafter continued at all times in such possession of all said property until the same was seized by defendant, and taken possession of by him, under and by virtue of attachments issued in the suits referred to in said answer, is not true; nor is it true that Locke had possession of any of said property during any of said time. That the allegation in said answer that the persons designated as creditors in said actions were creditors of said Locke, while he was in possession of the property described in the amended complaint, is not true. It was stipulated and agreed by defendant, on the trial of this cause, that if there was such a delivery of the property described in said complaint to the plaintiff, or to the pledgeholder to hold for security of plaintiff's debt against Locke, and such a continuous possession by plaintiff or his pledge-holder as the law requires, in order to preserve the lien of a pledgee of personal property, as against the creditors of the pledgeor, then in that case plaintiff is entitled to a decree making the injunction perpetual. In reference to the alleged delivery to and subsequent possession of said personal property by the plaintiff, the court finds the following to be the facts, to-wit: In August, 1883, plaintiff loaned H. F. Locke the sum of four hundred dollars, taking his note therefor, due, with interest, six months after date. That, at the time of such loan and execution of said note, said Locke, being the owner and in possession of said personal property, delivered the whole thereof to plaintiff to secure the payment of said note. That plaintiff thereupon took possession of said property, and deposited it in his own name in a warehouse in the town of Woodland, in said county, taking the warehouseman's receipt therefor. That the delivery of said property, and change of possession from Locke to Hilliker, the plaintiff herein, was open and notorious, and plaintiff kept the same continuously in

his exclusive possession in said warehouse until the nineteenth day of June, 1884. That at the date last aforesaid, at the request of said Locke, plaintiff loaned him a further sum of money, which, added to the amount then due upon said note, increased the indebtedness of Locke to plaintiff to the sum of \$761.75. That at the time of such subsequent loan said Locke proposed to plaintiff that said property, which consisted of a threshing-machine, engine, and threshing outfit, should be run during the threshing season of 1884, then about to commence, and, to induce plaintiff to consent that said property be used during said threshing season, represented to him that he (Locke) would furnish the labor and supplies necessary to run the machine, and do the work of looking up jobs of threshing, and notify the person in charge of said property of the place where such jobs were engaged.

"The court further finds that, to enable said Locke to pay his debt without a sale of said property, the plaintiff, upon the aforesaid representation of Locke, entered into an additional agreement in writing with him, by the terms of which plaintiff and Locke agreed to appoint, and did appoint, one W. S. Lafferty to take possession of said property as a pledge-holder, and to hold the same in his exclusive possession in pledge to secure the indebtedness of Locke to plaintiff until such indebtedness was paid; the plaintiff, however, reserving the right to retake the property from such pledge-holder at any time. It was further agreed by the terms of said writing between plaintiff, Locke, and said pledge-holder that said pledge-holder should take exclusive charge of said property; that he should run and operate the same during the threshing season until Locke's debt to plaintiff was fully paid from the earnings thereof, unless plaintiff should exercise his right to retake said property prior to such payment, and pay to plaintiff the net earnings of said machine until his debt and interest were fully paid. That, pursuant to said agreement, said plaintiff, on the nineteenth day of June, 1884, delivered all of said property to said W. S. Lafferty, the pledge-holder aforesaid, who took and held the same, and thereafter, on the twelfth day of July, 1884, commenced threshing, said Locke having furnished him necessary laborers to assist in running said machinery; and said Lafferty continued to run and operate said machinery, and in the possession thereof, until the eighteenth day of August, 1884. That, during the time said Lafferty was running said machinery Locke was frequently at the places where the same was being run, and from his observations concluded that said Lafferty was not sufficiently experienced to manage and run said machinery successfully; whereupon, on occasions when said Locke was present at the places where said machinery was being run, he frequently assisted said Lafferty in moving and setting said machinery, and by directions and advice, as to the details of managing the same. That plaintiff resides at a distance from the places where said machinery was being run, and had no knowledge of such or any interference on the part of Locke. That about the eighteenth day of August, 1884, Locke reported to plaintiff that the pledge-holder, Lafferty, was not, in his judgment, sufficiently experienced to operate said machinery successfully; whereupon plaintiff and said Locke appointed one A. B. Nordyke to take the possession of said property, and to hold and run the same, pursuant to the agreement between plaintiff and Locke when Lafferty was appointed pledge-holder. That at the date last mentioned Nordyke went to the machine, when Lafferty there delivered to him the possession of all the property described in the complaint, and said Nordyke took the same as pledge-holder, and run and used the same in threshing grain during the balance of the time the same was so used, to-wit, until the ninth day of September, 1884; and during the time said Nordyke had the same in possession said Locke exercised no control in the details of moving or running and operating said machinery, the said Nordyke having the exclusive management thereof, and the control and direction of all laborers employed about the same. That he notified the persons with whom he transacted business

that he was in possession of said property as pledge-holder. That at the date last mentioned, September 9, 1884, a portion of the laborers who were employed to work about said machinery forcibly took the same from said Nordyke, and hauled it from the field, where it was being used in threshing, to a public highway contiguous thereto, commenced suits for wages alleged to be due them, and sued out attachments against the property of plaintiff and said Locke, which attachments were placed in the hands of defendant, and by him levied on the tenth day of September, 1884, by seizure of the property described in the complaint, and taking possession thereof; which suits were the same referred to in the complaint as brought against plaintiff and said Locke. That while the property was so in the hands of said defendant, under said attachments, the judgment creditors referred to in the complaint—to satisfy whose judgment the property was about to be sold at the commencement of this action—began their actions against said Locke and caused said property to be attached by defendant, in their respective suits, as the property of said Locke. That during all the time said property was in the hands of said pledge-holders, or either of them, there was no concealment, or attempt at concealment, on the part of plaintiff or said pledge-holders as to the *status* or condition of said property. That, while the property was so in the hands of said pledge-holders, plaintiff told, among other persons, some of the judgment creditors mentioned in said complaint, that the same was being held in pledge to secure Locke's debt to him. That said Locke on one occasion, a short time prior to the levy of said attachments, told one of his creditors (not one of the judgment creditors mentioned in the complaint) that said property had not been pledged by him, but that such statement was false, and made without the knowledge or assent of plaintiff, and in his absence; and that plaintiff did not know until after the commencement of the suits, and the attachment by the judgment creditors named in the complaint, that said Locke had ever at any time made such a statement denying the pledge of said property. That the pledge-holder Nordyke was paid by plaintiff for his services as such pledge-holder at the rate of four dollars per day. That all the acts and transactions of plaintiff were open, fair, and were made and done in good faith. That the indebtedness of Locke to the said judgment creditors mentioned in the complaint was contracted subsequently to June 19, 1884."

The contention of the appellant that, under the findings, the plaintiff was not entitled to an injunction, should not prevail, because, in the *first* place, it was stipulated between the parties in the court below, upon the trial, that if there was such a delivery of the property described in said complaint to the plaintiff, or to the pledge-holder to hold for the security of plaintiff's debt against Locke, and such a continuous possession by plaintiff or pledge-holder as the law requires in order to preserve the lien of a pledgee of personal property, as against the creditors of the pledgeor, then in that case plaintiff is entitled to a decree making the injunction perpetual; and because, *secondly*, the findings show that "the delivery and continuous change of possession required by law" were sufficient to entitle the plaintiff to preserve his lien aforesaid. For the mere fact that Locke, after the delivery of possession to pledge-holder, either with, or, as appears most probable, without, the knowledge or consent of Hilliker, had for a time taken charge of the property in the manner he did, would not necessarily render the holding of it as a pledge void as to creditors, (*Goldstein v. Nunan*, 66 Cal. 542, 6 Pac. Rep. 451;) the same rule being applicable, in such a case, with regard to delivery and change of possession, as that which is required on a sale of personal property, (*Woods v. Bugbey*, 29 Cal. 466.) The order should be affirmed.

BELCHER, C. C., and SEARLS, C., concurred.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed

71 Cal. 221

TIDE LAND RECLAMATION CO. v. CUNNINGHAM. (No. 11,030.)

(Supreme Court of California. October 28, 1886.)

APPEAL—REVIEW—DISCRETION OF TRIAL COURT.

When the trial court has granted a new trial on the ground of the insufficiency of the evidence to support the verdict, its action will not be reviewed in the supreme court.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county.

Action brought by Tide Land Reclamation Company, a corporation, against Thomas Cunningham, sheriff of San Joaquin county, for the conversion of certain stock. Verdict for defendant. New trial granted, and defendant appeals from the order.

W. L. Dudley, for appellant. Terry & McKinne, for respondent.

SEARLS, C. This is an action to recover damages for the unlawful taking and conversion of certain horses, mules, and colts. Defendant had a verdict, which was, on motion of plaintiff, set aside, and a new trial granted. Defendant appeals from the order granting a new trial. The plaintiff is a corporation. Defendant was sheriff of the county of San Joaquin, and justified taking the property under and by virtue of a writ of attachment issued out of the district court of the Fifth judicial district in and for the county of San Joaquin, in a certain action wherein B. W. Owens and E. Moore were plaintiffs, and S. L. Ganow was defendant. The answer sets up that the animals belonged to said Ganow, and were seized under said writ of attachment, as his property; that, after such seizure, the said Owens and Moore obtained judgment against said Ganow, and thereupon the defendant herein, under and by virtue of an execution issued thereon, levied upon and sold a part of the property to satisfy said judgment. The order in the case does not show upon what ground the motion for a new trial was granted. The evidence as to the ownership of the animals was conflicting, and as every intendment must be indulged in favor of the action of the court below, we are authorized to presume that the motion was granted on the ground of the insufficiency of the evidence to support the verdict. *Irving v. Cunningham*, 58 Cal. 306. The court below, who has the witnesses before it, with an opportunity to judge from their manner and appearance, and mode of testifying, as to the credit to be given to their statements, is in a much better position to judge of the facts than we are. It is therefore eminently proper that a wide discretion be given to the judge who presided at the trial, in granting and refusing new trials in cases involving a substantial conflict of evidence. In the present case we see no cause to infer an abuse of the discretion vested in the court. *Savage v. Sweeney*, 63 Cal. 340; *Bauder v. Tyrrel*, 59 Cal. 99.

The order of the court below should be affirmed.

BELCHER, C. C., and FOOTE, C., concurred.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

71 Cal. 223

SHEPHERD v. JONES. (No. 11,483.)

(Supreme Court of California. October 28, 1886.)

1. APPEALS—TIME OF TAKING—FROM JUDGMENT.

In California, appeals taken more than one year after rendition of the judgment appealed from will be dismissed.

2. SAME—RECORD—ASSIGNMENT OF ERRORS.

An assignment of error in these words: "The court erred in ordering judgment for the plaintiff on the findings,"—is too general to warrant the appellate court to review the judgment.

3. SAME—REVIEW—PRESUMPTIONS.

Where the trial judge supplements a special verdict by certain special findings of his own, such findings, not having been excepted to at the time by either party, will be presumed to have been adopted by both.

4. SAME.

Defendant resisted payment of a note, claiming its execution was fraudulently obtained from him, and asked the court to charge that "fraudulent representations" might consist in acts as well as words, and if said note was fraudulently obtained the verdict should be for him. *Held*, such request correctly stated the law, and, having been refused, such refusal would be presumed to have been for lack of evidence tending to support it.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county.

The action was brought on a promissory note. The defendant in his answer denied the allegations of the complaint, and pleaded in avoidance of the note: (1) Want of consideration; (2) fraud in procuring the execution of the note; and (3) rescission by agreement of the parties, and the return to the payee of certain stock for which the note had been given. The further facts are stated in the opinion.

J. C. Campbell and *D. S. Ferry*, for appellant. *J. A. Louittet* and *Joseph H. Budd*, for respondent.

BELCHER, C. C. This is an action upon a promissory note given for the purchase of stock in a mining company, and the appeal is from a judgment entered against the defendant, and from an order denying his motion for a new trial. The appeal from the judgment cannot be considered, for the reason that it was taken more than a year after the judgment was entered. The motion for a new trial was properly denied. The case was tried before a jury upon special issues, and the court then, after argument, found certain other facts, and upon the verdict and findings rendered the judgment. Conceding that this method of procedure was irregular, still no objection appears to have been taken to it by either side, and we must presume it was adopted by consent. The defendant requested the court to instruct the jury, in effect, that fraudulent representations may be made by acts as well as by words, and that if the note was obtained from defendant by false and fraudulent representations, then the verdict should be in favor of defendant. The court refused to instruct as requested, and the refusal is assigned as error. The instructions stated correct propositions of law, and were refused, doubtless, because there was no evidence to support them. If so, the refusal was proper. *Mecham v. McKay*, 37 Cal. 154; *Mendelsohn v. Lighter Co.*, 40 Cal. 657. The jury found that the defendant was not induced to execute the note by any false and fraudulent representations; and after carefully going over the record, we are unable to find any testimony tending to show that he was. It is true that shortly before the giving of the note the defendant, with the secretary and two of the directors of the company, went to the mine, and, while they were standing on the surface of it, the secretary picked up a small piece of gold, and one of the directors picked up another piece, and at another time the secretary showed the defendant some gold filings which, as he represented, had been washed out of the mine, and that defendant was thereby so impressed with the value of the mine that he concluded to take the stock, and give his note. But there is no testimony to show that the small pieces of gold were not honestly found and picked up, or that the gold filings did not come from the mine as represented.

Within a month after his purchase of the stock, the defendant became dissatisfied with his bargain, and sought to rescind the contract. He returned the certificate which he had received to the secretary, and demanded back his note. The secretary took the certificate, and subsequently promised to get and return the note, but never did so. The court finds that before the promise to return was made, the note had been, for a valuable consideration, and

by a resolution passed by the directors of the company, transferred and assigned to the plaintiff, and that he was then the owner and holder of it. It is objected that this finding is not supported by, but is directly contrary to, the evidence. Conceding this to be so, we cannot consider the objection, for the reason that there is no specification in the statement on which it can be rested. The attempted specification, that "the court erred in ordering judgment for the plaintiff on the findings," is not sufficient for any purpose.

On the whole, we find no error in the record of which the defendant can be heard to complain. The appeal from the judgment should therefore be dismissed, and the order denying a new trial should be affirmed.

SEARLS and FOOTE, CC., concurred.

PER CURIAM. For the reasons given in the foregoing opinion the appeal from the judgment is dismissed, and the order denying a new trial affirmed. Hearing in bank denied.

75 Cal. 134

JOHNSTON *et al.* v. SAN FRANCISCO SAV. UNION. (No. 12,075.)

(Supreme Court of California. February 18, 1888.)

1. HUSBAND AND WIFE—COMMUNITY PROPERTY—RIGHTS OF HEIRS—DEBTS OF SURVIVOR—QUIETING TITLE.

A surviving husband mortgaged community land to secure a community debt, and also a debt contracted after his wife's death, and the mortgagee purchased the land on foreclosure. Some of the wife's heirs who were minors at the time of the foreclosure, and were not brought into court in that action, sued to quiet the title to their share of the land. *Held*, under Act Cal. 1850, relating to community property, that, before obtaining a decree, they must pay their proportionate share of the community debt secured by the mortgage, less the amount due them for their share of the rents and profits of the land accruing while the mortgagor held it, but that they need not pay any part of the debt incurred after the wife's death; the mortgagor having no power to bind their interest in the community property for any except community debts.

2. SAME—WHAT LAW GOVERNS.

The respective rights of surviving husband and children in community property are governed by the law in force at the time of the wife's death.

JUDGMENT—COLLATERAL ATTACK—DEFENDANT SUED BY FICTITIOUS NAME—WAIVER OF IRREGULARITIES.

In a foreclosure suit, an adult not named as a party defendant, or served with summons, appeared and answered, reciting that he had been sued by a fictitious name, and setting up a claim to the land. Judgment was rendered against him by his true name, though the complaint was not amended. *Held*, that the judgment was conclusive against him on collateral attack, whether his claim was adverse to the mortgagor or not; he having submitted both his person and his cause to the jurisdiction of the court.

4. SAME—RENDITION AND ENTRY—JUDGE'S MEMORANDUM.

A judgment is not void although the court filed first a memorandum of opinion, and then a set of formal findings, whichever instrument be considered the basis of the judgment, since the question whether the findings support the judgment cannot be raised upon a collateral proceeding.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

This was an action brought by James Johnston, John F. Johnston, and Francis T. Johnston against the San Francisco Savings Union to quiet title to certain land. The court granted the decree upon conditions, and both parties appeal.

Eugene R. Garber and *George C. Ross*, for appellants. *A. & H. C. Campbell*, (*Cope & Boyd*, of counsel,) for respondents.

HAYNE, C. An action to quiet title. In 1859 the property in controversy was the community property of James Johnston, Sr., and Petra Jara, his wife. In that year Johnston was indebted to J. and William M. Morris in the sum of \$17,000, secured by mortgage upon the property, and "which said indebtedness was a debt contracted during the life-time of said Petra, and after her intermarriage with said James Johnston, Sr., and was a debt of said marital community." Petra Jara died on April 30, 1861, leaving the three plaintiffs, her surviving children. Prior to her death, the debt had been reduced by payments, and subsequently there were many changes in the form of the indebtedness. In this regard the court finds: "That said debt was never paid, but that said James Johnston, Sr., at different times, renewed and extended such debt, and the security therefor, which indebtedness and security were held by other persons than said J. and Wm. M. Morris, but that it always existed and continued, increased by the accumulation of interest at said rate; and that new mortgages were by said James Johnston, Sr., substituted for the old from time to time as they fell due. That the loan made by the defendant herein, and the mortgage given therefor, * * * was one of such renewals and substitutions; and to the extent of \$9,150, with interest thereon from April 1, 1864, was a survival of the said debt of the marital community of said James Johnston, Sr., and Petra Jara." In November,

1875, the defendant herein commenced an action to foreclose the mortgage mentioned in the finding quoted. The three children of Petra Jara (two of whom were then minors) were not parties defendant by name; but they came in and filed answers, reciting that they were sued by fictitious names, and setting up substantially the facts upon which they found their present claim. Judgment was entered for the plaintiff in said suit, and the property was sold, the plaintiff in said suit (defendant herein) becoming the purchaser, and, in due time, receiving the sheriff's deed. The court below decided against the plaintiff James Johnston, but quieted the title of the other two plaintiffs upon condition of their paying to the defendant their proportion of the community debt of \$9,150, with interest from April 1, 1864. Each side appeals.

1. It is contended that the court in the foreclosure suit filed a second set of findings, and that, this being unauthorized, the decree was void. It is plain, however, that what is termed the "first set of findings" is merely the opinion of the court. The learned judge who wrote it calls it a "memorandum." But if it had amounted to formal findings, and if the consequence had been that the second set of findings was unauthorized, as contended, the result would simply be that the document first filed would do duty as the findings in the case, and it would not matter whether it supported the judgment or not; for the question whether the findings support the judgment—in other words, whether the judgment is erroneous—cannot be raised in a collateral action. If there were no findings at all, a waiver would have to be presumed, even on appeal in the cause, and, *a fortiori*, in a subsequent action. It has even been held that a judgment ordered without a trial cannot be attacked collaterally. *Ex parte Bennett*, 44 Cal. 87.

2. The plaintiff James Johnston, Jr., was of age at the time of the commencement of the foreclosure suit. As above stated, he was not named as a party defendant, nor was he served with summons under a fictitious name. But he came in and answered, reciting that he was sued by the fictitious name of John Doe, and setting up the substance of his claim in the present suit. The complaint was not amended by inserting his true name, but judgment was entered against him by his true name. The fact that he was not served with summons is immaterial. Service of summons is waived by appearance, (except in case of a minor;) and we think this rule applies where the party is sued by a fictitious name, as this party appears from his own recital to have been. Nor is it material that his true name was not afterwards inserted in the complaint. That irregularity does not render the judgment void. *Campbell v. Adams*, 50 Cal. 203. But it is argued for this plaintiff that his interest was adverse to that of the mortgagor, and therefore that it could not have been litigated in the foreclosure suit, and that the decree is void as to him for that reason. Conceding, for the purpose of the case, that his interest was adverse, within the meaning of the rule invoked, and that therefore it could not *properly* have been tried and determined in that suit, the fact remains that it *was* there tried and determined. The court had jurisdiction of the subject-matter and of the person; and, this being the case, we fail to perceive how the circumstance that the issues tried were improperly mixed up with other issues can render the judgment void. If that were the rule, it would follow that questions as to misjoinder of causes of action and defense could be made on a collateral attack, which it is hardly necessary to say is not the case. If the party did not desire to have his interest passed upon in the foreclosure suit, and was right in his position with respect to it, he should have taken steps to present the question in that suit; or, if he wished a jury trial, he should have asked for it there. The case of *McComb v. Spangler*, 71 Cal. 418, 12 Pac. Rep. 347, is not in conflict with the foregoing. There the judgment of foreclosure against the party in question was by default. He did not set up his adverse interest, and the decision simply was that he was not required to do so. The other cases cited have no application. In *San Francisco*

v. *Lawton*, 18 Cal. 472; *Croghan v. Minor*, 53 Cal. 15; and *Marlow v. Barlow*, Id. 456,—the question was made on appeal in the foreclosure suit. In *Fulton v. Hanlow*, 20 Cal. 450, and *Flandreau v. Downey*, 23 Cal. 354, the actions were not actions of foreclosure.

3. The other plaintiffs here, viz., John F. Johnston and Francis T. Johnston, were minors at the time of the foreclosure suit. And it was held upon the former appeal (63 Cal. 554) that the court did not acquire jurisdiction of their persons in that suit. It is now argued for the defendant here that the surviving husband represented the community, and that therefore the children were not necessary parties; and *Carter v. Conner*, 60 Tex. 52, is cited. But that matter was decided upon the former appeal. The court there said: "As to the legal title of an undivided moiety of the lands, descent was cast upon them on the death of their mother. The object of the suit was to sell and transfer their title, as well as that of their father. They had an interest to protect it; to deny the existence of the mortgage, or to reduce the amount alleged to be secured by it; to prove that there were no community debts, or that they were less than the advance made by the mortgagee, and that the mortgagee had notice of the facts with reference to such indebtedness; that their father had exceeded his limited authority, and that the mortgagee knew it was not a mortgage in 'good faith.' As they were necessary parties to the foreclosure suit, the decree therein was void with respect to one-half the lands mortgaged, unless the court acquired jurisdiction of the infants." *Johnston v. Savings Union*, 63 Cal. 560, 561.

This decision has become the law of the case, and the question as to the effect of the decree upon the interest of these two plaintiffs is no longer open. Upon the retrial the court below so held. But it also held that, the present action being equitable in its nature, these plaintiffs would be granted relief only upon condition of their paying to the defendant here two-sixths of the sum of \$9,150, and interest. Each side appeals from this decision. The two plaintiffs urge that no condition should have been imposed upon them, and that, if it be imposed, the rents and profits should be set off against it. The defendant contends that the condition should have been extended to a proportion of the whole sum found due in the foreclosure suit. We will examine these positions separately.

(a) The wife having died while the act of 1850 was in force, that act must govern the case. The construction which it received was that the death of the wife did not release any portion of the property from liability to be taken for community debts, and that her descendants took it subject to the payment of such debts; that no probate administration of the estate of the deceased wife was necessary, but that the husband had control of the property, as survivor of the marital partnership, for the purpose of settling up its affairs. See *Packard v. Arellanes*, 17 Cal. 536; *Ord v. De la Guerra*, 18 Cal. 67; *Cook v. Norman*, 50 Cal. 637. At the time of the death, there was a community debt, which was secured by mortgage upon the property. This debt (or a portion of it) was kept alive by the surviving husband by renewals, extensions, and substitutions, as stated in the finding above quoted. If he had the power so to keep it alive, we think it must be regarded as the same debt; for a court of equity will look beneath the mere form of the transaction, and regard its substance only. We think he had the power. If he could have conveyed the whole property in satisfaction of the debt, as was held in *Cook v. Norman*, above cited, it is hard to see why he could not attempt to save some of it for those interested by putting off the day of payment. *Rusk v. Warren*, 25 La. Ann. 314. The children were not personally liable for the debt, and could not lose, but might have gained, by the course taken. At the time of the foreclosure suit, therefore, the interests of these children were bound by the mortgage for a portion of the debt. Their interests escaped from the operation of the decree by a mere slip in the foreclosure proceedings.

And, while it must be held that they did so escape, yet, when the owners of such interests come into equity for relief against the cloud arising from the very same foreclosure proceedings, they must be prepared to do equity; and we think it is equity that they should pay such proportion of the community debt as their share bears to the whole property, viz., two-sixths. See *Kellogg v. Duralde*, 26 La. Ann. 234. The court below, therefore, was right in imposing the condition upon the plaintiffs.

(b) We think it was also right in not extending the condition to a proportion of the whole sum found due in the foreclosure suit. The equity to which effect is given by the condition depends upon whether, at the time of the foreclosure suit, the interests of the plaintiffs were bound by the mortgage. As above stated, we think their interests were bound by the mortgage for so much of the debt as was a survival of the original debt contracted during the existence of the community. This was fixed by the findings at \$9,150, with interest as specified; and, after a careful examination, we cannot say from the record that this finding was not justified by the evidence. The remainder of the \$60,000, then, was a debt contracted after the dissolution of the community. The question, therefore, is whether the surviving husband had the power to bind the interests of the children for the payment of this portion of the debt. The position that he had such power appears to us to rest upon the idea that, notwithstanding the death of the wife, the "community" continued, or might continue, with reference to the children's interest. So far as we are advised, that was the case in the Spanish law. In the argument of the case of *Packard v. Arellanes*, Mr. Lies (who was well versed in Spanish law) said: "By whatever shadowy designation of feigned dominion or defeasible right the Spanish jurists call the mother's title, her heirs knew that the property must descend to them, and that their father managed it as their senior partner." 17 Cal. 536. And in *Ord v. De la Guerra*, BALDWIN, J., delivering the opinion, said: "It is, moreover, held by the civil law, that, when the husband keeps undivided the common property after the death of the wife, it is presumed to be done with the acquiescence of the heirs, and the effect is to continue the partnership. See Escriche, Dict. *verb.* 'Bienes Gananciales,' 368." But this doctrine of the Spanish law (if such it be) did not obtain a foothold in our law. Under the act of 1850, the wife's interest vested in her descendants. "They take title of the same nature, and to the same extent, as that which vests in the survivor." *Broad v. Broad*, 40 Cal. 496; and see *Broad v. Murray*, 44 Cal. 228; *Johnston v. Bush*, 49 Cal. 201. The property remained subject to the community debts, and the duty of settling such debts was upon the husband. But he took as surviving partner, (*Packard v. Arellanes*; *Ord v. De la Guerra*), not as a continuing partner. The partnership was dissolved by the death, and his duty was to settle up its affairs; not to proceed to impose new burdens upon the property in the prosecution of new enterprises. In *Cook v. Norman*, in reasoning to the conclusion that the surviving husband had power to convey the property in satisfaction of a community debt, the court said: "The authority to sell the property of the community belongs to him as the survivor of the community, and is the same in its nature as was his power to do so during the existence of the community." It is to be observed that this case proceeds upon the assumption that the debt in question was a community debt, and the decision was merely that a conveyance by the surviving husband was one of the modes in which the property could be made to satisfy the liability for such debts, which liability was admitted to exist. This is widely different from saying that the property is liable for debts which are not community debts; that is, for debts contracted after the dissolution of the community. The statement quoted was not necessary to the decision, and seems rather vague. It is to be observed, however, that what the court was speaking of was the power to convey, and that what it said of this power

was that it was the same "in its nature" as before the dissolution of the community. It was not said that this power was the same *in extent* as before the dissolution, and it is impossible that the court should have meant this; for that would be to say that the children's interests could be taken for non-community debts, or, in other words, that the power of the husband was unrestrained. We do not regard the case as conflicting with the views above expressed. In *Packard v. Arellanes* the court said that the debts for which the property was liable to be taken included all debts of the community contracted for the common benefit, "whether by the deceased or by the survivor." This remark was not necessary to the decision, which was merely that no probate administration upon the estate of the wife was necessary. There can be little doubt that such expenditures as are necessary to preserve the property *in statu quo* may be made by the surviving husband, and would be allowed upon a settlement of his accounts. But the case here is manifestly not of that character. The interests of the children, therefore, were not bound for the debt contracted after the dissolution of the community, and there is no equity in imposing a condition as to such debt.

(c) We do not see why the rents and profits of the shares of these two children should not be set off against the amount of the condition imposed upon them. This does not refer to the rents and profits received by James Johnston, Sr. The defendant here is not James Johnston, Sr., and cannot be charged with rents and profits which it did not receive; but, after it went into possession under the sheriff's sale, it received the rents and profits of all the land, except a small portion in possession of the plaintiffs. It had no right to the rents and profits of the plaintiffs' share, and should be charged therewith. It is probably true that the parties, being tenants in common, could not be made to account to each other in an independent action; but, in imposing a condition, the court must take into consideration all the circumstances, in order to arrive at the justice of the case.

The other positions do not require special notice. We therefore advise that the cause be remanded, with directions to the court below to find, from such additional evidence as may be introduced, the value of the rents and profits of the entire property since the defendant has been in possession, and also the value of the rents and profits since said time of the portion in possession of the said two plaintiffs, and, after deducting the latter amount from the former, to set off the remainder against the amount of the condition imposed upon said plaintiffs; that in all other respects the judgment and order appealed from be affirmed. The said two plaintiffs to recover their costs of appeal.

We concur: BELCHER, C. C.; FOOT, C.

PER CURIAM. For the reasons given in the foregoing opinion the cause is remanded, with directions to the court below to find, from such additional evidence as may be introduced, the value of the rents and profits of the entire property since the defendant has been in possession, and also the value of the rents and profits since said time of the portion in possession of the said two plaintiffs, and, after deducting the latter amount from the former, to set off two-sixths of the remainder against the amount of the condition imposed upon said plaintiffs; and in all other respects the judgment and order appealed from be affirmed. The said two plaintiffs to recover their costs of appeal.

75 Cal. 147

FRASER v. ALEXANDER. (No. 11,564.)

(Supreme Court of California. February 20, 1888.)

1. OFFICE AND OFFICER—REMOVAL FOR MISCONDUCT—STATUTES—REPEAL BY CONSTITUTION.

Under Const. Cal. 1879, art. 22, § 1, providing that no law inconsistent with the constitution should remain in existence after July 1, 1880, the act of March 30, 1874,

(St. Cal. 1873-74, p. 911,) providing for the removal of civil officers for violation of official duties, ceased to exist on July 1, 1880, such act specifying that the officers should be removed by decree of the district court, which court ceased to exist when the constitution went into effect.

2. SAME—REPEAL BY IMPLICATION.

The act of March 30, 1874, (St. Cal. 1873-74, p. 911,) imposing upon civil officers who violate their official duties a fine for the benefit of the informer, is inconsistent with the act of March 14, 1883, (St. Cal. 1883, p. 299,) imposing in such cases a fine for the benefit of the county, and is therefore repealed by the latter act.

In bank. Appeal from superior court, Lake county; RODNEY M. HUDSON, Judge.

This is an action by J. K. Fraser against David Alexander. Plaintiff obtained judgment, and defendant appeals.

E. W. Britt and Fox & Kellogg, for appellant. *Oliver P. Evans and Ben. P. Tabor*, for respondent.

SEARLS, C. J. This is an action brought by the plaintiff in his individual capacity against the defendant, as supervisor of the county of Lake, state of California, to recover \$100, and to remove the defendant from his office as supervisor for a willful violation of official duty, pursuant to an act of the legislature of the state of California, approved March 30, 1874, entitled "An act providing for the removal of civil officers for a violation of official duties," (St. 1873-74, p. 911; Deering's C. C. P., following § 810.) Plaintiff had judgment as prayed for in his complaint, from which judgment, and from an order denying a new trial, defendant appeals. The complaint was filed January 7, 1886, is verified, and shows that a claim for \$74.55, in favor of one G. W. Rawson, on account of bridge lumber furnished to the county of Lake, was presented to the board of supervisors of said county for allowance. The *gravamen* of the charge against the defendant is: (1) "That said claim was not verified as required by law." (2) That on the 20th day of July, 1885, the defendant, as a supervisor, "willfully, and in violation of his official duty as a supervisor of said county of Lake, did cast his vote as such supervisor in favor of the allowance and payment of said claim for the full amount thereof, contrary to the form, force, and effect of the statutes in such cases made and provided." (3) That the claim was allowed; and ordered paid; that defendant voted in favor of such allowance and payment; and that in so doing he became guilty of a willful violation of his official duty. A copy of the bill, as presented and allowed, is attached to the complaint as an exhibit. It is in the usual form of an itemized account, the dates, etc., being given, and is only verified and certified as follows:

"Subscribed to this 18th July, 1885.

G. W. RAWSON.

"*D. Poston, Supervisor District 1.*"

Defendant demurred to the complaint upon the grounds (1) that it failed to state facts sufficient to constitute a cause of action; and (2) that plaintiff had not legal capacity to sue. The demurrer was overruled, and this action is assigned as error. Defendant urges that the demurrer should have been sustained for the reasons: (a) The statute of March 30, 1874, so far as it could apply to the case of the supervisor, has been superseded and repealed by sections 55 and 184 of the act known as the "County Government Act," (St. 1883, p. 299.) (b) Conceding the act of March 30, 1874, to be in full force, the complaint is yet bad for the want of sufficient statement of essential facts.

The act of 1874 provides that any member of certain boards, among which are supervisors, "who shall be guilty of a willful violation of any of the provisions of the statute under which he or they were or may be hereafter elected or appointed, or of any other statute or statutes of this state prescribing or defining their duties and powers, or passed for their government or control, or who shall be guilty of any other willful violation of official duty, shall be

deprived of his office and otherwise punished, in accordance with the provisions of section 2 of this act." Section 2 provides for a complaint, duly verified, setting forth the facts constituting a violation of duty, to be filed in the district court, for a citation to the party charged, and requires the court to proceed to hear in a summary manner the complaint and evidence offered in support of the same, and the evidence offered by the party charged, and, if it shall appear that the charge or charges contained in the complaint are sustained, requires the court to enter a decree depriving the party charged of his office, and to enter judgment for \$100 in favor of complainant, and for costs. Section 3 provides that the act shall not repeal or impair the provisions of any other act; but shall be construed to be a cumulative remedy for the enforcement of official duty. The laws in force and providing for the removal of civil officers, otherwise than by impeachment, at the time of the passage of the cumulative act of 1874, were: (1) Upon an accusation in writing presented to the grand jury, as provided by section 758, Pen. Code. The sections immediately following defined the proceedings to be had, the mode of trial, and judgment to be rendered. (2) Section 772 of the same Code (Pen. Code 1872) provided a process for the removal of public officers by summary proceedings before the district courts, for charging illegal fees, or for refusal or neglect to perform the official duties pertaining to their offices. In this class of cases a complaint could be presented by an individual, and, in case of guilt, judgment of removal from office followed, and also a judgment for \$500 in favor of the informer. This section was amended in 1880 so as to authorize the proceeding to be had in the superior court; but in other respects the section was not changed. Pen. Code, § 772. Thus stood the statutes when, on the 14th of March, 1883, an act entitled "An act to establish a uniform system of county and township governments" was approved. Section 55 of this last act is as follows: "Any supervisor who neglects or refuses to perform any duty imposed on him, without just cause therefor, or who willfully violates any law provided for his government as such officer, or fraudulently or corruptly performs any duty imposed on him, or willfully, fraudulently, or corruptly attempts to perform an act as supervisor unauthorized by law, in addition to the penalty provided in the Penal Code, forfeits to the county \$500 for every such act, to be recovered on his official bond, and is further liable on his official bond to any person injured thereby for all damages sustained." Section 231 of the same act (county government act) repeals all acts and parts of acts inconsistent therewith. The manifest object of the county government act was to provide a comprehensive system of government for counties and townships. It provides for a board of supervisors, fixes and defines their powers, regulates the manner of their exercise, etc. The board exercises judicial functions, in examining and passing upon claims against the county; legislative powers, in the enactment of ordinances; and executive authority, in a variety of matters confided to its supervision. For willful, fraudulent, or corrupt acts of omission or commission, by the fifty-fifth section of the act, they forfeit to the county \$500, to be recovered on their official bonds, and for damages or hurt to individuals by such acts or omissions, they are severally liable on such bonds. Coupled with the provisions of the Penal Code, under which they may be removed from office for malfeasance, it would seem the legislature has so hedged the supervisors around, as to protect alike the public and the individual.

It was said in *City and County of Sacramento v. Bird*, 15 Cal. 295: "Every statute must be considered according to what appears to have been the intention of the legislature, and even though two statutes relating to the same subject be not in terms repugnant or inconsistent, if the latter statute was clearly intended to prescribe the only rule which should govern in the case provided for, it will be construed as repealing the original act." Sedg. St. & Const. Law, 124. As was said in *State v. Conkling*, 19 Cal. 512:

"When the legislature makes a revision of particular statutes, and frames a general statute upon the subject-matter, and from the frame-work of the act it is apparent that the legislature designed a complete scheme for this matter, this is a legislative declaration that whatever is embraced in the new law shall prevail, and whatever is excluded is ignored." In *Norris v. Crocker*, 13 How. 429, it was held that where, under an act of congress, a penalty was given to an individual for certain violations of the act, a subsequent act, which did not in terms repeal the former, but which imposed a fine and imprisonment for a like violation of the law, upon a prosecution by the United States, the effect of the latter statute was to repeal the former, so far as the penalty was concerned. We think it may be stated as a general rule that acts of the legislature prohibiting the same offenses and injuries as former acts, but imposing different penalties or giving different remedies, repeal, so far, such former acts. *Rex v. Cator*, 4 Burrow, 2026; *Nichols v. Squire*, 5 Pick. 168; *Com. v. Kimball*, 21 Pick. 373; *State v. Whitworth*, 8 Port. (Ala.) 434. A comparison of section 55 of the county government act with the statute of 1874, shows that while the latter is somewhat more specific and comprehensive than the former, yet it covers the same unlawful acts, and provides a different mode of punishment, with different penalties.

Again, the act of 1874 provided for a prosecution in the district court. By section 1, art. 22, Const. 1879, it was provided that "the provisions of all laws which are inconsistent with this constitution shall cease upon the adoption thereof, except that all laws which are inconsistent with such provisions of this constitution as require legislation to enforce them shall remain in full force until the 1st day of July, 1880, unless sooner altered or repealed by the legislature." Sections 2 and 3 of the same article conferred upon the courts created by the new constitution jurisdiction in all actions and proceedings pending upon its adoption, and for offenses committed before such adoption. The legislature of 1880 amended the provisions of the Penal Code relating to the removal of civil officers, to conform to the new constitution, by giving jurisdiction of the proceedings to the superior court, where it had been before in the district court. No change was, however, ever made in the act of 1874, conforming it to the new constitution. As it stood, it required legislation to conform it to the new order of things. It provided for prosecutions in courts which ceased to exist when the new constitution went into effect, and not having been amended prior to July, 1880, ceased at that date to have any force or effect.

We are of opinion, therefore — *First*, that the act of March 30, 1874, (St. 1873-74, p. 911,) ceased to exist as a law on the 1st day of July, 1880; *second*, that, waiving the first proposition, such act of 1874 is inconsistent with the county government act, and is therefore repealed by the 184th section thereof. It follows that the judgment and order appealed from should be reversed, and the court below directed to sustain the demurrer, and dismiss the action. Ordered accordingly.

We concur: MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.; THORNTON, J.

75 Cal. 163

BROWN v. STARR *et al.* (No. 12,313.)

(Supreme Court of California. February 20, 1888.)

APPEAL—WHEN LIES—FINAL JUDGMENT—APPLICATION TO DIVIDE HOMESTEAD.

One of several judgment defendants appealed from an order of court directing a division of his homestead to satisfy such judgment, and also from a refusal of the court to remand the appraisalment of his homestead to the appraisers for a report as to the value of his life-estate therein. *Held*, that neither the order nor the refusal, under Civil Code Cal. § 1245, providing that the application of the creditor is to be "to

the superior court of the county in which the property is situated," is a proceeding in the original judgment action, nor such *final judgment* in a special proceeding as to entitle defendant to an appeal.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; A. W. HUTTON, Judge.

Wicks & Ward, for appellant. *C. N. Wilson*, for respondent.

HAYNE, C. The plaintiff recovered a judgment against the defendants, and caused execution to be levied upon the homestead of the defendant T. C. Alexander. Upon petition of the plaintiff, the court appointed appraisers to appraise the value of such homestead. They reported that the value of the homestead was \$15,000, and that it could "be subdivided without the necessity of sale." The plaintiff thereupon moved the court for an order directing the appraisers to proceed to make the division. The defendant T. C. Alexander moved the court "to remand the appraisal of his homestead to the appraisers for further report as to the value of his life-estate in the property covered by such homestead; suggesting, at the same time, that the interest of T. C. Alexander in the property covered by such homestead was only a life-estate, or else a mere personal right of occupancy during declarant's life-time, and that such interest only was homesteaded." He also asked to be allowed to introduce evidence in support of these statements. The court denied the motion of the defendant, and granted the motion of the plaintiff, and the defendant appeals.

We do not think the orders are appealable. The statute provides that the application of the creditor is to be "to the superior court of the county *in which the property is situated*." Civil Code, § 1245. It is not necessarily to be made to the court which rendered the judgment; therefore it is not to be a proceeding in the action. It is to be an independent proceeding; a special proceeding. At least, it must be so where the homestead is situated in a different county from that in which the judgment was rendered; and we do not think that the meaning of the statute is that such applications are to be held to be of different natures according to the place in which they may happen to be made. Taking it to be an independent proceeding, the orders complained of cannot be held to be "special orders made after final judgment;" for such orders must be *in the cause* in which the judgment was rendered.

Nor do we think that either order appealed from can be held to be a final judgment in a special proceeding. The order on *defendant's* motion was simply a refusal to remand the matter to the appraisers for a report of a certain character; or, in other words, with certain instructions. But, inasmuch as the matter was remanded with other instructions, the order on defendant's motion simply amounts to a refusal to give the appraisers certain instructions. This certainly is not a final judgment.

The order on *plaintiff's* motion was that the matter be remanded to the appraisers for the purpose of making a division of the property. This order does not seem to be final in its nature. Something remained to be done before the matter could be ended. The natural course would be for the appraisers to make the division, and report their action to the court, and for the court thereupon (if satisfied with the result) to confirm the report. The order of confirmation would be the final judgment in the proceeding. The only difficulty about this view is that there is no express provision of statute requiring that the report be confirmed, or that there be any report upon the second reference. The statute provides that if the first report shows an excess of value, and that the property can be divided without material injury, the matter must again be referred to the appraisers for the purpose of making the division, (Civil Code, § 1253,) but is silent in regard to further proceedings. But we think it must be assumed that the intention was that the action of the appraisers is to be subject to the control of the court, and evidenced by some

matter of record. And, if the Civil Code is to be considered as containing no implication upon the subject, we think it is a proper case for the court to supply the necessary machinery under section 187, Code Civil Proc., and that the proper course is for the appraisers to report their action as to the division, and for such report, after reasonable notice, to be confirmed, if satisfactory to the court, and, if not satisfactory, a third reference to be ordered, and so on until a report is obtained which is confirmed, in which case the order of confirmation is to be considered as the final judgment in the proceeding.

We therefore advise that the attempted appeals be dismissed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the attempted appeals are dismissed.

75 Cal. 159

QUINN v. DRESBACH *et al.* (No. 11,684.)

(*Supreme Court of California.* February 20, 1888.)

1. NEGOTIABLE INSTRUMENTS—PAYMENT—TO AGENT—AUTHORITY OF AGENT.

A party who in good faith makes payments upon a promissory note to one whom he has reason to believe is the authorized agent of the holder thereof, and whose acts in receiving such payments have come to the knowledge of the holder, and have not been repudiated by him, cannot be held for the money so paid to the agent.¹

2. SAME.

The fact that the note was not in the possession of the agent at the time a payment to the agent was made thereon, but in the hands of a third person, to whom the payer had made direct payments, is not conclusive as to the agent's want of authority to receive such payment, but only a circumstance to be considered.

3. SAME—TRANSFER OF NOTE AFTER MATURITY WITHOUT NOTICE TO MAKER.

A holder of a note who transfers it after maturity, without notice to the maker thereof, cannot hold such maker for payments to his authorized agent, made subsequent to the transfer.

Commissioners' decision. In bank. Appeal from superior court, Yolo county; C. H. GAROUTTE, Judge.

Action by Isaac Quinn against William Dresbach, John P. Medan, Carl Haneke, and Jason Watkins to restrain the sale of certain land under a deed of trust given to secure the payment of a promissory note.

Add. Hinkson and J. C. Ball, for appellant. *A. Morgenthal*, for respondents.

HAYNE, C. Action to enjoin a sale by defendants under a deed of trust given to secure the payment of a promissory note. The plaintiff paid the amount of the note to one Treadwell, who appropriated the money to his own use, and the question is whether Treadwell was the agent of the payee.

Treadwell was not the actual agent of the payee in the matter. It is true that the plaintiff testifies that he was instructed by the payee to pay to Treadwell. But the payee denies this, and, in view of the rule in cases of a substantial conflict in the evidence, it must be assumed that there was no actual agency. Then, was there an ostensible agency? The facts as shown by uncontradicted evidence are as follows: The land which is the subject of the deed of trust was sold by the defendant Haneke to the plaintiff. The plaintiff gave his promissory note for \$800, and assumed the payment of an outstanding indebtedness secured upon the property. Neither of these obligations having been met, the defendant Haneke placed the matter in the hands of Tread-

¹A *bona fide* purchaser of a negotiable instrument, after maturity, from one whose title is not perfect, but who has been clothed by the real owner with the usual *indicia* of title, will be protected as against the owner, although the instrument was obtained from the latter by fraud. *Moore v. Moore*, (Ind.) 13 N. E. Rep. 673. See note to *Id.*

well, who was an attorney at law, residing in Yolo county, where the property is situated, and where the plaintiff resided. The result of Treadwell's operations was the advance by Haneke of money to pay off the outstanding indebtedness, and the taking of a new note from plaintiff covering the amount of the former note and the amount advanced by Haneke. So far, there is no kind of doubt but that Treadwell was the agent of Haneke for the collection of the principal and interest of the first note. This agency, however, terminated with the giving of the second note. This note was, by its terms, payable at the Bank of California in San Francisco, and the note was given to the bank for collection. The plaintiff seems to have known of this fact. He fell into the habit, however, of paying his interest to Treadwell, who assumed still to be the agent of Haneke. At least six payments of interest were made in this way. Treadwell sent the money to the bank, and the receipts therefor were forwarded to him, and by him delivered to the plaintiff. On some occasions, however, the plaintiff sent the interest to the bank through one R. W. Pendergast, who had no connection with Treadwell. Not only was interest paid to Treadwell, as above stated, but on one occasion a part payment of the principal was made to him. This payment was sent by Treadwell to the bank with the following letter:

"WOODLAND, December 24, 1881.

"*Thomas Brown, Esq., Cashier Bank of California:* Herewith I send you check for \$437.50 on the part of Isaac Quinn, being \$400 principal and \$37.50 interest on note favor of Carl Haneke. I also send receipt of tax of Carl Haneke on mortgage given to secure said note, amounting to \$36, which was *paid* by Mr. Quinn. This makes up the amount of \$73.50 interest due December 27th. Please acknowledge receipt.

"Yours,

W. B. TREADWELL."

This payment of the principal was properly credited on the note. There can be no doubt but that the plaintiff believed in good faith that Treadwell remained the agent of Haneke for the collection of the principal and interest after the giving of the second note; and this belief was justified by the conduct of Haneke. Plaintiff had made one payment of principal to Treadwell, and this payment had not been repudiated by Haneke, but was credited upon the note. Ostensible authority may be conferred by the recognition of a single act of the agent, if sufficiently unequivocal. *Wilcox v. Railroad Co.*, 24 Minn. 270. It was negligence in Haneke to have allowed the plaintiff to act under the belief that Treadwell was authorized to receive the money. Haneke was chargeable with knowledge that Treadwell continued to act in *some* way in the matter. He was chargeable with this knowledge, because the bank knew it, and the bank was his agent for the collection of the debt. See *Bierce v. Hotel Co.*, 31 Cal. 166. Now, if Haneke knew that Treadwell was continuing to act in the matter *at all*, the only inference which he was entitled to draw, and the one which he ought to have drawn, was that he was continuing to act as he had commenced, viz., as his (Haneke's) agent. It was not a natural inference that Treadwell had changed his position in the matter, and was acting for the other side. The presumption was that he was assuming to act for Haneke; and we think that this was what nine out of ten business men would have thought. This being the case, Haneke ought to have repudiated the assumed agency, and not have suffered the matter to stand as it did. The Civil Code provides that "ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." Civil Code, § 2319. And this is the embodiment of a well-established principle of the common law, which has been called "the foundation of the law of agency." 1 Pars. Cont. *44; *Kasson v. Nollner*, 43 Wis. 650.

Nor does the fact that the note was not in the possession of Treadwell change the result. The want of possession of the note is a circumstance to be considered in determining the question of authority, but is not conclusive. The fact

that the bank held the note for collection would not prevent the owner from collecting it himself. *Flanagan v. Brown*, 70 Cal. 254, 11 Pac. Rep. 706.

The circumstance that Haneke had assigned the note to his daughter, and that it was owned by her at the time of the final payment to Treadwell, is not material, because the transfer was after the maturity of the note, and no notice was given to the plaintiff. *Bank v. Jones*, 65 Cal. 437, 4 Pac. Rep. 418; and compare *Preston v. Grayson Co.*, 30 Grat. 497; *Gibson v. Pew*, 3 J. J. Marsh. 222.

This view of the case renders it unnecessary to consider the interesting question as to the power of the court below to change its findings.

We therefore advise that the judgment and order denying a new trial be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying a new trial are reversed, and cause remanded for a new trial.

MCKINSTRY, J., expressing no opinion.

75 Cal. 154

MEEKER v. DALTON. (No. 11,066.)

(*Supreme Court of California*. February 20, 1888.)

1. EJECTMENT—DEFENSES—EQUITABLE TITLE.

Plaintiff in ejectment had been agent for the owner of the land in controversy, and, as such, had sold the same and other lands to defendant's grantor, received payment therefor, and delivered the deed, which, however, accidentally omitted one of the lots paid for. Defendant, without notice of such omission, bought, took possession of, and improved said lot. Plaintiff discovered such omission, took to himself a deed from said original owner, and brought ejectment. *Held*, that defendant's equitable title, coupled with his actual possession, was a complete defense to the action.

2. SAME—PLEADING—ANSWER—CHARACTER OF PLEADING.

An answer in ejectment denying generally all material allegations of the complaint, and after using the words "further answering, by way of cross-complaint," setting up matters constituting an equitable defense, is good on general demurrer; the character of the pleading being determined by the court, by the facts alleged, and not by what it might be called by the pleader.

Commissioners' decision. In bank. Appeal from superior court, San Joaquin county; BUCKLEY, Judge.

J. C. Byers and *L. W. Elliott*, for appellant. *Stanton L. Carter*, for respondent.

BELCHER, C. C. The action is ejectment to recover possession of a lot of land in the town of Lodi. The complaint is in the form usual in such actions. The answer denies all the allegations of the complaint, and alleges that defendant is the owner of the land sued for, and entitled to the possession thereof, and has been such owner, and so entitled to possession, since the 1st day of December, 1881; and then, "further answering said complaint, and by way of cross-complaint," alleges certain facts which show an equitable defense. The plaintiff demurred to all that part of the "answer called a 'cross-complaint,' upon the ground that the same does not state facts sufficient to constitute a defense to said action;" and his demurrer was overruled. The case was tried before a jury upon special issues, and answers were returned to all the questions submitted. The court adopted the findings of the jury, and made certain other findings, and, among others, that, while the plaintiff had the legal title to the property sued for, he was not entitled to recover the possession thereof, but defendant was entitled to maintain his possession.

Judgment was thereupon entered that defendant recover from plaintiff his costs of suit; and from that judgment the plaintiff appealed, the case coming here on the judgment roll.

It is objected for appellant that that part of defendant's pleading which follows the words "by way of cross-complaint" must be treated as only a cross-complaint, seeking affirmative relief, and cannot be used as an answer; that, as a cross-complaint, or as a defense, it is insufficient, because it contains no allegation that defendant did not buy the land for less than its true value on account of the situation, or that he paid anything for it, or that he was imposed upon as to what he was buying; that the part of the pleading which precedes the words quoted is insufficient, because it contains no averments showing an equitable defense; and, in short, that each part of the pleading must be treated as separate and distinct from the other, and must stand or fall on its own merits. It is also further objected that the findings are contradictory and inconsistent.

We do not think these objections can be maintained. The so-called cross-complaint is preceded by the words, "further answering said complaint." The plaintiff demurred to it, on the ground that it did not state facts sufficient to constitute a *defense*; and at the trial it appears to have been treated as a part of the answer. Having been so treated there, it is too late to raise the question here. *Erkins v. Ayer*, 58 Cal. 313. We think the words "and by way of cross-complaint" may be treated as surplusage, and disregarded. "It is immaterial what the defendant called his pleading; whether he designated it an answer or cross-complaint. Its character will be determined by the court. It is the facts set up in the pleading which make it an answer or cross-complaint." *Holmes v. Richet*, 56 Cal. 311. Taken as a whole, the pleading seems to us sufficient; certainly, when tested by a general demurrer.

We have carefully examined the findings, and are unable to see wherein they are contradictory or inconsistent. The material facts as shown by the findings are as follows: Plaintiff was agent for the owner of certain lands in the town of Lodi, and was authorized to sell the same, and receive payment therefor. Acting as such agent, plaintiff on the 1st of January, 1881, sold to one George Ringer the lot in controversy, with other adjacent land, and received from him the full purchase price agreed upon for all the land sold. On the 18th day of the same month plaintiff delivered to Ringer a deed, duly executed by the owner of the land; and both plaintiff and Ringer then supposed that the lot in controversy was included in the premises conveyed thereby. Ringer entered into possession of the property so bought by him, inclosed it all with a fence, and placed valuable improvements upon the lot in question. He remained in possession until the 1st of December, 1881, when he sold to the defendant. The defendant purchased in good faith, and paid a valuable consideration for the property, believing that Ringer had the legal title to the premises so inclosed and improved by him. He entered into possession, erected improvements, and has remained in possession ever since. By some mistake, the lot in controversy was not included in the deed to Ringer, nor in that from Ringer to the defendant. Plaintiff discovered this mistake, and in the month of November, 1882, procured a deed of the lot from the former owner to himself; knowing at the time that, as agent for the former owner, he had sold the lot to Ringer, and received full value therefor. Assuming, then, as we must, that the evidence was sufficient to justify the findings, it is apparent that, when Ringer purchased and went into possession of the lot in controversy, he became the equitable owner of it; and, when he sold to the defendant, the latter succeeded to all his rights. It is also apparent that, when the plaintiff received his deed to the lot, he took only such right as his grantor had, and that was the naked legal title.

The defendant, then, having the equitable title, coupled with possession, the question is, could he set up that title as a defense to an action of eject-

ment brought against him by the holder of the legal title? In New York it has been held that, in an action of ejectment, defendant can set up as a defense that the land in question was intended to be conveyed to him by a deed from plaintiff, but, by a mistake in the description, was not included. A reformation of the deed is not necessary, but the same facts which will entitle defendant thereto will establish his equitable right to possession, and constitute a defense as effectual as the legal title. *Hoppough v. Stouble*, 60 N. Y. 430. The same rule obtains in this state. In *Arguello v. Bours*, 67 Cal. 450, 8 Pac. Rep. 49, it is said "that, under our system of practice, a defendant may plead, as a defense to 'ejectment,' that he is in possession under a contract of purchase, the conditions whereof have been fully performed on his part; in other words, that he is in possession under a contract which gave him the right of possession, and that he is entitled to retain the possession as against the bare, naked title of his vendor, which the vendor holds disconnected from any real interest. A perfect equity united to the possession is, under our system, equivalent for all purposes of defense to a legal title. *Morrison v. Wilson*, 13 Cal. 494, 73 Amer. Dec. 593. A vendee in possession under an executory contract, the conditions of which have been performed on his part, may avail himself of his equitable title as a defense to an action of ejectment brought against him by the holder of the legal title. *Love v. Watkins*, 40 Cal. 547. A mere equitable title to land, if of such a character as in equity entitles the holder to the possession, is a sufficient defense to an action for the possession brought by the holder of the legal title. *Willis v. Wozencraft*, 22 Cal. 607." We consider the foregoing cases decisive of the case in hand, and the judgment should therefore be affirmed.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

75 Cal. 166

HELLMAN *et al.* v. MESSMER. (No. 12,332.)

(Supreme Court of California. February 20, 1888.)

TRUSTS—RESULTING TRUSTS—PAYMENT OF PURCHASE MONEY.

Where a party, while acting as agent for another, collecting rents, paying bills, etc., buys land at the request of his principal, but takes the legal title in his own name, advancing the money himself, which the principal afterwards repays him, a trust results in favor of such principal and his representatives, under Civil Code Cal. § 853, providing that, "when a transfer of real property is made to one person, and the consideration thereof is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made," if being sufficient if the money paid by the party taking the legal title was advanced as a loan.¹

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; A. W. HUTTON, Judge.

A. Brunson and Bicknell & White, for appellant. Glossell, Smith & Patton, for respondents.

BELCHER, C. C. The plaintiffs, as executors of the last will of Andre Brisswalter, commenced this action to compel the defendant to convey to them cer-

¹ When a conveyance is made to one person, the consideration for which moves from another, a trust results in favor of the latter. *Bigley v. Jones*, (Pa.) 7 Atl. Rep. 54; *Donlin v. Bradley*, (Ill.) 10 N. E. Rep. 11; *Harris v. McIntyre*, (Ill.) 8 N. E. Rep. 182; *Springer v. Young*, (Or.) 12 Pac. Rep. 400; *Smith v. Brown*, (Tex.) 1 S. W. Rep. 573; *Bedford v. Graves*, (Ky.) *Id.* note 534; *Ward v. Matthews*, (Cal.) 14 Pac. Rep. 604; *O'Connor v. Irvine*, (Cal.) *ante*, 236; *Carter v. Challin*, (Ala.) 3 South. Rep. 313; *Reynolds v. Sumner*, (Ill.) 14 N. E. Rep. 661; *Craig v. Turley's Adm'r*, (Ky.) 6 S. W. Rep. 648. And such trust results, even though the consideration has been in fact advanced by the grantee for the other person; the grantee holding the title as security for such advances. *Barroilhet v. Anspacher*, (Cal.) 8 Pac. Rep. 804; *Walton v. Karnes*, (Cal.) 7 Pac. Rep. 676. But see, to the contrary, *In re Wood*, 5, Fed. Rep. 443; *Bear v. Koenigstein*, (Neb.) 20 N. W. Rep. 104.

tain real property in the city of Los Angeles. The complaint alleges that Briswalter in his life-time purchased the property in controversy from Pio Pico for the sum of \$1,000; that the defendant was employed by him, as his agent, to negotiate the purchase, and as such agent did negotiate the purchase for and on account of his principal; that the property was conveyed by Pico to defendant, who agreed to take and hold the same in his own name for the use and benefit of Briswalter; and that the purchase money was paid by Briswalter. The answer denies that Briswalter purchased the property and alleges that "said Briswalter desired to purchase the property mentioned in the complaint, but the personal relations between Pio Pico and said Briswalter were such that said Briswalter did not believe he could accomplish such purchase without the intervention of some third party. This defendant, knowing that said Briswalter desired to purchase said property, and being himself friendly with said Pico, said Pico came to defendant and stated to him that he would not sell said property to said Briswalter, but would sell it to this defendant. This defendant thereupon bought said property in his own name and paid for it with his own money, but afterwards said consideration was paid to him from and out of the funds of said Briswalter, it being then and there the intention of said Briswalter and of this defendant, that this defendant should, if said Briswalter desired, convey to him (said Briswalter) said property so purchased from said Pico." The answer then further alleges that before his death Briswalter made a gift of the property to the defendant, "whereupon this defendant accepted such gift, and has since retained the title of the same, and is now the owner thereof, free from any charge or trust in favor of said Briswalter, or his estate, or said plaintiffs, or either thereof." The court below found that all the allegations of the complaint were true; that the defendant "was employed by Briswalter, and undertook for him to negotiate with and purchase from the said Pico for him (the said Briswalter) the said property;" and that the defendant, "as the agent and friend of said Briswalter, and not otherwise, bought said property and paid the said Pico for it out of his (the defendant's) own money; but the money so paid was at all times considered and intended by him as a loan of said money to the said Briswalter, and thereafter, to-wit, on April 13, 1885, the full consideration and all of said moneys were repaid to him out of the funds of said Briswalter." The court further found that "it was never the intention of said Briswalter to give said property to the defendant, nor did he ever relinquish to the defendant any right or title to any part thereof; nor did the defendant ever accept any gift thereof." Judgment was rendered in favor of the plaintiffs, from which, and from an order denying his motion for a new trial, the defendant has appealed.

"Appellant's theory," as stated in the brief filed in his behalf, "is and has been that there is no trust relation existing between him and Briswalter's representatives, and that, while there *may* be a cause of action against him for the \$1,000 delivered to him by Briswalter, he cannot be compelled to deed to the executors the land which he bought from Pico." And it is said: "If there is any trust shown by the evidence, it must arise from the mere fact that Messmer made a bargain with Pico, after a previous verbal understanding, to which Pico was not a party, that the property conveyed should be held in trust for the deceased. It is not pretended that any money was paid by Briswalter to Pico for the land, or that Pico knew anything about Briswalter's connection with the purchase. It is conceded that the consideration paid was Messmer's money, and while it is true that the latter had promised that he would negotiate the trade and deliver its fruits to Briswalter, yet this was merely a promise to convey lands, and was void under subdivision 5, § 1624, Civil Code." Whether this theory can be maintained or not, is the question for decision. The rule is well settled that when real property is purchased, and one party pays the purchase money and another takes the title, a result-

ing trust arises in favor of the former, and the latter holds title as his trustee. But the trust must result, if at all, at the time the deed is taken. No oral agreements and no payments made after the title is taken will create a resulting trust. The party claiming the benefit of the trust must show that the money was paid before or at the time of the execution of the conveyance. *Case v. Coddington*, 38 Cal. 191; *Botsford v. Burr*, 2 Johns. Ch. 404; *Pinnock v. Clough*, 16 Vt. 500. It is not, however, necessary that the money should have been actually paid by the party setting up the trust. It may have been paid by the party who took the title, but advanced as a loan to the other party, and, if so, a trust results. *Hidden v. Jordan*, 21 Cal. 92; *Millard v. Hathaway*, 27 Cal. 140, 142; *Sandfoss v. Jones*, 35 Cal. 481; *Boyd v. McLean*, 1 Johns. Ch. 582; *Page v. Page*, 8 N. H. 187. Perry, in his work on Trusts, (section 133,) states the rule as follows: "If one should advance the purchase money and take the title to himself, but should do this wholly upon the account and credit of the other, he would hold the estate upon a resulting trust for the other." And our Civil Code (section 853) declares the same rule in the following words: "When a transfer of real property is made to one person, and the consideration thereof is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made."

Was, then, the purchase money for the land in controversy advanced by Messmer "wholly upon the account and credit of" Briswalter? The court below found that it was, and we think the finding sustained by the evidence. It is clear from the evidence that Messmer was the friend and agent of Briswalter, and had been so for a considerable time. He collected Briswalter's rents and paid his bills. He made the purchase for and at the request of Briswalter. He drew his own check for the purchase money, but collected the money back from Briswalter. To collect the money he had his son draw a check in Briswalter's name, and as soon as he received the money on the check he reported the fact to Briswalter, who said, "All right." Shortly after he received the deed he offered to re deed to Briswalter, but the latter asked him to hold the papers for a while. After Briswalter's death he admitted before several of the witnesses that he bought and held the property for Briswalter. In his testimony, speaking of his son's drawing the check for the repayment to him of the money, he said: "My son drew checks in Andres' name when he wanted money. My son drew checks for Andres to pay taxes for him. He never drew a check in Andres' name for my benefit before. He drew this because Andres owed it to me." But how did Briswalter owe him the money, if it had not been advanced by him as a loan? These facts seem to us to bring the case within the rule above stated. No point is now made in regard to the alleged gift.

The complaint was sufficient, the demurrer was properly overruled, and the judgment and order should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

2 Cal. Unrep. 842

SCOTT *et al.* v. SOWDEN, Justice of the Peace. (No. 12,123.)

(*Supreme Court of California.* February 21, 1888.)

APPEAL—NO APPEARANCE OR BRIEF BY APPELLANT—AFFIRMANCE.

Where there is no appearance by appellant, and there are no points or authorities filed in his behalf, the judgment appealed from will be affirmed.

Commissioners' decision. Department 1. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

The petition of William Scott and Raphael Solari against William P. Sowden, justice of the peace, for a writ of mandate to compel the suspension of certain proceedings in respondent's court, and compel him to certify the same to the superior court, was denied, and plaintiffs appealed.

Cross & Simonds, for appellants. *A. D. Mason* and *William P. Sowden*, for respondent.

FOOTE, C. There being no appearance on the part of the appellant, and no points or authorities filed on his behalf, the judgment and order appealed from should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

75 Cal. 174

PETERSON v. WEISSBEIN *et al.* (No. 12,218.)

(*Supreme Court of California*. February 21, 1888.)

1. JUDGMENT—ON DEMURRER—RES ADJUDICATA—PRIVIES IN ESTATE MAY SET UP.

G. bought real property at an execution sale upon a justice's judgment against plaintiff. Thereafter plaintiff brought an action against G. and others to have such judgment and sale set aside, on the ground that the complaint was filed on a legal holiday, and judgment was rendered against plaintiff on a general demurrer to his complaint. In this action to recover possession of the same premises, defendants claim under G., and set up the judgment in the former action. *Held*, that such judgment was available to defendants, and was properly admitted in evidence.

2. EXECUTION—CONSTABLE'S DEED—WHEN ADMISSIBLE IN EVIDENCE.

In an action to recover possession of real property claimed by defendant under an execution sale, it is error to admit in evidence the constable's deed without proof of the judgment and execution under which the constable acted.

Commissioners' decision. Department 1. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

Action by A. G. Peterson against Joseph Weissbein and Jacob Weissbein to recover possession of real property. Plaintiff appeals from a judgment in favor of defendants, and from an order denying a new trial.

Cross & Simonds and *Gaylord & Searls*, for appellant. *A. Burrows*, for respondent.

BELCHER, C. C. This action was brought to recover possession of 240 acres of land situate in Nevada county. The complaint alleged the plaintiff's ownership of the demanded premises, and his ouster therefrom by the defendants in September, 1885. The answer denied the plaintiff's ownership, admitted the defendants' possession, and then set up a further defense as follows: "Defendants allege that ever since the 26th day of December, 1883, they have been the owners of the said premises, and entitled to the possession thereof; that up to November, 1882, plaintiff was the owner, and entitled to the possession, of said premises; that on said date said premises were duly attached in a suit against this plaintiff from the justice's court of Grass Valley township; that thereafter, in said suit, judgment was duly given and made against plaintiff herein, (Peterson,) and by virtue thereof execution duly issued to the constable of said township, and the said premises were duly sold thereunder to one Goldberg, who on November 26, 1883, duly received the constable's deed therefor, and thereupon transferred said premises to these defendants; that in February, 1883, said Peterson began suit in this court to set aside said justice's court judgment, and said constable's sale, because the complaint was filed on a holiday, etc.; that plaintiff therein had judgment, from which judgment defendants therein appealed to the supreme court, who reversed the

same, in the case entitled *Peterson v. Weissbein*, 2 Pac. Rep. 730, and thereafter said superior court duly gave and rendered judgment in favor of defendants therein, affirming the validity of said justice's court judgment, and the said execution sale thereunder; * * * and that said judgments were duly given and made, and estop the plaintiff from again contesting the validity thereof, and defendants hereby plead them as estoppel." At the trial the plaintiff introduced evidence showing that he acquired the title to a portion of the demanded premises in 1874, and to the balance thereof in 1875, and rested. Thereupon the defendants, to maintain the issues on their part, offered in evidence the judgment roll in the case referred to in their answer, and promised to show that it related to the premises in dispute, and that defendants had succeeded to the interests of Goldberg therein. The plaintiff objected to the judgment roll being received in evidence, on the ground that it was irrelevant and immaterial, and not pertinent to any issue involved in the case; that the parties to that action were not the same as in this case, and it was therefore not admissible by way of estoppel. The court overruled the objection, and the plaintiff reserved an exception. The defendants then offered in evidence a constable's deed, in proper form and duly executed, dated November 26, 1883, conveying the demanded premises to William Goldberg, and a deed from Goldberg, dated February 1, 1884, conveying the same premises to defendants. The plaintiff objected to the constable's deed, on the ground that the judgment and proceedings in the justice's court of Grass Valley township, upon which the deed purported to be based, had not been introduced in evidence; and further objected to both deeds, on the ground that they were incompetent, irrelevant, and immaterial. The court overruled the objections, and the plaintiff reserved exceptions. In rebuttal, the plaintiff proved that September 9, 1882, had been appointed and proclaimed by the governor of the state as a legal holiday. The court found that the plaintiff was not the owner, or entitled to the possession, of the premises in dispute, and further found to be true all the facts set up in that part of defendants' answer hereinbefore quoted. Judgment was entered in favor of the defendants; and from that, and an order denying him a new trial, the plaintiff appealed.

1. It is insisted for the appellant that the judgment roll was not admissible in evidence, but we see no prejudicial error in the ruling complained of. The action was brought to obtain a decree declaring the judgment in the justice's court case, and the constable's sale thereunder, null and void, because the complaint was filed with the justice on a legal holiday. Goldberg was the purchaser at the sale, and was a party to the action. The plaintiff obtained a judgment at first, but that judgment was reversed by this court, and the case remanded. *Peterson v. Weissbein*, 65 Cal. 42, 2 Pac. Rep. 730. An amended complaint was then filed, to which a general demurrer was interposed and sustained, and, the plaintiff declining to further amend, final judgment was entered in favor of defendants. In due time Goldberg obtained a constable's deed, and thereafter conveyed the property to the defendants here. It is true the judgment was entered on demurrer, but "a judgment on demurrer to the plaintiff's complaint is conclusive of everything necessarily determined by such judgment." *Freem. Judgm.* § 267. The point was involved, and necessarily determined, that the justice's court judgment was not void for the reason assigned. And, as *res adjudicata*, a judgment is conclusive between the parties thereto, and their successors in interest. Section 1908, Code Civil Proc.; *McCreery v. Fuller*, 63 Cal. 30. The defendants were the successors in interest of Goldberg, and had therefore the same right to avail themselves of the judgment roll that he would have had if he had not conveyed the property, and had been made the defendant.

2. It is also insisted that the constable's deed was not admissible in evidence without proof of the judgment and execution which authorized the sale, and in pursuance of which it was made. The rule undoubtedly is that, when

one seeks to obtain or hold possession of real property under a sheriff's deed, he must prove the judgment and execution under which the sheriff acted in making the sale. *Freem. Ex'ns*, § 350. The title of the purchaser, in such a case, rests upon the judgment, execution, sale, and deed. The law upon this subject is stated in *Hihn v. Peck*, 30 Cal. 288, as follows: "The judgment and execution go to the sheriff's power to sell, and to his power to recite a sale, and to his power to give a deed also; and therefore the recitals are not admissible to prove the sheriff's authority to sell, or his authority to recite a sale. The power to sell, to recite, and to deed, having its origin in the judgment and execution, must be proved by a production of both, under the rule of best evidence; but, when the power has been so proved, the sheriff becomes, so to speak, the accredited historian of his acts under it." See, also, *People v. Doe*, 31 Cal. 220; *Blood v. Light*, 38 Cal. 649. Under the law as announced in the foregoing cases, we think it was necessary for the defendants to produce and introduce in evidence the judgment of the justice's court, and the execution issued thereon, and that the court erred in admitting the constable's deed in evidence without such proof.

The judgment and order should be reversed, and the cause remanded for a new trial.

I concur: FOOTE, C.

I concur in the conclusion: HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

75 Cal. 172

MODOC CO. v. CHURCHILL. (No. 12,137.)
(*Supreme Court of California*. February 21, 1888.)

1. TAXATION—COLLECTION BY SUIT—EVIDENCE—ASSESSMENT ROLL.

In an action brought by a county to recover the taxes assessed against a property owner, the assessment roll is *prima facie* evidence of the plaintiff's right to recover.

2. SAME—DEFENSES—FAILURE OF EQUALIZATION BOARD TO MEET AT APPOINTED TIME.

Where a property owner fails to return under oath, to the assessor, a statement of his property as required by Pol. Code Cal. § 3633, and the assessor makes a valuation thereof, such person cannot plead, in an action to collect the tax, that the assessment and levy were illegal for the reason that the board of county supervisors did not meet on the proper day to equalize the assessment, as in any event he could not have the assessor's valuation reduced by the board.

Department 1. Appeal from superior court, Modoc county; G. F. HARRIS, Judge.

This was an action brought by Modoc county against Jerome Churchill, to recover taxes due. Judgment having been rendered for the plaintiff, defendant moved for a new trial, which being refused, he appeals.

E. M. Barnes, for appellant. *Geo. A. Johnson*, Atty. Gen., and *J. H. Stewart*, for respondent.

MCKINSTRY, J. The examination of this case has been rendered more difficult by the form of the findings, but the court did find the real estate assessed, its valuation by the assessor, and that it was assessed in tracts not to exceed 640 acres in each. Finding 9. The defendant did not except to the sufficiency of that finding. And the court also found that all the personal property returned in the list furnished by the defendant, and none other, was duly assessed at the sum of \$20,226. Finding 7. This is, in effect, a finding that the assessor made up his assessment of personal property by taking the list furnished by the defendant and affixing values to the same. The

defendant did not except to the sufficiency of the evidence to sustain finding 7.

The evidence sustained the first finding. It is contended the only evidence to sustain the finding of an assessment was "the assessment list, wherein no values to the real estate were set out, and the assessment roll, wherein the form was as is prescribed by law for assessment rolls." But the assessment roll, in the form prescribed by law, is *prima facie* evidence of the plaintiff's right to recover. St. 1880, p. 136.

The court below found "that the county board of equalization duly met and convened on the 21st day of July, 1884, pursuant to and in accordance with an order of the state board of equalization, which was duly made, extending the time for the completion and the delivery to the clerk of the board of supervisors of said county by said assessor of the assessment book of said county, to examine the assessment book and equalize the assessment of property in the county, and that the defendant did not appear before said county board, nor at all." The appellant contends that finding 3 was not sustained by the evidence; that the county board of equalization is required to meet on the first Monday of July, (Pol. Code, § 3672,) which was prior to July 21, 1884; and even if they can meet subsequently, it is only by virtue of section 3707, Pol. Code; and that it appears from the bill of exceptions that no order of the state board of equalization was certified to the county auditor, providing that the time of meeting of the county board be postponed; that, by reason of the fact that the county board did not meet on the first Monday of July, the defendant was deprived of an opportunity of applying for a reduction of his assessment. But the rights of the defendant were not affected by an irregularity, if any, in the actions of the supervisors. The defendant, after demand by the assessor, having refused to give under oath a statement of his assessable property, could not have had the valuations of the assessor reduced by the county board of equalization. Pol. Code, § 3633. Judgment and order affirmed.

We concur: PATERSON, J.; TEMPLE, J.

71 Cal. 226

WILSON *et al.* v. STURGIS. (No. 9,878.)

(Supreme Court of California. October 28, 1886.)

PRINCIPAL AND AGENT—REAL-ESTATE AGENTS—COMMISSIONS.

Defendant placed his ranch in plaintiffs' hands to sell on commission within a specified time. They found a purchaser, who paid defendant part of the purchase money, and tendered the balance in checks, which defendant refused. After the time specified had expired, defendant, without returning the partial payment, conveyed the ranch to his father, who conveyed it to the purchaser on payment of the balance of the agreed price; defendant saying at the time that he did not intend to pay plaintiffs any commission. *Held*, that plaintiffs were entitled to their commission; the sale being made to their purchaser, and defendant never having repudiated the original contract of sale by returning the money paid upon it.

Commissioners' decision. Department 2. Appeal from superior court, Contra Costa county.

Action by John M. Wilson and others against T. W. Sturgis to recover commissions for the sale of real estate. Plaintiffs obtained judgment, and defendant appeals.

Mills & Jones, for appellant. *Eli R. Chase* and *W. S. Tinning*, for respondents.

SEARLS, C. This is an action to recover the sum of \$846, as commissions, alleged to be due plaintiffs, copartners, as real-estate brokers, upon the sale of defendant's ranch, situate in Contra Costa county. Plaintiffs had judgment as prayed for in their complaint. From the judgment, and from an order denying a new trial, the defendant appeals. On the 10th day of May,

1883, defendant entered into a written contract with the plaintiffs, by the terms of which he authorized the latter to "sell and take deposits" upon his ranch, situate in Contra Costa county, consisting of 268 acres, for the sum of \$40 per acre; terms cash, (or \$11,440;) the authorization to be in full force until September 1, 1883. In case plaintiffs were instrumental in effecting a sale of the property, or finding a customer for the same, defendant agreed to pay $2\frac{1}{2}$ per cent. commission, and all over they might realize. On or about May 21, 1883, plaintiffs found a purchaser for the property in one P. F. Cox, to whom they agreed to sell for \$12,000; payment to be made and deed delivered on or before September 1, 1883. Cox paid plaintiffs 10 per cent. of the purchase price, (\$1,200,) which they paid over to defendant. There was an understanding between the parties that the payment should be made and the deed delivered on the 1st day of September at the Bank of Martinez. On the last-mentioned day the parties met at the bank, and Cox offered checks in payment of the sum due, which defendant declined to receive. Defendant then deposited a deed of the property in escrow with the officers of the bank, to be delivered to Cox upon payment of the money due (\$10,800) at any time prior to September 5, 1883. On the 5th day of September, Cox called at the bank, deposited the \$10,800 to the credit of defendant, and demanded the deed, which was refused, upon the ground that the time for payment had expired. Defendant caused the sum of \$10,800 to be transferred in the bank to the credit of Cox; but did not return, or offer to return, the \$1,200 paid to him. A few days later, and before the 10th day of September, defendant conveyed the property to his father, Josiah Sturgis, and the latter conveyed to Cox, receiving payment of the residue of \$10,800 due on the original contract. There was testimony tending to show that defendant professed to have been misled by the clause of his contract with plaintiffs under which they claimed as compensation, in addition to the $2\frac{1}{2}$ per cent., the amount for which the land sold over \$11,440, viz., \$560; and, as defendant declared "he did not calculate to pay any commissions to plaintiffs," we may properly conclude the plan adopted by him in conveying the property to Cox, through his father, was an instrumentality to that end. The testimony of Cox is as follows: "The deed I have of the ranch is from Josiah Sturgis, father of defendant. He gave it to me himself. Nothing in particular said by him. At the time I came down he handed me the deed, and said he had the place. I paid him twelve thousand dollars less the twelve hundred dollars I had paid defendant, and received the deed. * * * I have stated all the bargain with Josiah Sturgis. I had no understanding with him about it, except that I was paying the balance of my money, and getting a good title for the place. I don't recollect that defendant said anything about why he had conveyed to his father, except saying that he did not calculate to pay any commissions to plaintiffs."

1. Defendant, in order to the exercise of his right to rescind the contract for non-payment of the purchase money on the 4th day of September, should have returned, or offered to return, the \$1,200 which he had received on account of such contract. Civil Code, § 1691; *Bohall v. Diller*, 41 Cal. 535; *Henderson v. Hicks*, 58 Cal. 364; *Miller v. Steen*, 30 Cal. 402; *Morrison v. Lods*, 39 Cal. 381.

2. A real-estate broker is not entitled to commissions for making a sale of real estate for his principal unless he strictly performs the services required of him, according to the authority conferred upon him. *Neilson v. Lee*, 60 Cal. 565. In the case at bar, the plaintiffs, as brokers, produced a purchaser, to whom the defendant in fact sold, although not in the precise manner, and not upon the precise day, agreed upon. The defendant having thus had the benefit of the services of the plaintiffs, pursuant to their agreement therefor, cannot evade his liability under the agreement. *Phelan v. Gardner*, 43 Cal. 306, *Blood v. Shannon*, 29 Cal. 393. The case of *Fultz v. Wimer*, 9 Pac.

Rep. 316, relied upon by counsel for appellant, differs materially in its facts from this case. There, the purchaser produced by the broker did not purchase within the time limited in the agreement between the latter and the owner. He did subsequently purchase the property, not for cash, but payable in installments at considerable intervals. The court held that, the owner not having caused the delay in the sale, and not having been guilty of any negligence, fraud, or fault, no recovery could be had against him.

3. We think there was sufficient evidence to fully warrant the findings of the court below, and that the interpretation placed upon the contract under which plaintiffs recovered the sum for which the property sold in excess of \$11,440, was the only one by which force and effect could be given to all the provisions contained in such contract.

Upon the whole record as presented, we are of opinion the judgment and order appealed from should be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

75 Cal. 189

In re TRAYLOR'S ESTATE. (No. 12,173.)

(*Supreme Court of California.* February 25, 1888.)

WILL—BEQUEST—"ORNAMENTS"—JEWELRY.

A will contained the following provisions: "To my niece Louise E. Matthews * * I give * * * my finger-rings, * * * and so many of my books, pictures, and ornaments (not otherwise bequeathed specifically) as she shall choose to take." Held, that the word "ornaments," as used in the will, was intended to include articles of jewelry, such as breastpins, bracelets, ear-rings, brooches, lockets, chains, etc., and also many articles not classified under the head of jewelry.

In bank. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

D. Wm. Douthitt, for appellant. Olney, Chickering & Thomas, for respondent.

McFARLAND, J. The deceased, Mrs. Elizabeth D. Traylor, left an estate worth about \$155,000. Her will contains (among other bequests) the following: "To my niece, Louise E. Matthews, of this city, I give \$10,000, my piano, sewing-machine, finger-rings, (save the diamond ring I habitually wear,) and so many of my books, pictures, and ornaments (not otherwise bequeathed specifically) as she shall choose to take." The said Louise appears to be as near a relative as any other person named in the will. The court below entered a decree of partial distribution, in which there was distributed to said Louise E. Matthews (now Louise M. Overacker) certain personal property set forth in Exhibit A, which forms part of the record. From this decree, and from an order denying a new trial, Elizabeth H. Siddall, admitted to be the heir at law, appeals, upon the ground that the personal property so distributed was not intended by the testatrix to be bequeathed to said Louise. And the question to be determined is whether or not the court below erred in holding that the things distributed were "ornaments" within the meaning of that word as used in the will. Exhibit A contains a number of articles not classified under the head of "jewelry;" and we think that the court was right in holding them to be ornaments. About the character of a few of them, of small value, there may be some room for doubt; but we think the ruling of the court below concerning them was not erroneous. Exhibit A, however, contains a list of articles scheduled under the head of "jewelry," and about these the main question arises. They consist of breastpins, bracelets, ear-rings, lace-pins, sleeve-buttons, glove-buttons, brooches, lockets, chains,

etc., made of various jewels and gold,—such as women usually wear for personal decoration. We have no doubt that the word “ornaments,” in its general signification, and freed from any modification that might come from association in particular instances with other language, includes “jewelry” worn by women for the purpose of adding grace or beauty to their persons, or for the purpose of complying with the usages of society. Such is its meaning both in classic English and in common language. In Webster’s Dictionary an illustration is given from Sir Thomas Browne, as follows: “Some think it it most *ornamental* to wear their bracelets on their wrists; others about their ankles.” And the Jenkins of the present day in his descriptions of the costumes of ladies at evening parties writes, “*ornaments*, diamonds.” But it is contended that as the word “ornament,” as used in the will, immediately follows the words “books” and “pictures,” it must, therefore, be restricted to things resembling (that is *ejusdem generis* with) books and pictures. There is certainly force in this suggestion; but the words, “not otherwise specifically bequeathed,” which immediately follow “ornaments,” must also be considered. And when we look at the few things which have been otherwise specifically bequeathed, we find that nearly every one of them that could, in any sense, be called an ornament, is an article of jewelry. The words, “as she shall choose to take,” also indicate that liberality of construction in favor of the legatee should be indulged in. The discovery of the real intention of the testatrix in this case is no doubt a difficult matter, but as the word “ornaments,” in its general and ordinary sense includes the property in contest, and as the other language of the will, taken all together, does not clearly indicate that the word was used in a special or limited sense, we conclude that the view taken of the question by the learned judge of the court below is more satisfactory than the opposite view taken by appellant. Judgment and order affirmed.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; PATERSON, J.; TEMPLE, J.

75 Cal. 182

MOALLISTER v. CLEMENT *et al.* (No. 9,874.)

(Supreme Court of California. February 25, 1888.)

NOTARY PUBLIC—NEGLIGENCE IN TAKING ACKNOWLEDGMENT—INJURIA SINE DAMNUM.

In an action against a notary public for misconduct and neglect in taking the acknowledgment to a mortgage, it appeared that the mortgage, if it had been properly acknowledged, would not have secured the debt, in that the crop which it purported to secure was wholly valueless. *Held* that, in such case, the mortgagee, having suffered no injury by the neglect of the notary, could not, under the Code, recover even nominal damages.

Commissioners’ decision. In bank. Appeal from superior court, San Luis Obispo county; S. M. SWINNERTON, Judge *pro tem*.

Action by A. McAllister against C. H. Clement, a notary public, and J. P. Andrews and E. W. Steele, his sureties, to recover damages for the alleged official misconduct and neglect of such notary. The court found that if there was misconduct, the plaintiff had suffered no injury thereby, and was entitled to no damages. Plaintiff appeals.

J. M. Wilcoxson and Ernest Graves, for appellant. J. R. Patton and C. H. Clement, for respondents.

BELCHER, C. C. This action was brought to recover damages for the alleged official misconduct or neglect of a notary public. The material facts of the case are as follows: In 1883, the defendant, C. H. Clement, was a notary public for San Luis Obispo county, and the other defendants were the sureties on his official bond. On the 14th day of April of that year, one W. A. Cook made to the plaintiff his promissory note for \$600, payable six months after date, with interest; and on the same day, to secure the payment of the note,

executed to plaintiff a mortgage upon a crop of wheat, barley, and oats then growing in the county of San Luis Obispo. The mortgage was properly sworn to by the mortgagor and mortgagee, and was acknowledged by the mortgagor before the defendant Clement. The certificate of acknowledgment, which was attached to the mortgage, reads as follows:

"*State of California, County of San Luis Obispo*—ss.: On this 14th day of April, 1880, before me personally appeared W. A. Cook, known to me to be the person whose name is subscribed to the within instrument, and he acknowledged to me that he executed the same. In witness whereof I have hereunto set my hand, and affixed my official seal, at my office in the county of San Luis Obispo, on the day and year in this certificate first above written. [Seal.]

"C. H. CLEMENT, Notary Public."

In this condition the mortgage was recorded on the 19th day of May, 1883. Before the note became due, Cook was adjudged to be an insolvent debtor, and his assignee in insolvency took possession of all his property, including the mortgaged crop. The plaintiff made no effort to foreclose his mortgage, or to subject the mortgaged property to the payment of his debt. The note has never been paid, and Cook is insolvent and unable to pay it. It is alleged in the complaint that the failure to state correctly in the certificate the year when the acknowledgment was taken, and to insert in the body of the certificate "the name and quality of the officer" who made it, destroyed the lien of the mortgage as against the assignee, and left the mortgaged crop free and clear of all claim thereto by the plaintiff. It is further alleged that but for these defects in the certificate the mortgage "would have been a good and valid lien upon a valuable growing crop, and would have amply secured the said promissory note." The court below found the facts to be substantially as above stated, but further found "that said mortgage would not have secured said note; that said crop was not valuable, and was and is wholly valueless;" and, as a conclusion of law, "that plaintiff has not suffered any damage or loss by reason of the act or acts of defendants, or any of them." Judgment was entered in favor of the defendants, and from that judgment the plaintiff appealed; the case coming here on the judgment roll.

We do not think it necessary to consider the question principally discussed by counsel, namely, as to the sufficiency of the certificate of acknowledgment. The Code declares that, "for the official misconduct or neglect of a notary public, he and the sureties on his official bond are liable to the parties injured thereby for all the damages sustained." Pol. Code, § 801. But it is clear that no action will lie to recover damages if no damages have been sustained. The findings are responsive to the issues, and must be presumed to have been justified by the evidence. It is urged, however, that the plaintiff was at least entitled to recover nominal damages. But why should he have nominal damages if he suffered no actual damage? The Code does not seem to justify this contention, and, at any rate, we think it is a case where in this court the maxim *de minimis non curat lex* should be applied. The judgment should be affirmed.

We concur. FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

75 Cal. 179

PEOPLE *ex rel.* ATTORNEY GENERAL *v.* BOARD SUP'RS. (No. 12,276.)

(*Supreme Court of California.* February 25, 1888.)

INJUNCTION—TO RESTRAIN PUBLICATION OF RESULT OF ELECTION—REMOVAL OF COUNTY-SEAT.

Under the "County Government Act," (Deering's Pol. Code, p. 841,) a petition was presented to the board of supervisors asking the submission of the question of

removing the county-seat to the voters of the county. The supervisors, believing that the petition was legally presented, in good faith ordered the election, which was held, the returns received, compared, and result ascertained by the board; and it only remained for them to announce the result, and give notice thereof, as required by statute. Held that, whether the order for holding the election was legal or not, the supervisors having acted in good faith, the publication of the result of such election cannot be restrained by injunction; such publication being within the inhibition of Civil Code Cal. § 3423, subd. 4, providing that no injunction shall issue to "prevent the execution of a public statute by officers of the law for the public benefit."

Commissioners' decision. Department 1. Appeal from superior court, Tehama county; CHARLES T. BRAYNARD, Judge.

A. C. Adams and Jackson Hatch, for appellants. Edward Sweeney, Clay W. Taylor, and Chipman & Garter, for appellees.

FOOTE, C. In this action an injunction is prayed for enjoining the defendants, as a board of supervisors, from declaring the result of an election, and from giving notice thereof, under section 3981, Pol. Code, held by their order upon the question of a removal of the county-seat of Shasta county. It is alleged that the election was illegally ordered by the board, when they had no jurisdiction so to do, and therefore that they should be enjoined from making known and publishing the result of such election. The court below, by its judgment, denied the writ of injunction, and dismissed the bill filed in the action. From that this appeal is taken.

We do not deem it necessary to go into the matter as to whether the board of supervisors did or did not legally order the election to be held. The question which meets us upon the threshold is, did or did not the court below have any right to grant an injunction to prevent the board of supervisors from *announcing* and publishing the *result of an election*? The statutes bearing upon the question are as follows: "Whenever there shall be presented to the board of supervisors of any county a petition signed by the qualified electors of such county, in number equal to a majority of the votes cast at the preceding general election, praying for the submission of the question of the removal of the county-seat of such county, it shall be the duty of the board of supervisors, by due proclamation, to submit the question of such removal of the county-seat at the next general election to the qualified electors of such county. The election shall be conducted and the returns canvassed in all respects as provided by law for the conducting general elections, and canvassing the returns thereof; but a proposition of removal of a county-seat shall not be submitted in the same county more than once in four years." Section 12, County Government Act, approved March 14, 1883, (Deering's Pol. Code, p. 841.) Section 3981, Pol. Code, which prescribes the duties of the board with reference to announcing the result of such an election, is as follows: "When the returns have been received and compared, and the results ascertained by the board, if two-thirds of the legal votes cast by those voting on the proposition are in favor of any particular place, the board must give notice of the result by posting notices thereof in all the election precincts in the county." In this case the board of supervisors acted on what appeared to them a legal petition as prescribed by law. They ascertained to their satisfaction that the requisite number of qualified electors had signed that petition, which they believed to have been duly and legally presented to them for their action. They took action thereon as petitioned, and ordered the election. The election was then held in due form of law, and two-thirds of the legal voters of the county voting on the proposition voted in favor of removing the county-seat. No objection was made to anything pertaining to the whole matter until after the election had been thus held. The returns have been received and compared, and the results ascertained by the board, and now the effort is made to prevent them from announcing the result, and giving notice thereof, as required by the statutes. The board of supervisors, whose

good faith is nowhere questioned, believe they legally ordered the election. It was held under all the requisite forms of law; but the appellants seek to enjoin them from announcing the result of such election, which was ordered and held in good faith, and to do this they seek, in effect, to have determined the question as to whether the old county-seat is to remain such, or another place has been duly elected to be such county-seat. In this case we do not think that an injunction would lie. Section 3423, subd. 4, Civil Code, is as follows: "An injunction cannot be granted * * * (sub. 4) to prevent the execution of a public statute by officers of the law for the public benefit." The board of supervisors are simply endeavoring to perform a duty enjoined on them by law,—to announce the result of an election which in good faith they believe to have been duly ordered and legally held; and we think it would be a most dangerous interference by the courts to prevent them from performing a legal duty, and, in effect, to determine the result of a contested election, in this action for an injunction. *Dickey v. Reed*, 78 Ill. 261. For these reasons we are of the opinion that the judgment of the court below should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

75 Cal. 185

CERF *v.* PHILLIPS *et al.* (No. 11,552.)

(*Supreme Court of California.* February 25, 1888.)

FRAUDULENT CONVEYANCES—ACTION BY ASSIGNEE TO RECOVER FROM FRAUDULENT PURCHASER—DEMAND.

Under Civil Code Cal. § 3439, a sale or transfer made with intent to delay or defraud creditors is void, and passes no title; and a demand for possession by an assignee in insolvency is not necessary to support his action of claim and delivery against such fraudulent purchaser.

Commissioners' decision. In bank. Appeal from superior court, San Louis Obispo county; D. S. GREGORY, Judge.

Joseph R. Brandon and J. M. Wilcoxon, for appellants. *McD. R. Venable and C. W. Goodchild*, for respondents.

FOOTE, C. This is an action of claim and delivery. The appeal is from a judgment in favor of the plaintiff, and from an order refusing the defendants a new trial. The defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, because, as they say, no demand was alleged to have been made for the possession of the property before suit were brought. If the facts set out in the pleading objected to were true, and for the present purpose they must be so treated, the defendants were never lawfully in possession of the property in dispute; the sale to them was absolutely void, being in contravention of section 55 of the insolvent act of 1880, and section 3439 of the Civil Code. The defendants were inhibited by law from making the purchase, the insolvent could have no right to sell, and the plaintiff in this action (the assignee in insolvency) is, as against them, the lawful owner of the property, and derives his right to it from the act participated in by the defendants and the insolvent, whereby they violated the law. The defendants did not obtain a lawful possession of the property. They purchased it from those who had no right to sell it, in view of the relative situation of the parties to the transaction, and the defendants, in taking possession of it under the attempted and void sale, converted it to their own use unlawfully. *No demand was necessary*, and the demurrer was properly overruled. *Bull v. Houghton*, 65 Cal. 422, 4 Pac. Rep. 529; *Surles v. Sweeney*, 11 Or. 21, 4 Pac. Rep. 469. Besides, the defendants

do not seem to have relied upon their demurrer, as if they were willing to yield up possession if a demand therefor had been made by the assignee in insolvency. In their answer they claim title in themselves adverse to the plaintiff, and give no countenance anywhere in the record to the belief that a demand, if made, would have been of any avail. Having contested the case upon the merits, on a claim of superior right to the property, it would seem as if a demand would have been useless, and that the case in hand comes within that class where no demand is necessary. *Lamping v. Keenan*, 9 Colo. 390, 12 Pac. Rep. 434. We cannot say that the verdict of the jury was contrary to the evidence. It was for them to determine the credibility of witnesses, the weight of testimony, and the force of all the circumstances adduced in evidence. They have done so, and we see no reason to disturb their verdict upon the special issues submitted to them. The judgment and order should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

75 Cal. 192

KAHN v. EDWARDS et al. (No. 12,256.)

(Supreme Court of California. February 29, 1888.)

LIMITATION OF ACTIONS—ACKNOWLEDGMENT—ORAL STATEMENT OF ACCOUNT.

Defendants were indebted upon open account to a partnership, the assets of which plaintiff owned at the time suit was brought. Before the statute of limitations barred that account, the parties orally agreed upon the balance due, which defendants promised to pay. Plaintiff brought his action on account stated for such balance within two years after the agreement. *Held*, that the statute of limitations of two years (Code Civil Proc. Cal. § 339 subd. 1,) was not a bar to such action.

Commissioners' decision. Department 2. Appeal from superior court, Yolo county; C. H. GAROUTTE, Judge.

Hudson Grant, for appellant. *G. P. Harding*, for respondents.

FOOTE, C. This is an action upon an account stated. Both of the defendants pleaded the statute of limitations of two years under section 339, subd. 1, Code Civil Proc. One of them, Goodin, further pleaded, in bar of the action, that he by agreement had been absolved from paying the account sued on. The trial court found that the amount of the account was correct; that no such agreement as Goodin claimed had in fact existed, but held that the cause of action as to both defendants was barred by the statute of limitations. From the judgment roll, it appears that the defendants were indebted upon an open account to a partnership, of whose effects the plaintiff was the sole owner at the time of the institution of this suit. Before the statute of limitations had barred any portion of that account, the parties met, and agreed orally upon the balance that was due from the defendants to the plaintiff. In other words, an accounting was had between the parties; and the balance which the plaintiff claimed to be due from the defendants they then and there orally admitted to be due, as he claimed, and agreed to pay. At the time when this action upon the "account stated" was instituted, two years had not elapsed since the agreement had been made to pay the ascertained balance due on the original account. Therefore the cause of action upon which this suit is based was not barred, and the plaintiff should have had judgment upon the findings. "An open account already barred by the statute of limitations cannot be relieved from the bar of such statute by an oral statement of such account. * * * Where, however, the demand is not barred at the date of the account stated, although the statement is verbal, the statute begins to run upon the new cause of action thus brought into existence from the date

of the settlement and new promise arising thereunder, and, if verbal, an action may, under subdivision 1, § 339, Code Civil Proc., be brought within two years after such settlement." *Auzerais v. Naglee*, 15 Pac. Rep. 371. The judgment, therefore, should be reversed, and the court below directed to render judgment upon the findings for the plaintiff.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the court below directed to render judgment upon the findings for the plaintiff.

75 Cal. 194

CHICAGO Q. M. CO. v. OLIVER. (No. 12,090.)

(*Supreme Court of California.* February 29, 1888.)

PUBLIC LANDS—RAILROAD GRANTS—"MINERAL LANDS" EXCEPTED FROM.

In an action to quiet title defendant claimed under a patent issued to the C. P. R. Co. in pursuance of the act of congress approved July 1, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean," and the amendatory act approved July 2, 1862. The original act excepted from the grant all "mineral lands," and the amendatory act excludes them. Defendant's patent also excluded and excepted "all mineral lands," should any such be found to exist in the tracts described therein. *Held*, that such patent is not conclusive that the land was properly included in the grant, and that, upon evidence of its being "mineral land," plaintiff is entitled to relief. SEARLS, C. J., and McFARLAND, J., dissenting.

In bank. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

This was an action brought by the Chicago Quartz Mining Company against John Oliver, to quiet title to land. Judgment for defendant, and plaintiff appeals.

Gaylord & Searls, H. V. Rearden, and Wm. Singer, Jr., for appellant. A. Burrows, for respondent.

SHARPSTEIN, J. This is an action to quiet title. The plaintiff claims under a mining patent issued August 16, 1883; defendant under a patent issued to the C. P. R. Co., dated April 18, 1870. The only question is whether the title to the premises in controversy vested in the railroad company under the act of congress entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean," etc., approved July 1, 1862, and the act amendatory thereof, approved July 2, 1862. The land is within the boundaries of one of the sections covered by that grant, and, if not reserved or excepted from it, undoubtedly vested in the railroad company. So that the question is: Was the land reserved or excepted from the grant to the railroad company? In the original act there is a proviso that all mineral lands shall be excepted from its operation, and, in the amendatory act, that the grant shall not include any mineral lands. And the Revised Statutes provide that "No act passed at the first session of the thirty-eighth congress granting lands to states or corporations to aid in the construction of roads or for other purposes, or to extend the time of grants made prior to the 30th day of January, 1865, shall be so construed as to embrace mineral lands, which in all cases are reserved exclusively to the United States, unless otherwise officially provided in the act or acts making the grant." Rev. St. U. S. § 2346. The patent under which defendant claims contains this clause: "Excluding and excepting from the transfer by these presents 'all mineral lands,' should any be found to exist in the tracts described in the foregoing." The court found "that all the land described in said complaint as the 'Chicago

Quartz Mine' is valuable gold-bearing mineral land, and has been notoriously known and frequently worked as such ever since 1861." This finding is justified by the evidence, and is not assailed by appellant. But, while conceding the fact to be as found, he contends that the title to the land, nevertheless, vested by the patent in the railroad company. As stated by appellant's counsel, his contention is that "mineral land did not pass by the grant, (to the railroad company,) and the officers of the land department had no authority to designate by the patent any land which was mineral in character. The law required them to designate only such land as was non-mineral in character, and the issuance of the patent under the law, aided by the presumption which the law attaches to the performance of all official acts, was a conclusive determination that the land designated in the patent was non-mineral, and the reservation in the patent was meaningless." The act of congress making the grant does not in express terms require any officer or officers of the government to identify and exclude from the patent mineral lands lying within the alternate sections granted to aid in the construction of the road. In the original act all mineral lands are expressly excepted from its operation, and in the amendatory act it is enacted that the grant shall not include mineral lands or any lands returned and denominated as mineral lands. "Whatever is included in the exception is excluded from the grant; and it therefore often becomes important to ascertain what is excepted in order to determine what is granted." *Railroad Co. v. U. S.*, 92 U. S. 733. It is not claimed that the officers on whom was devolved the duty of issuing patents for the lands granted could add anything to the grant, but it is claimed the patent is conclusive evidence that the grant included all the land covered by the patent. The supreme court of the United States has said: "A patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that it had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved for sale or dedicated to special purposes, or had been previously transferred to others." *Smelting Co. v. Kemp*, 104 U. S. 636. This is quoted approvingly in the opinion of the court, delivered by FIELD, J., in *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. Rep. 985. In *McLaughlin v. Powell*, 50 Cal. 64, the plaintiff in ejectment introduced a patent to the W. P. R. Co., from which he deraigned title to the demanded premises, similar to that relied on by appellant in this case, and rested. "The defendant then offered to prove that the land was mineral land, containing large quantities of cinnabar and quicksilver, and that he had held the land as a mining claim since October, 1866, under the rules and regulations and customs of miners in the district where the land was situated. The plaintiff objected to the testimony as irrelevant, and the court sustained the objection. The plaintiff recovered judgment, and the defendant appealed from the judgment and from an order denying a motion for a new trial." This court said: "The exception contained in the patent introduced by the plaintiff is part of the description, and is equivalent to an exception of all the subdivisions of land mentioned which were 'mineral' lands. In other words, the patent grants all of the tracts named in it which are not mineral lands. * * * We think the defendant should have been allowed to prove that the demanded premises were mineral lands." The judgment and order were reversed. The doctrine laid down in that case, if applied to the case now in hand, is decisive of it; and we think it in harmony with the cases decided by the supreme court of the United States. It has not been overruled in any reported case in this state, although it is claimed to have been in the unreported case of *Railroad Co. v. Leavenworth*. No opinion was filed in that case, and we are unable to determine from the record that this question was passed on in that case. Those portions of finding 3 which are alleged to be unsupported by the evidence, are, in our opinion, immaterial. It is therefore unnecessary to determine whether the evidence is sufficient to

justify them. The material facts found are supported by the evidence. Judgment and order affirmed.

We concur: TEMPLE, J.; PATERSON, J.; MCKINSTRY, J.; THORNTON, J.

We dissent: SEARLS, C. J.; MCFARLAND, J.

75 Cal. 203

ROBERTS v. DUNSMUIR *et al.* (No. 12,162.)

(*Supreme Court of California.* March 1, 1888.)

COURTS—STATE COURTS—JURISDICTION—RESIDENTS OF FOREIGN COUNTRY.

The dismissal, for want of jurisdiction, of an action brought to recover damages for injuries received while employed in defendants' coal mine in a foreign country, where it appears that personal service of the summons was had on one of the defendants, even though plaintiff and the defendant served are both subjects of a foreign country, is error.

Department 1. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

Action by Henry Roberts against R. Dunsmuir, James Dunsmuir, and A. Dunsmuir, to recover damages for injuries received while working in defendants' mine. The court dismissed the action for want of jurisdiction. Plaintiff appeals.

John I. Caldwell and *Geo. D. Buckley*, for appellant. *W. H. L. Barnes*, for respondents.

TEMPLE, J. The plaintiff is a subject of Great Britain, and brings this suit against these defendants, who are also subjects of Great Britain, to recover damages for injuries received while employed by them in their coal mines in British Columbia. At the time of bringing the suit the plaintiff and one of the defendants were actually residing in this state, and the plaintiff had declared his intention to become a citizen of the United States. But one of the defendants was served with summons. He answered denying the alleged partnership, or that he was ever owner of the mine, which he averred was wholly owned by the defendant, who resided in British Columbia.

On motion of the defendant, the court below dismissed the action, on the ground that the courts of this state have no jurisdiction. In this it is plain the court erred. *Johnson v. Dalton*, 1 Cow. 543; *Gardner v. Thomas*, 14 Johns. 134; *Smith v. Bull*, 17 Wend. 323. The action is transitory, and the defendant may be sued wherever found; otherwise, a person might in some cases escape such liability by simply going into another state. The defendants R. Dunsmuir and James Dunsmuir were not personally served, and are not residents of this state. The court had no jurisdiction as to them, if they have not voluntarily appeared in the action. It is claimed they did that by filing a petition asking to have the cause removed to the circuit court of the United States, and by procuring an extension of time to answer after such appearance. The plaintiff at the trial asked to have their default entered, and thereupon read the petition for the removal of the cause; and offered to prove that, after such petition was filed, the defendants R. and James Dunsmuir applied to the circuit court for and obtained several extensions of the time in which to plead. The court rejected this last evidence of its own motion, saying that it was immaterial, as the court had no jurisdiction of the action. In other words, the court refused to act at all upon the motion for a default, believing it had no jurisdiction of the case. The judgment is reversed, and cause remanded for a new trial, and for further proceedings.

We concur: SEARLS, C. J.; MCKINSTRY, J.

71 Cal. 236

ASHE v. BOARD SUP'RS. (No. 11,481.)

(Supreme Court of California. October 29, 1886.)

REVIEW, WRIT OF—USE OF HIGHWAY FOR RAILROAD—PARTY BENEFICIALLY INTERESTED.

The affidavit for a writ of review to an order of the board of supervisors granting the right to use a highway for the purpose of a railroad alleged that affiant, in common with others living along the highway, would be damaged by the maintenance of such railroad. *Held*, that the application was not made by "the party beneficially interested," as required by Code Civil Proc. Cal. § 1069.

In bank. Motion to quash a writ of review.

Motion to quash a writ of review issued on the petition of one W. Ashe to an order of the board of supervisors of Colusa county granting to certain persons the right to appropriate a highway for the purpose of constructing a railroad. The petitioner alleged in his affidavit that he was a citizen and taxpayer of the county lying upon such highway, and that he and all other citizens living along the line of the same would suffer damage from the maintenance of the railroad in question.

A. L. Hart, for petitioner. Stabler & Bayne, for respondents.

PER CURIAM. The motion to quash the writ of review heretofore issued in this proceeding must be granted. It does not appear that the application for the writ was made on the affidavit of *the party beneficially interested*. The Code requires that "the application must be made on affidavit by the person beneficially interested." Code Civil Proc. § 1069. It does not appear by the petition in this case that the petitioner has any other or greater right in the public highway mentioned therein than any other citizen of the state. The requirement that the application must be made by "the party beneficially interested" has been construed to mean "that, in an application made by a private party, his interest must be of a nature which is distinguishable from that of the mass of the community." *Linden v. Alameda Co.*, 45 Cal. 7. Writ quashed, and proceeding dismissed.

MYRICK, J., concurred in the judgment.

71 Cal. 230

McLAUGHLIN v. DEL RE *et al.* (No. 11,165.)

(Supreme Court of California. October 29, 1886.)

MINES AND MINING—ADVERSE POSSESSION.

In an action to recover damages for dumping the tailings in hydraulic mining on plaintiff's land, and for an injunction to restrain the continuance of such injury, a judgment for the plaintiff is supported by the finding that the plaintiff had for more than 10 years been in open, notorious, exclusive, and adverse possession of the land in controversy, though it was originally claimed for a dumping ground, under miners' laws, by the defendants' grantors.¹

Commissioners' decision. Appeal from superior court, Calaveras county.

John McLaughlin brought this action against Henry Del Re *et al.* to restrain them from dumping *placer* tailings on his ground. Judgment for plaintiff, and defendants appeal.

C. V. Grey, J. B. Reddick, and W. T. Lewis, for appellants. Ira H. Reed, for appellee.

FOOTE, C. The complaint in this action alleged that the plaintiff, being the owner of a certain *placer* mining claim, appropriated, for the purpose of working the same, the waters of a certain creek or gulch, by means of a ditch and flumes, and that, while in the use and possession of said ditch, the defendants began mining by the hydraulic process on the hill-side sloping into the gulch, whereby large quantities of earth and *debris* were washed down, and deposited in the gulch, and ran into and filled up the plaintiff's ditch; and prayed that the defendants be perpetually enjoined from continuing the acts complained of, and for damages which such acts had already occasioned to the plaintiff's property. Upon the other hand, the defendants, by their answer, claimed that for more than 20 years they had possessed and worked their mining claim, and had used the creek or gulch as a tail-race and receptacle for tailings and *debris* caused by the working of their mine by said hydraulic process; and that the plaintiff had, at his own risk and peril, entered upon their said claim while defendants were working it, and constructed his ditch and flumes. Upon the former hearing of the case before this court, it appeared that it was an action in equity, and that the court below had granted the injunction as prayed for, and rendered judgment for damages upon the verdict of a jury, without having made or filed any findings of fact; whereupon the judgment and an order denying to the defendants a new trial was reversed, and the cause remanded, with directions to the trial court to find the facts upon the testimony already taken, and such further testimony as might be thereafter taken, and to enter an appropriate judgment thereon. 64 Cal. 473, 2 Pac. Rep. 244. In compliance with such direction, the court below proceeded to take further testimony; and upon it, and that which had been formerly taken, and upon the verdict of the jury, awarding \$470 for damages inflicted on the plaintiff's property by the defendants, filed findings of fact and conclusions of law based thereon, and granted a perpetual injunction restraining the defendants from continuing the acts complained of against them; besides rendering judgment for the plaintiff for the sum of money awarded by the verdict of the jury. From the judgment and an order denying a new trial the defendants have appealed. The findings are as follows: "(1) That, in the year 1862, Patrick Kelly, James Grider, and Michael Carroll were the owners of, and in the possession of, that certain gravel mining claim described in defendants' answer, and which claim is in the hill, and is situated and commences a short distance above the bed of the gulch known as 'Old Gulch,' in Calaveras county, and extending into the hill about eight hundred feet, more or less. (2) That on the date last aforesaid the said Kelly, Grider, and

¹See note at end of case.

Carroll claimed a portion of said Old Gulch, four hundred feet in length and one hundred feet in width, as a deposit for tailings, dirt, gravel, and *debris* taken out of said claim while working and mining the same. That on the 23d day of January, 1862, said last-named parties caused a notice of intention to claim said land as a dump or deposit for said tailings to be recorded in the mining records of the Old Gulch mining district. A copy of said notice is as follows:

"We, the undersigned, claim the Old Gulch, from the small gulch in which McDermott turns his waste-water in from his reservoir, up the said Old Gulch four hundred (400) feet, for the purpose of depositing our tailings in, and one hundred feet wide.

[Signed]

JAMES GRIDER.

"PATRICK KELLY.

"MICHAEL CARROLL.

"*Old Gulch, January 23, 1862.*"

"(3) That the said Kelly, Grider, and Carroll thereafter worked said claim, and deposited the tailings therefrom in said gulch claimed by them until the year 1863 or 1864, when they sold and conveyed by bill of sale their interests in said claim and said dump in said gulch to Cyprian J. Agostini. (4) That said claim thereafter was worked and mined by the said Cyprian J. Agostini and other parties to whom he sold some interest therein, and said dump in said gulch was used as a place of deposit for the tailings from said claim until some time in the year 1867, when the said Cyprian J. Agostini and Francis Agostini became the owners of said claim and said dump, by purchase from their copartners, and received from them written bills of sale therefor, and that thereafter they worked said claim, and deposited the tailings in said gulch, until the 26th day of October, 1878. (5) That at and prior to the year 1868 plaintiff was, and ever since has been, the owner of, and in the possession of, a certain gold *placer* mining claim, situated in French gulch, in said Calaveras county. That, for the purpose of conveying water to work said claim, plaintiff constructed the ditch and flume mentioned in said complaint, of sufficient capacity to carry three hundred inches of water under a four-inch pressure, and in length over one and one-half miles, at a cost of two thousand five hundred dollars. (6) That said ditch and flume traverses in its course the hill-side opposite to the hill in which defendants' claim is situated, along said Old Gulch, and is about ten feet in a perpendicular line, and about fifteen feet on the slope of said hill-side, above the bed of said Old Gulch, and that the width of the bed of said gulch is about eighty feet where plaintiff's ditch and flume traverses the land in controversy. (7) That from the time of the construction of said ditch and flume in the month of November, 1868, and down to the acts of defendants hereinafter stated, the plaintiff was in the actual, open, and notorious occupation and possession of the land in controversy, upon which said ditch and flume is situated, using and maintaining the same to convey water to his said mining claim. That during all of said time the plaintiff held, used, and maintained said ditch, for the purposes aforesaid, continuously and uninterruptedly under a claim of title adversely to the said C. Agostini and F. Agostini, the grantors of the defendants herein. (8) That at the time of the construction of said ditch upon the land in controversy the said Cyprian Agostini, one of the grantors of defendants, knew of the construction of the same, and made no objection to its construction thereon; and that neither the said Cyprian Agostini, nor his said copartner, the said F. Agostini, at any time thereafter, objected to the use of said land upon which said ditch was constructed by the said plaintiff, and never interfered with the use of said ditch over the land in controversy by the plaintiff at any time while they were the owners of said claim, and never deposited, or attempted to deposit, tailings from said claim upon the land occupied by said ditch at any time. (9) That on the 26th day of October, 1878, the said Cyprian and F. Agostini, by deed, sold and conveyed to the defendants all their right, title, and interest in and to said gravel gold-mining claim, and extending into

the hill eight hundred feet, and being in width about five hundred feet and about seven hundred feet of the gulch into which to run the tailings from the claim. (10) That defendants, in working said claim, caused great quantities of tailings, dirt, gravel, bowlders, and *debris* to be deposited in said gulch, filling up the same up to and into plaintiff's ditch, filling up the said ditch, and preventing him from using the same in April, 1879. That, subsequent thereto, the said defendants continued said mining operations and continued to deposit the tailings from the working of said claim in and upon plaintiff's said ditch, and in and upon his flume, filling up said ditch and breaking down said flume; thereby preventing plaintiff from running water therein to work his said mining claim, and preventing him from working said claim. (11) That the plaintiff has sustained damages by reason of the acts of said defendants filling up said ditch up to the month of October, 1880, and in breaking down said flume by the means and manner aforesaid, in the sum of \$470. (12) That the distance is less than one hundred feet from the point where said ditch is filled up, and said flume broken down by said tailings, to the limit of the bed of said gulch on the opposite side of said gulch. (13) That in the month of April, 1858, at a meeting of the miners residing in Old Gulch, they organized a mining district, known as 'Old Gulch Mining District,' and established and defined the boundaries thereof, and adopted a code of laws regulating the mode of locating and holding the possession of mining claims therein, and elected a mining recorder of said district. (14) That on the fourteenth day of January, 1867, the following local law was adopted and passed: 'Art. 14. All miners shall hold their tailings, and the ground necessary to hold the same, provided they are mining in good faith.' (15) That at and prior to the year 1862 there was a custom in force in said Old Gulch mining district permitting the owner of mining claims therein to hold ground necessary for the deposit of tailings from their claims."

After a careful examination of the whole record, we are of opinion that the evidence, although conflicting, warranted the findings, and that the latter support the judgment, and are sufficiently intelligible. It also appears evident, as we think, that the court found upon all the material issues made by the pleadings. As the defendants have suffered from no prejudicial error, the judgment and order should be affirmed.

BELCHER, C. C., and SEARLS, C., concurred.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

NOTE.

ADVERSE POSSESSION—WHAT CONSTITUTES. The occupancy necessary to give title by adverse possession must be adverse to the claim of all others, and accompanied by an actual possession, exclusive in its character. *Richards v. Smith*, (Tex.) 4 S. W. Rep. 571. The statute of limitations will not run in favor of an occupant of real estate, unless the occupancy and possession are adverse to the true owner, and with the intent and purpose of the occupant to assert his ownership of the property. His possession must be as owner, and adverse to every other person. *Colvin v. Land Ass'n*, (Neb.) 36 N. W. 861. Exercising that dominion over the thing, and taking that use and profit which it is capable of yielding, is a possession. When such acts are so repeated as to show that they are done in the character of owner, and not of an occasional trespasser, the possession is adverse. *Baum v. Club*, (N. C.) 2 S. E. Rep. 673. Actual occupancy by residence, cultivation, or inclosure, or the erection of permanent improvements, is not required in order to establish title by adverse possession, and that whether, in any case, title has been acquired by length of possession, and to what extent, and within what limits, must be determined by the actual facts. *Cooper v. Morris*, (N. J.) 7 Atl. Rep. 427; *Murray v. Hudson*, (Mich.) 32 N. W. Rep. 889; *Murphy v. Doyle*, (Minn.) 33 N. W. Rep. 220. Defendant had been for the statutory period of limitation exercising acts of ownership and possession of parts of a certain strip of land, the title to which was in plaintiff. The evidence showed that for the same period plaintiff had been in actual, continuous possession and use of other parts of such strip. Held, that such possession by defendant was no defense to plaintiff's action of ejectment. *Railway Co. v. Maffit*, (Mo.) 6 S. W. Rep. 600. When a mortgage is in law as well as in equity sim-

ply a lien on the land it covers, and it gives no right of possession of the land, the mortgagor's possession during the period allowed by the statute for instituting a suit of foreclosure is not adverse to the rights of the mortgagee, but is subordinate thereto; and the same is true as to the possession of the mortgagor's grantee, although such grantee hold under covenants warranting the title. *Gordan v. Sayre*, (Fla.) 3 South. Rep. 329. See, also, as to the character of the occupancy necessary to constitute adverse possession, *Hyne v. Osborn*, (Mich.) 23 N. W. Rep. 521, and note; *Scott v. Woodruff*, (Ark.) 4 S. W. Rep. 908; *Witt v. Railway Co.*, (Minn.) 35 N. W. Rep. 862; *Dame v. Chandler*, (Ga.) 4 S. E. Rep. 765; *Todd v. Todd*, (Ill.) 7 N. E. Rep. 585; *Locke v. Whitney*, (N. H.) 3 Atl. Rep. 920; *Merrill v. Tobin*, 30 Fed. Rep. 738; *Roots v. Beck*, (Ind.) 9 N. E. Rep. 698; *Iron-Works v. Wadhams*, (Mass.) 9 N. E. Rep. 1; *Evans v. Templeton*, (Tex.) 6 S. W. Rep. 843; *Dame v. Chandler*, (Ga.) 4 S. E. Rep. 765; *Riggs v. Riley*, (Ind.) 15 N. E. Rep. 253.

2 Cal. Unrep. 843

PEOPLE v. O'LEARY. (No. 20,358.)*

(Supreme Court of California. February 29, 1888.)

1. CRIMINAL LAW—PLEAS—FORMER ACQUITTAL.

Deering's Pen. Code Cal. § 1017, provides that a plea must be entered upon the minutes of the court in substantially the following form: "(3) If he plead a former conviction or acquittal: 'The defendant pleads that he has already been convicted [or acquitted] of the offense charged by the judgment of the court of,' etc. "(4) If he plead once in jeopardy: 'The defendant pleads that he has been once in jeopardy for the offense charged, [specifying the time, place, and court.]" Defendant asked to have entered, as a plea of former acquittal: "Defendant pleads that he has already been acquitted of the offense charged by the judgment of this court, rendered at this court-room on the 14th day of February, 1887, when defendant's demurrer to plaintiff's information was sustained by the court, and said court then and there or at any time failed to render its opinion that the objection to said demurrer could ever be cured by filing a new information." *Held* a sufficient plea of former acquittal.

2. SAME—FORMER JEOPARDY.

Defendant asked to have entered, as a plea of once in jeopardy: "Pleads, further, that he has been once in jeopardy, he having on the ——— day of January, 1887, been placed on trial for the offense now alleged in the information before the justice court of Cache Creek township and a jury, which court was a competent court, and which jury was a competent jury; and witnesses against defendant were sworn before said jury, and, before the final submission of said matter to said jury, the jury was discharged, against the objection of the defendant." *Held* a sufficient plea of once in jeopardy.

3. SAME—FAILURE OF CLERK TO ENTER PLEA PROPERLY.

Held, further, that the failure of the clerk to make the entry as fully as he ought to have done, could not prejudice defendant.

4. SAME—VERDICT—NOT RESPONSIVE TO PLEAS.

Defendant entered three pleas: *First*, not guilty; *second*, a former acquittal; *third*, once in jeopardy. The jury found only on the first. *Held*, that there could be no conviction without a verdict on each plea.

Commissioners' decision. In bank. Appeal from superior court, Yolo county; C. H. GAROUTTE, Judge.

Information against Arthur O'Leary for practicing medicine without a certificate. Defendant was convicted, and appeals.

R. Clark, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

BELCHER, C. C. The information filed against the defendant charged him with practicing medicine at a time when he had not obtained a certificate authorizing him to do so, as required by the "Act to regulate the practice of medicine in the state of California," (Deering's Pen. Code, pp. 625-629.) The defendant demurred to the information, and his demurrer was overruled. We see no error in this ruling. The information charged the offense in language sufficiently full and explicit. The defendant then pleaded not guilty, and asked to have further pleas entered as follows: "Further pleading to said information, defendant pleads that he has already been acquitted of the offense charged by the judgment of this court, rendered at this court-room on the 14th day of February, 1887, when defendant's demurrer to plaintiff's information was sustained by the court, and said court then and there or at any time failed

*Reversed in banc. See 18 Pac. 856, 77 Cal. 30.

to render its opinion that the objection to said demurrer could ever be cured by filing a new information. Pleads, further, that he has been once in jeopardy, he having, on the ——— day of January, 1887, been placed on trial for the offense now alleged in the information before the justice court of Cache Creek township and a jury, which court was a competent court, and which jury was a competent jury; and witnesses against defendant were sworn before said jury, and, before the final submission of said matter to said jury, the jury was discharged, against the objection of the defendant." The court refused to allow these pleas to be entered, on the ground that they were not pleas recognized by the statutes, and the defendant excepted to the ruling. As entered upon the minutes of the court, the pleas were as follows: "*First*, defendant pleads not guilty of the offense charged; *second*, a former acquittal; *third*, once in jeopardy." The jury found the defendant guilty, but did not find on the issues of former acquittal and once in jeopardy. Judgment was entered that defendant pay a fine of \$500, and, in default of payment, be imprisoned in the county jail for the term of 500 days, or at the rate of one day for each dollar of the fine, and from that judgment he has appealed.

The rule is well settled in this state that if, in a criminal case, there be a plea of not guilty, and also a plea of former conviction or acquittal, the defendant is entitled to a verdict on each plea, and until there is such a verdict there can be no judgment of conviction. *People v. Kinsey*, 51 Cal. 279; *People v. Helbing*, 59 Cal. 567; *People v. Fuqua*, 61 Cal. 377. The attorney general, while admitting the correctness of the decisions referred to, urges that defendant's pleas of former acquittal and once in jeopardy, as entered by the clerk, did not meet the requirements of section 1017, Pen. Code, and for that reason he was not entitled to any findings upon them. That section provides as follows: "Every plea must be oral, and entered upon the minutes of the court, in substantially the following form: * * * (3) If he plead a former conviction or acquittal: 'The defendant pleads that he has already been convicted [or acquitted] of the offense charged by the judgment of the court of ———, [naming it,] rendered at ———, [naming the place,] on the ——— day of ———.' (4) If he plead once in jeopardy: 'The defendant pleads that he has been once in jeopardy for the offense charged, [specifying the time, place, and court.]" The pleas of former acquittal and once in jeopardy, as the defendant asked to have them entered, were in substantially the form required by the Code. They were oral, and the clerk was to enter them on the minutes of the court. If the clerk failed to make the entry as fully as he ought to have done, the defendant cannot be made to suffer for that failure. If the failure was by reason of the order of the court, the order was erroneous, and is cause for reversal.

We think the judgment should be reversed, and the cause remanded for a new trial.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for a new trial.

75 Cal. 199

CHUCK v. GARRISON *et al.*, (HAWLEY BROS. HARDWARE Co., Intervenor.)
(No. 11,992.)

(Supreme Court of California. February 29, 1888.)

LIENS—FOR LABOR ON THRESHING-MACHINE—OWNERSHIP IMMATERIAL.

St. Cal. 1885, p. 109, provides: "Every person performing work * * * in, with, about, or upon any threshing-machine * * * shall have a lien upon the same" for the value of his services. Plaintiff worked for defendants on a threshing-machine, and sought to enforce a lien against it. The intervenor complained that it

was the owner of the threshing-machine, and that the defendants were not its agents. *Held*, that intervenor's complaint was demurrable; the actual ownership of the threshing-machine being immaterial. McFARLAND, J., dissenting.

In bank. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

Action to foreclose a lien on a threshing-machine by Jack Chuck, a Chinaman, plaintiff and respondent, against George W. Garrison and William Falla, defendants, and Hawley Bros. Hardware Company, a corporation, intervenor and appellant. A demurrer to the complaint of intervention was sustained, and the intervenor appeals.

Stuart S. Wright and Olney, Chickering & Thomas, for appellant. *W. B. Cullom and Brown & Daggett*, for respondent.

SHARPSTEIN, J. The plaintiff alleges that the defendants Garrison and Falla are indebted to him in the sum of \$138.25 for work and labor performed for them, at their request, on their certain threshing-machine, while engaged in threshing grain in Fresno county, between June 1 and August 14, 1886. Then follows a description of the machine, its appurtenances and value. He alleges that he quit work on said 14th day of August, and that 10 days have not expired since he ceased so working. He alleges that he has a lien on the machine and its appurtenances for the amount due him for said work, that there is danger of said machine and appurtenances being removed from said county, and prays for a judgment against the said defendant for said sum of \$138.25 so due for said work and labor; that E. H. Tucker of Fresno county be appointed by this court to receive and safely keep the said threshing-machine, and all of the said appurtenances, and everything thereto appertaining, whether the same has been properly described herein or not; and that the same, and every part thereof, be sold according to law, and the proceeds thereof be applied to the payment of plaintiff's judgment, and all costs of suit. The summons was served on Garrison, one of the defendants, but the record does not show that it was served on Falla, or that either of the defendants ever appeared in the action. The default of defendant Garrison was entered on the 5th day of October, 1886. On the 11th day of October, 1886, Hawley Bros. Hardware Company, (a corporation,) by leave of the court, filed a complaint in intervention, in which, among other things, it is alleged that at the time of the commencement of the action the intervenor was, and for more than six months prior thereto had been, the owner of the property mentioned in the plaintiff's complaint; that the defendants were not agents or employes of intervenor, nor had they or either of them any power or authority to bind intervenor by any contract, or to create any lien upon said property; that plaintiff performed no work or labor for intervenor "in, with, about, or upon" said property. To the complaint in intervention the plaintiff interposed a general demurrer, which was sustained by the court, and, as the intervenor declined to amend, judgment was awarded the plaintiff for the relief prayed in his complaint. From that judgment intervenor appeals.

Appellant's counsel say "that the order sustaining the demurrer must have been made upon the ground that the title to the property could not have been involved in the action. That is to say, the mere fact that work and labor had been performed 'in, with, about, or upon' the property gave to the persons who had performed such work or labor a lien upon the property, and all of it, no matter who was the owner of the whole, or of any part thereof." We think the demurrer could have been sustained only on the ground that the actual ownership of the property was an immaterial circumstance. The action is brought under the provisions of the act entitled "An act to secure the wages of persons employed as laborers on threshing-machines," approved March 12, 1885, (St. 1885, p. 109.) It is very short, and we insert it in full:

"Section 1. Every person performing work or labor of any kind in, with,

about, or upon any threshing-machine, the engine, horse-power, wagons, or appurtenances thereof, while engaged in threshing, shall have a lien upon the same to the extent of the value of his services.

"Sec. 2. The lien herein given shall extend for ten days after the person has ceased such work or labor.

"Sec. 3. If judgment shall be recovered in any action to recover for said services for work or labor performed, and said property shall be sold, the proceeds of such sale shall be distributed *pro rata* to all judgment creditors who have within ten days begun suits to recover judgments for the amount due them for such work.

"Sec. 4. The lien shall expire unless a suit to recover the amount of the claim is brought within ten days after the party ceases work."

The language of the act is sufficiently comprehensive to include a case like this. We could not exclude such a case from its operation without a material modification of its provisions. This case is clearly within the letter of the law, and we see no reason to doubt that it is just as clearly within the spirit of it. The statute gives the lien, and a court of equity undoubtedly has jurisdiction of an action to foreclose it. We think the court properly sustained the demurrer to the complaint of intervention, and that the judgment should be affirmed. Judgment affirmed.

We concur: SEARLS, C. J.; TEMPLE, J.; PATERSON, J.

I dissent: McFARLAND, J.

75 Cal. 213

In re NEWMAN'S ESTATE. (No. 12,170.)

(*Supreme Court of California.* March 1, 1888.)

1. DESCENT AND DISTRIBUTION—"ISSUE"—ADOPTED CHILD.

Civil Code Cal. § 1886, div. 1, relating to the rule of inheritance, provides: "If the decedent leave no surviving husband or wife, but leave issue, the whole estate goes to such issue; and if such issue shall consist of more than one child," etc. *Held*, the word "issue" is used in the same sense as "child," in this section; and sections 227 and 228 of the Code, relating to the *status* of adopted children, when construed with this section, will entitle an adopted child to succeed to the estate of the adopting parent.

2. JUDGMENT—DIVORCE—COLLATERAL ATTACK—PROOF OF SERVICE OF SUMMONS.

The validity of an adoption was sought to be impeached by showing that a judgment for divorce, which, if properly obtained, would only require the consent of the parent in custody of the child, was void, because of some irregularities in the proof of the service of the summons by publication, and that judgment was rendered before expiration of defendant's time for answering. *Held*, that the fact of service, and not the proof, gave the court jurisdiction, and that, after jurisdiction had been acquired and judgment rendered, the proceedings could not be attacked collaterally.¹

3. DIVORCE—DECREE—OPERATIVE ON DELIVERY TO CLERK.

In an action involving the question as to when a decree for divorce became binding upon the parties thereto, it appeared that the decree was signed by the judge, and delivered to the clerk for filing, who neglected to enter it for over a year. *Held*, that the decree became operative as to the parties from the date of its delivery to the clerk.

4. ADOPTION—ORDER—VALIDITY—SIGNED BY ACTING JUDGE.

An order for the adoption of a child, made by the court, and signed by an acting judge, was objected to, on the ground that it was not made and signed by the regular judge sitting in chambers. *Held*, this did not invalidate the order.

SEARLS, C. J., dissents.

In bank. Appeal from superior court, Los Angeles county; WILLIAM A. CHENEY, Judge.

¹Respecting the grounds on which a judgment may be collaterally attacked, see *McCarter v. Neil*, (Ark.) 6 S. W. Rep. 731, and note; *Nicholson v. Nicholson*, (Ind.) 15 N. E. Rep. 223; *Decker v. Decker*, (N. Y.) *Id.* 307.

Bernard Newman, a resident of Los Angeles county, died intestate on the 15th day of November, 1886. His estate is valued at \$88,000. The next of kin of the deceased are his brother, Michael Newman, the appellant herein, and several nephews and nieces. It is claimed by the respondent that one George B. Maldonado, her child, aged two and one-half years, is the adopted son of the deceased. Mary Maldonado, the mother and guardian of said minor child, claims the right to letters of administration on said estate, under section 1368, Code Civil Proc. Said guardian filed her petition for letters on the 24th day of November, 1886. Appellant, Michael Newman, filed his petition on the 6th day of December, 1886, and also filed grounds of opposition to the petition of said Mary Maldonado; alleging, among other things, that George B. Maldonado is not the adopted child of the deceased, that said child is not entitled to succeed to said estate, that therefore his guardian is not entitled to letters, (section 1365, Code Civil Proc.,) and that said Mary Maldonado is a married woman. In his grounds of opposition, Michael Newman asserted his right to letters of administration. He further set out that the decree for divorce claimed by Mary Maldonado from her husband was void, because of certain irregularities in the proof of the service of the summons by publication, and that the judgment was rendered upon default before the expiration of the time allowed defendant in which to answer. He also asserted that the decree, if operative at all, did not become so until nearly six months after the adoption of the child. It appeared that the decree was duly signed by the judge, and delivered to the clerk for filing in October, 1885, who neglected to enter it until in January, 1887. The child was adopted in June, 1886. Newman claims the decree for divorce did not become binding on the parties until entered by the clerk in January, 1887; that as there was no consent of the father to the adoption, as required by law, in case the divorce was void, or did not become binding on the parties until January, 1887, there was therefore no valid adoption of the child, and the mother had no right to administration.

Matthew I. Sullivan and *Stephen M. White*, for appellant. *Lucien Shaw* and *James M. Damron*, for respondent.

PATERSON, J. 1. The provisions of the Civil Code bearing upon the first question presented for our consideration are the following:

"Sec. 227. The judge must make an order declaring that the child shall thenceforth be regarded and treated in all respects as the child of the person adopting.

"Sec. 228. A child adopted may take the family name of the person adopting. After adoption the two shall sustain towards each other the legal relation of parent and child, and have all the rights, and be subject to all the duties, of that relation."

"Sec. 1386. When any person having title to any estate dies without disposing of the estate by will, it is succeeded to, and must be distributed, in the following manner: (1) If the decedent leave no surviving husband or wife, but leave issue, the whole estate goes to such issue; and if such issue consists of more than one child living, or one child living and the lawful issue of one or more deceased children, then the estate goes in equal shares to the children living, or the *child* living, and the issue of the deceased *child* or *children*, by right of representation."

Under these provisions, we think that an adopted child is entitled to succeed by inheritance to the estate of the adopting parent. The provisions of sections 227 and 228 extend to all the rights and duties of natural parents and children. The language is general and comprehensive. The use of the word "issue," in section 1386, does not limit the right of inheritance to natural children only. That section prescribes the rule of inheritance. The word "issue" is there used in the same sense as the words "child" and "children." If the adopted child is, by virtue of its *status*, to be "regarded and treated in

all respects as the child of the person adopting," and is to "have all the rights, and be subject to all the duties, of the legal relation of parent and child," the right to succeed to the estate of the deceased parent must be included. *Estate of Wardell*, 57 Cal. 491. See, also, *Ross v. Ross*, 129 Mass. 266.

2. So far as the action of *Maldonado v. Maldonado* affected the status of the parties and the custody of the child, it was a proceeding *in rem*, and service by publication in such cases is good. *Pennoyer v. Neff*, 95 U. S. 714. The recital in the judgment that the defendant was duly served with process is consistent with the proof of service. It is the *fact of service* which gives the court jurisdiction, not the proof of service; and the court had authority to receive the amended affidavits of service after judgment, and before the roll was made up. *Mason v. Messenger*, 17 Iowa, 261; *Richards v. Ladd*, 4 Pac. Coast Law J. 52; *Allison v. Thomas*, 14 Pac. Rep. 309. The affidavits of service, and the recitals in the judgment, are conclusive. The affidavit on application for an order of publication, and the order of publication, cannot be considered. They are no part of the roll. *Hahn v. Kelley*, 34 Cal. 391; *McCauley v. Fulton*, 44 Cal. 355. *Belcher v. Chambers*, 53 Cal. 635, is not in point. In that case, as in *Pennoyer v. Neff*, the judgment considered was a personal judgment against a non-resident, without personal service or process. So far as the rule established in *Hahn v. Kelley* is applicable to proceedings *in rem*, it has not been overruled. The judgment referred to in that case was for money,—the deficiency after foreclosure and sale. The court had jurisdiction of the defendant, and the subsequent proceedings, from the time that publication of summons was complete. Code Civil Proc. 416. The fact that judgment was rendered upon default entered before the time allowing the defendant to answer had expired, rendered the judgment erroneous, simply, not void. A judgment thus rendered can be attacked only upon motion or by appeal, and by the parties in interest. Maldonado is the only party aggrieved by the decree, and he is the only one who can attack it in any way. *Alderson v. Bell*, 9 Cal. 321; *Mitchell v. Aten*, 14 Pac. Rep. 497.

3. It is contended that the order is void because it was made by the court, and not by the judge. The order appears to have been made in open court, but it is a written order, signed by the judge, and filed in the proceedings. The words "by this court," in the order, may be treated, we think, as surplusage. An order made by the judge at chambers, in a case requiring action by the court, may, for good reasons, be held to be invalid, but no such reasons can be urged in cases like this. The power which the judge might have exercised in his chambers was exercised in open court; and the fact that the clerk and sheriff were present cannot affect the validity of his judicial act.

4. The judge who signed the order—Honorable B. T. WILLIAMS, of Ventura county—had the same power as the judge of Los Angeles county, for whom he was acting. Section 71, Code Civil Proc. It must be presumed, in the absence of a showing to the contrary, that he was acting upon the request of the governor, or of one of the judges of the superior court of Los Angeles county.

5. The decree was signed by the judge on October 19, and was filed with the clerk on October 22, 1885. Thus rendered, it was binding on the parties and privies, although not entered until January 5, 1887. The clerk could not, by his failure to perform a ministerial duty, abridge the rights of any party interested. *Casement v. Ringgold*, 28 Cal. 339; *Gray v. Palmer*, Id. 422. The order is affirmed.

We concur: McFARLAND, J.; SHARPSTEIN, J.; TEMPLE, J.; MCKINSTRY, J.; THORNTON, J.

I dissent: SEARLS, C. J.

75 Cal. 205

PATENT BRICK CO. *et al.* v. MOORE *et al.* (No. 9,958.)

(Supreme Court of California. March 1, 1888.)

1. NEW TRIAL—INSUFFICIENCY OF EVIDENCE—STATEMENT OF CASE.

On the hearing of a motion for a new trial, where the statement of the case contained no specification of the particulars wherein the evidence was alleged to have been insufficient to justify the decision, the court below properly disregarded the statement as to that ground.

2. SAME—ERRORS OF LAW—FAILURE TO TAKE EXCEPTIONS.

Where it appears from the statement of the case that there were no exceptions whatever taken at any time during the trial to any act of the court, the court is justified in refusing to grant a new trial upon the ground that the decision is against the law.

3. SAME—ISSUES NOT RAISED AT TRIAL.

On a motion by defendant for a new trial, made on bill of exceptions and statement of the case, in an action to foreclose a mechanic's lien, because a certain bond, introduced in evidence without objection, which appears in the statement of the case as signed by plaintiffs, as sureties for the contractors who built the building upon which the lien is claimed, containing an express stipulation that the building should be delivered clear of all liens, worked an equitable estoppel *in pais*, and prevented the foreclosure of plaintiffs' lien, *held*, that as there was nothing in the findings to indicate that such a clause existed in the bond, and no issue being made, based upon such a contention, the trial court, not being informed by the statement of the case that the defendant claimed the evidence derived from that clause in the bond did not justify the decision, was not bound to make a finding not responsive to the pleadings, and the motion for a new trial was properly refused.

4. DAMAGES—LIQUIDATED DAMAGES—UNCERTAINTY OF ACTUAL DAMAGES.

Under Code Civil Proc. Cal. § 1671, which provides that parties to a contract may agree upon an amount as liquidated damages when, from the nature of the case, it would be impracticable to fix the actual damages, taken in connection with section 1670, which provides that every contract by which the damages to be paid for a breach thereof is determined in anticipation is to that extent void, except as expressly provided in section 1671, a building contractors' bond, containing a stipulation that, if the building is not completed on a day certain, they should pay \$100 for each day of delay as liquidated damages, does not of itself, in the absence of all other evidence upon the subject, make it clear that it would be impracticable to fix the actual damages resulting from the breach of a bond in not completing the building.

5. MECHANICS' LIENS—ATTORNEY'S FEE—DISCRETION OF COURT.

Plaintiff in an action to foreclose a mechanic's lien asked for an attorney's fee. The defendant, in his answer, did not claim that no fee should be allowed, but that a smaller fee than that asked for would be sufficient. *Held*, that the parties had left it to the discretion of the trial court to fix the amount, and his decision, having been judiciously made, will not be disturbed.

6. SAME—MATERIALS USED IN BUILDING—FINDINGS—APPEAL.

On appeal from a judgment in plaintiffs' favor, in an action to foreclose a mechanic's lien, when the complaint states and the findings show that the materials furnished were sold to be used, and were used, upon the building, and that the claim was assigned to plaintiff, and the statement of the case cannot be examined to see if the evidence upon these points is sufficient, and from the record there does not appear to have been any exceptions taken, it will be presumed that the findings were based upon sufficient evidence.

7. SAME—ASSIGNMENT OF CLAIM—FINDING.

An allegation in the pleading that a claim was transferred and assigned in writing is an allegation of a matter of evidence, so far as the statement that it was in writing is concerned; and, when the findings show that the claim was assigned to plaintiff, it will be presumed, in the absence of anything to show to the contrary, that the court found upon sufficient evidence that the claim was assigned in writing.

8. SAME—PERFORMANCE OF LABOR—FINDINGS.

From the findings in an action to foreclose a mechanic's lien, to the effect that plaintiff performed labor upon and in the construction of the building at the request of the contractors, it would appear, in the absence of anything to show to the contrary, that plaintiff, as a person, performed the labor upon the building, and was entitled to enforce his lien, having filed his claim under Code Civil Proc. Cal. § 1183, giving mechanics, material-men, etc., a lien for all labor performed or materials furnished by them, etc.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

The action of *William Cronan, et al. v. The Mechanics' Institute and*

Charles P. Moore, et al. was commenced in July, 1882. Thereafter eight other suits were brought against the same defendants by the Patent Brick Company *et al.*, *Charles Hanson et al.*, *A. Gennon et al.*, *Fr. H. Rosenbaum*, *Asa R. Wells et al.*, *Alpheus Kendall et al.*, *Walter J. Weatherly*, and *Charles Williams*. These nine actions were consolidated and tried together. Each of these actions was brought to foreclose mechanics' liens for materials furnished and work done for defendants *Moore et al.*, contractors in the construction of a building for the Mechanics' Institute, known as the "Mechanics' Pavilion." In the contract it was provided that the building should be completed by the 10th of February, 1882, and the contractors were to pay \$100 per day as liquidated damages for every day thereafter that the said work should remain unfinished. A bond was given by the contractors, signed by *Hanson* and *Joost*, plaintiffs in these suits, as sureties, containing the same provision. It was also provided that the building should be delivered over to the institute free and clear of all liens; that 75 per cent. of the appraised value of the work should be paid as the work progressed, and the residue 31 days after the entire work was completed and accepted. The contract price was \$32,000. Defendants claimed a breach of the contract, and \$6,000 damages, for failure to complete the contract, and also that the work was not done in a workman-like manner, in accordance with the terms of the contract, "whereby this defendant was damaged in the sum of eight thousand dollars." At the trial, the court awarded \$2,000 damages, but did not allow liquidated damages, and, to save any question, found that defendants had suffered no damages by the alleged breach of the contract. The court found \$6,482.60 due the contractors, and awarded the same to the plaintiffs proportionately, and their liens upon the land covered by the building were recognized and foreclosed. From a judgment overruling a motion for a new trial, made on a bill of exceptions and statement of the case, defendants appealed, assigning error.

Estee, Wilson & McCutcheon, for appellants. *D. H. Whittemore, Arthur Rodgers, K. M. Smith, A. N. Drown, Culler & Eisner, Wm. H. H. Hart, Wm. H. Fifield*, and *Jarboe, Hornson & Goodfellow*, for respondents.

FOOTE, C. Nine separate actions were instituted in the trial court for the foreclosure of mechanics' liens against certain property belong to the Mechanics' Institute, arising out of a building contract which the institute had entered into with *Charles P. Moore et al.* Those several actions were by order of court consolidated into one, and tried without a jury. Judgment of foreclosure in behalf of all the lien claimants was rendered; and from that, and an order refusing to grant a motion for a new trial, the Mechanics' Institute has appealed. The grounds upon which the motion for a new trial proceeded, as set out in the notice of intention, were: *First*, insufficiency of the evidence to justify the decision; *second*, that the decision is against law; *third*, errors in law, occurring on the trial, and excepted to by the defendant.

We will first consider the case as it affects the appellant and *Charles Hanson et al.*, respondents. There is no specification in the statement of the case of the particulars wherein the evidence is alleged to have been insufficient to justify the decision; therefore the court below was obliged to disregard the statement as to that ground for a new trial.

As to the second ground, it appears from the statement that there was no exception whatever taken at any time during the trial to any act of the court; so that it was justified in refusing to grant a new trial upon that ground.

It is claimed for the appellant that the court should not have given a decision in favor of enforcing the lien of *Hanson et al.*, and should not have rendered a judgment of foreclosure in their favor because a certain bond which appears in the statement of the case as signed by *Hanson* and one *Joost*, as sureties for *C. P. Moore et al.*, (the contractors in the building of the insti-

tute,) contained an express stipulation that the building should be delivered over to the appellant free and clear of all liens. It is argued that inasmuch as Hanson and Joost signed such a bond as sureties, they cannot be allowed to foreclose a lien for materials furnished the contractors, Moore *et al.*, which were used to complete the appellant's building. It is said that the clause in the bond above referred to worked as an equitable estoppel *in pais*, and prevented Hanson and Joost from foreclosing their alleged lien. There is nothing in the findings which indicates that any such clause existed in the bond, and there is no issue made by the pleadings based upon any such contention as is here made. As the trial court was not informed, in the statement of the case, that the appellant claimed the evidence to be derived from the recitations of that clause of the bond did not justify the decision, we cannot perceive how the court could have done otherwise than refuse a new trial because of the mere existence of such a clause in the bond, introduced in evidence.

But it is further argued that, although an estoppel *in pais* may not be properly pleaded, yet, where evidence tending to show such an estoppel is introduced without objection, that a verdict based thereon will not be disturbed; and from that it is argued that where such evidence is introduced in a case tried by the court without a jury, that a decision is against law if the trial court omits to make a finding thereon. The case of *Davis v. Davis*, 26 Cal. 23, is cited to us in support of that view. But we fail to see how it is applicable here. There the party waived his right to object to evidence not responsive to the issues made by the pleadings; and it was very properly held that it was a waiver of an existing right, and for that reason the verdict should not be disturbed, and the case was to be considered as if the estoppel had been pleaded. But we do not understand that it was held in that case that the trial court *must make* a finding based upon evidence not responsive to the issues made by the pleadings, even although such evidence may have been introduced on the trial without objection.

Again, it is urged that the court below was not justified in finding that the appellants had suffered no damage by reason of the delay in the construction of their building. It is said that the bond signed by Hanson and Joost contained a clause that if the building was not completed by a certain day, that they should pay \$100 for each day of delay as liquidated damages. But, as we have before said, the court could not, on the motion for a new trial, consider that matter, because there was no specification filed wherein the evidence was alleged to be insufficient to support the decision. But it is pressed upon us that, as the findings show such a clause did exist in that bond, and that it was pleaded by the appellants, as against the right of the respondents to recover, it is apparent from the judgment roll that the court erred in its decision and judgment. We must take the language of the finding which sets out a recital of the bond, in considering this matter, as the error, if any, is to be determined on the judgment roll. It does not anywhere appear in the findings that, "from the nature of the case" in hand, it was "impracticable or extremely difficult to fix the actual damage" that would result from non-completion of the building by a certain date. Section 1671, Code Civil Proc. Nor does it appear anywhere in the judgment roll that such was the nature of the case. That being so, we cannot perceive how the contention of the appellant is maintainable, when we come to consider the language of the section *supra*, taken in connection with section 1670, Civil Code, which is as follows: "Every contract by which the amount of damage to be paid, or compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section." As a matter of course, we do not mean to declare that there may not be cases where, from their very nature, (the point made by the appellants,) parties may themselves anticipate and fix liquidated damages to be recovered on a breach

of contract, but it must always, as it seems to us, be demonstrated by satisfactory evidence that the case is one where such liquidated damages may, under the statute, be contracted for and recovered. In the present case there is nothing in the record to show that it was impracticable or extremely difficult to have fixed the actual damage which would result by the failure of the contractors to complete the building by the date mentioned in their contract. Certainly, the stipulation in the bond does not of itself, in the absence of all other evidence upon the subject, make it clear that it would be extremely difficult or impracticable to fix the actual damages that would result from a breach of the bond in not finishing the building by a certain date. It would appear, therefore, that the findings do support the decision, and that it was not against law, so far as it affects the rights of the appellants and Hanson and Joost.

Upon the matter of the allowance of an attorney's fee, the institute, in its answer, does not claim that no fee should be allowed, but simply claims that \$250 would be a sufficient fee. It was therefore left by all parties to the discretion of the trial court to fix the amount of that fee, and we do not see but what it has been judiciously exercised.

It is claimed that the decree in favor of W. J. Weatherly was erroneously entered by the trial court; that the lien established in his favor is not valid, and cannot be enforced, because, as the appellant alleges, it does not appear that the material was expressly furnished for the building; that Whittier, Fuller & Co., who furnished the materials, had assigned it in writing to Weatherly; or that the bill or demand therefor was in writing. The statement of the case could not be examined to see if the evidence on these points was insufficient to justify the decision, because there were no particulars specified in which the evidence was alleged to be insufficient. There does not appear to have been any exception or objection taken to any action of the court during the trial. The findings show and the complaint states that the materials furnished by Whittier, Fuller & Co. were sold to be used, and were used, in the building, and that the claim was assigned and transferred to W. J. Weatherly by Whittier, Fuller & Co. We think that this finding, to the effect that materials were furnished to be used in the building, and were used in the construction and erection of the building, was sufficient taken with the allegations of the complaint as to those same matters, to bring this case within the rule laid down on the point in question in *Holmes v. Richet*, 56 Cal. 307; *Bottomly v. Church*, 2 Cal. 90. And when it is said, in the finding, that the claim was transferred and assigned to respondent, it will be presumed, in the absence of anything to show to the contrary, that the court thus found upon sufficient evidence that the claim was assigned in writing. The rule laid down in *Ritter v. Stevenson*, 7 Cal. 388, cited to us to support the appellant's contention as to this matter, declares a rule of evidence, for in that case it affirmatively appeared that the assignment of the claim and lien was oral. In this case it does not anywhere appear that the assignment and transfer was oral; and when the court, in its finding, says it was transferred and assigned, it must be presumed that the evidence showed it to be a legal transfer and assignment in writing, since we are confined to the judgment roll in considering the question. Error on appeal must be affirmatively shown. Hayne, New Trials & App. § 241; *Mulcahy v. Glazier*, 51 Cal. 626. The assignment to Weatherly is pleaded in the same language as that of the findings, and this is sufficient. *Millard v. Hathaway*, 27 Cal. 140; Hayne, New Trials & App. § 242, subd. b. Findings should not consist of mere matters of evidence; and an allegation in the pleading that the claim was transferred and assigned *in writing* is an allegation of a matter of evidence, so far as the statement that it was *in writing* is concerned, and need not be found.

It is claimed that the court erred in finding that Charles Williams was entitled to a lien. We cannot examine the statement of the case to ascertain

what the evidence was, because no specification of particulars wherein it was claimed to be insufficient to justify the decision was made by the appellant. We must look to the findings, then, to see what was the basis of Williams' claim to a lien upon the building. The finding is to the effect that Williams performed labor upon and in the construction of the building at the request of the contractors, and that the value thereof was \$474.81. In the absence of anything to show to the contrary, it would appear from the finding that Williams, as a person, performed labor upon and in the construction of the building, and was therefore entitled to enforce his lien, the claim therefor having been duly filed under section 1183, Code Civil Proc., which is as follows: "Mechanics, material-men, contractors, sub-contractors, artisans, architects, machinists, builders, miners, and all persons and laborers of every class, performing labor upon, or furnishing materials to be used in, the construction, alteration, or repair * * * of any building * * * or other structure, shall have a lien upon the property upon which they have bestowed labor or furnished materials."

The appellant does not appear to question the validity of any other of the liens for which judgment was rendered. The further claim is made in its behalf that the judgment should be reversed for the reason that the findings are inconsistent, and cannot be harmonized, but we can see no force in the contention. Perceiving no prejudicial error in the record, we advise that the judgment and order be affirmed.

I concur: BELCHER, C. C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

75 Cal. 222

EMERY v. MASON *et al.* (No. 9,715.)

(*Supreme Court of California.* March 2, 1888.)

EQUITY—ACCOUNTING—WHEN REFERENCE MAY BE REFUSED.

When an accounting is prayed, the court may itself take or state the account; and after ascertaining and declaring upon the evidence that there is no profit, return, money, or property acquired by the party whose estate was sought to be charged, under a contract set forth in the complaint, it is not error to refuse to refer the cause for the taking of an account.

Department 1. Appeal from superior court, city and county of San Francisco; M. A. EDMONDS, Judge.

This was an action by the plaintiff, Joseph S. Emery, against Guadalupe Mason, Guadalupe Mason, administratrix of the estate of Charles G. Mason, deceased, and Juan Anastacio Mason, defendants, for the recovery of profits and proceeds of an alleged contract with Charles G. Mason for a prospecting tour. The superior court found the facts, and gave judgment for the defendants, and plaintiff appeals.

Wilson, Otis & Roche, for appellant. *Garber, Thornton & Bishop*, for respondents.

MCKINSTRY, J. The appellant contends the facts of this case resemble those in the case of *Harris v. Hillegass*, 54 Cal. 463. But in *Harris v. Hillegass* the court below had sustained a demurrer to the complaint, and this court held the complaint stated a cause of action. In the case at bar the superior court overruled a demurrer to the complaint, and found upon evidence adversely to allegations of the complaint, which were denied by the answer.

The complaint avers that in consideration of money, provisions, and tools furnished by plaintiff to Charles G. Mason, under the prospecting contract, alleged in the complaint, between plaintiff and said Mason, and in pursuance of said contract, Charles G. Mason "entered upon and made the said prospect-

ing tour; and from said money, tools, and provisions made and received for the common benefit and advantage of himself and said Emery, a large amount of issues, profits, and proceeds, and outgrowth thereof, and the profits derived therefrom, for the equal, common profit, benefit, and advantage of said Mason and said Emery, and, in pursuance of the undertaking and adventure aforesaid, bought, located, and acquired valuable mines of gold and silver and other property, real and personal, and large sums of money, as proceeds, issues, and profits thereof, of the exact character, value, or location of which, except as hereinafter stated, plaintiff is ignorant." The superior court found: "(2) That in pursuance of said agreement, the said plaintiff, on or about said last-named date, at said San Francisco, furnished and delivered to the said Mason the sum of \$342 in money, and tools of the value of \$45.98, and provisions of the value of \$112.02; and the said Mason, in consideration thereof, entered upon said prospecting tour, and proceeded to said Santa Lucia mountains and prospected said marble quarry, and found the same valueless, and thereafter continued upon said prospecting tour without discovering, acquiring, or locating any mines or mine until about the 20th of October, 1863, when he arrived at San Luis Obispo, when he left the said tools, and abandoned the said prospecting tour, and proceeded thence to Arizona territory, when, after living a short time by hunting, he settled upon the Gila river, in Pinal county, A. T., where he took up a pre-emption claim, and engaged in farming, an occupation which he exclusively pursued, with a life of great hardship, poverty, and danger, for some eight or ten years, until about the 22d of March, 1875, when the Silver King mine, in Pinal county, A. T., was discovered by one of his neighbors, Isaac Copeland, and was located by Isaac Copeland, B. W. Reagan, W. H. Long, and said Charles G. Mason. (3) That said Charles G. Mason did not make or receive from said money, tools, or provisions, or any part thereof, or in any way, directly or indirectly, therefrom, either for the common benefit or advantage of himself and said Emery, or at all, any issues or profits or proceeds. That he never operated with said money or tools or provisions, or any part thereof, except to prospect said marble quarry; nor did he ever operate with the proceeds or outgrowth thereof, or with any part of the proceeds or outgrowth thereof, or with the profits derived therefrom, or with any part of the profits derived therefrom. That there never were any proceeds, outgrowth, or profits, either from said money, tools, or provisions, or any part thereof, or from said prospecting tour. (4) That said Charles G. Mason never did, in pursuance of the undertaking and adventure aforesaid, or under or in pursuance of said agreement, buy, locate, or acquire any mines or mine, valuable or otherwise, or any property of any kind, or any sum of money whatever, either as proceeds or as issues or as profits, or in any other way, directly or indirectly." The evidence sustained the findings.

It is insisted by appellant that, notwithstanding the findings, the superior court should have ordered an accounting; that the only way in which it could be ascertained that Charles G. Mason did not make or receive any advantageous benefit from the money, tools, and provisions supplied to him by the plaintiff was by an accounting. But, as the court found nothing was acquired during the prospecting tour, there was no necessity for a decretal order referring the cause for the taking of an account. Moreover, when an accounting is prayed, the court may itself take or state the account; and it would be difficult to state one in the present action more clearly than by ascertaining and declaring upon the evidence that there was no profit, return, money, or property acquired by the deceased under the contract set forth in the complaint, to be charged against him or his estate. Judgment and order affirmed.

We concur: TEMPLE, J.; PATERSON, J.

2 Cal. Unrep. 847

In re BARNES. (No. 11,756.)

(Supreme Court of California. March 2, 1883.)

1. ATTORNEY AND CLIENT—MISCONDUCT—DISBARMENT—OFFERING MONEY FOR TESTIMONY.

An attorney, believing a certain paper to be a forgery, hired an expert to examine it. The expert expressed his doubt as to the forgery; and the attorney, supposing that the expert believed the paper a forgery, and only expressed doubt to extort money, offered him a large sum of money to testify in regard to the forgery. *Held*, that such conduct was subject to criticism, but not sufficient ground for disbarment.

2. SAME—PROCURING PERSON TO STEAL PAPERS—EVIDENCE.

The respondent was charged with procuring one to steal a paper, but the only evidence against him was the testimony of the party who lost the paper that the person who stole it said that respondent had hired him to steal it. *Held*, that such statement was not evidence, and the respondent could not be disbarred on the charge.

In bank. Application to disbar.

This was an application to disbar W. H. L. Barnes, upon accusations preferred by James L. Crittenden, complainant. The respondent, Barnes, is charged in and by the complaint—*First*, with having “been guilty of the violation of his oath as an attorney and counselor at law;” *secondly*, with having “been guilty of the violation of his duty as an attorney and counselor at law;” *thirdly*, with having been guilty of “corrupt practices, tending to degrade and defeat the due administration of justice.” The complaint further specifies two instances wherein said Barnes was guilty as alleged, to-wit: *First*. That said Barnes, after M. Gumpel had informed him that certain letters and a contract of marriage introduced in evidence in the case of *Sharon v. Sharon* were written and signed by William Sharon, in his opinion, and that he (M. Gumpel) could not testify in favor of William Sharon, and against the genuineness of said letters and contract, “willfully and corruptly tried to induce said M. Gumpel to commit perjury, and swear that the signature of said Sharon to said contract was not his genuine signature, and that said letters were not written or signed by said Sharon, and willfully and corruptly offered to pay said M. Gumpel a large sum of money if said M. Gumpel would so swear, which said M. Gumpel declined to do.” *Secondly*. That respondent, Barnes, requested one McLaughlin, the clerk of George W. Tyler, to go to the office of said Tyler and procure a written contract which he (Barnes) supposed to have been made between George W. Tyler and M. Gumpel, and to take it and deliver it to him, (Barnes,) for money which he (Barnes) promised to pay; and that said McLaughlin, in order to earn the money so corruptly offered him by said Barnes, went to the office of said Tyler in the night-time, in the absence of Tyler, and stole therefrom a private paper belonging to Tyler, purporting to be such contract, and delivered the same to said Barnes, who paid said McLaughlin therefor the sum of \$25,000; and that said Barnes paid said money to said McLaughlin for said contract with the corrupt intent to use the same in evidence in the suit of *Sharon v. Sharon*; and that said Barnes did afterwards use said paper as evidence in said suit of *Sharon v. Sharon*. The respondent pleads not guilty to these charges.

James L. Crittenden, for complainant. John H. Curry, for respondent.

TEMPLE, J. I think the accusation should be dismissed. As to the first specification, the charge as made has not been established by evidence which satisfies my judgment. It does appear, however, that Gumpel was employed by the defendant in the case of *Sharon v. Sharon* to examine the alleged marriage contract, with the expectation that he would be called as a witness if his opinion was favorable. After the examination had been made, the respondent was induced to believe the result favorable to his wishes, and Gum-

pel was paid \$1,500 on account. Gumpel from the first talked of his poverty, of his urgent need for money, and insisted that it was a great case, and he expected to be liberally paid, and that there should be an agreement that his bill should be paid whatever it might be, and sometimes argued against the views of respondent in regard to the genuineness of the signature. Respondent, however, never supposed that Gumpel had any doubts as to the question of forgery, but thought he was merely attempting to get more money. Nevertheless, he continued to rely upon Gumpel, and paid him some money after this evidence of venality, and even intimated that he would probably be satisfied as to his compensation. Now, it must be borne in mind that Gumpel was employed to assist and advise the defense. On any other hypothesis the sum he had already received would be extortionate, or must have been received for the testimony he was to give. However much it may be regretted, we know that experts are often employed and paid large sums for their services, and practically for their testimony; for it often requires labor as well as skill to examine and determine the question upon which an opinion is to be given, and sometimes to prepare an effective exhibit of the facts for the court. The money paid was understood by both parties to be for such services, and I do not believe that Barnes thought that the money would cause the witness to change his opinion or his evidence as to the genuineness of the signature. The respondent knew, or thought he did, that the signature was a forgery, and he seems never to have doubted that Gumpel was of the same opinion, and he regarded, as he well might, the occasional arguments of the witness on the other side as mere intimations that he wanted some money. Under such circumstances, no doubt, it would have been more in accordance with exalted ideas of propriety for Barnes to have denounced the witness, and dismissed him, but I doubt whether many practitioners would have acted very differently from the course of the respondent. Lawyers meet and are compelled to contend with all sorts of people. They have in their hands the interests of their client, and they should not permit him to lose the benefit of important testimony upon any refined ideas of propriety. Frequently witnesses whose testimony is essential know the value of their position, and too often attempt to realize upon it. It is a trying thing for an attorney to be placed in a situation where he must deal with such a witness; and, while an honorable attorney would be careful to make no payments or promises which could affect the truthfulness of the evidence, all would try to retain the witness, however much he would be compelled to despise him. I have considered the matter entirely from the stand-point of the respondent; and while I think his conduct, according to his own testimony, may justly be criticised, I do not think it sufficient ground for a disbarment.

As to the other charge, it is still more proper to regard it entirely as the facts appeared to the respondent. He is not more guilty than he would have been had the document been genuine, and availed to expose the forgery of the signature of Sharon, and that it was being supported by perjured testimony. The *denouement*,—the discomfiture of Barnes,—showing that he had been duped, must be left out of view. If the facts had proven to be as he believed they were, and the result as he anticipated, most people, I think, would have applauded his conduct. There is no evidence in this record to show that Barnes advised McLaughlin to steal the paper, or induced him in any way to take it from the custody of Tyler. That idea is founded, so far as this case is concerned, entirely upon the statements of Tyler as to what McLaughlin told him. That, of course, is not evidence, and, in my judgment, not worthy of credence if it were. Had that fact appeared by legal and creditable evidence, I agree that Barnes' position would be indefensible. It is bad enough, no doubt, as it is. But detective work must be judged by an ethics of its own. It is deemed proper to deceive and practice stratagems upon a public enemy, and the criminal is the common enemy of all. I concur in discharg-

ing the accused, while regretting that one so high in the profession should have been guilty of conduct which requires explanation.

I think the respondent should neither be disbarred nor suspended. It is fair to repeat that all the facts have been viewed as I think they appeared to respondent. The allusions to Gumpel must be understood in that light. The accusation is dismissed.

McFARLAND, J., SHARPSTEIN, J., and PATERSON, J. We concur in the judgment, because, in our opinion, the evidence utterly fails to show any conduct on the part of respondent for which he should either be disbarred or suspended.

THORNTON, J. I concur in the conclusion reached in Justice TEMPLE's opinion on the second specification of the accusation, which relates to the Tyler-Gumpel contract. I do not concur in the conclusion reached as to the first specification.

SEARLS, C. J., was not present at the hearing, and did not participate in the decision.

2 Cal. Unrep. 846

BOYLE v. SOLSTIEN *et al.* (No. 11,665.)

(*Supreme Court of California.* March 1, 1888.)

JUDGMENT—BY DEFAULT—MOTION TO SET ASIDE—DISCRETION OF TRIAL COURT.

To set aside a judgment by default on motion and affidavits showing that defendant's attorney had suddenly died, and that defendant himself had no knowledge of the case, is not an abuse of the court's discretion.

Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

John Boyle sued H. A. Solstien and J. A. Arden, executors of Patrick Foley. Judgment against defendant by default, proper service having been made. On motion and affidavits, after notice to plaintiff, the same was set aside, and defendant allowed to plead, on the ground of excusable surprise, inadvertence, and neglect, in that defendant's attorney in charge of the case had suddenly died, and defendant himself had no knowledge of it. From this order plaintiff appeals.

J. M. Wood, for appellant. *Charles F. Hanlon*, for respondent.

PER CURIAM. The court did not abuse its discretion in granting the motion to set aside the default and judgment. Order affirmed.

75 Cal. 226

In re TURNER. (No. 20,401.)

(*Supreme Court of California.* March 8, 1888.)

CRIMINAL LAW—JUDGMENT—VALIDITY—HABEAS CORPUS.

In an application for a writ of *habeas corpus*, petitioner had been convicted of a misdemeanor. The complaint showed the date of the offense, and charged that it was done feloniously, but these facts did not appear in the judgment of conviction. The justice's docket showed plea of not guilty, waiver of jury, date of trial, issuance of subpoenas, examination of witnesses, argument of counsel, submission to the court, and the finding that defendant was guilty as charged. *Held*, that the judgment was not void, and that the writ of *habeas corpus* would not lie.¹

Application of Henry Turner for writ of *habeas corpus*. Conviction had in justice's court, city of Stockton, San Joaquin county; J. H. TAM, Judge. *A. L. Levinsky*, for petitioner. *Jas. H. Budd*, City Atty., for the People.

¹Respecting the office of the writ of *habeas corpus*, see *Barton v. Sanders*, (Or.) *post*, 921, and note.

PATERSON, J. The complaint upon which the petitioner was arrested, tried, and convicted, charged that "said Henry Turner committed the crime of petit larceny, a misdemeanor, as follows, to-wit: The said Henry Turner, on or about the 13th day of February, 1888, at the city of Stockton, county of San Joaquin and state of California, did willfully, unlawfully, and feloniously steal, take, and carry away certain faucets, tube-scrapers, thumb and screw wrenches, and old pipe and pipe connections, of the value of \$4, gold coin of the United States of America, the same being then and there the personal property of the state of California." The return of the sheriff shows that the petitioner is held in custody by virtue of a certified copy of the judgment of the police court, the material portion of which is as follows: "Whereas the said Henry Turner, having been duly convicted in this court of the crime of willfully and unlawfully stealing, taking, and carrying away certain personal property, the same being the property of the state of California, and of the value of \$4, or thereabouts,—a misdemeanor,—it is therefore ordered, adjudged, and decreed that the said defendant be punished by a fine of \$80, and, in default of the payment of such fine, that he be imprisoned in the county jail of San Joaquin county, California, until said fine is satisfied; said imprisonment to be at the rate of one day for each two dollars of said fine."

Counsel for petitioner has made a very ingenious argument on behalf of his client, but has failed to convince me that the judgment is void. The distinction between a void and a voidable judgment is sometimes very nice, and the judgment will fall under the one class or the other accordingly as it is regarded for different purposes. In some of the cases cited the commitments were for the purpose of holding the defendant to answer. After trial and conviction the commitment is of a higher dignity than an ordinary commitment holding to answer. This is true with courts, both of special or limited jurisdiction, and those of general jurisdiction. The judgment of a court of inferior jurisdiction is, to a great extent, beyond the reach of collateral attack by the writ of *habeas corpus*, as the judgments of higher courts are. Church, Hab. Corp. § 240. "In no case can the writ of *habeas corpus* be used as a writ of error. Mere error in the judgment or proceedings under and by virtue of which the party is imprisoned, constitutes no ground for the issuance of the writ, and it is well settled by both the state and federal courts that a judgment or sentence cannot be assailed on *habeas corpus*, if it is merely erroneous, the court having given a wrong judgment when it had jurisdiction of the person and the subject-matter." Church, Hab. Corp. § 372; *Willis v. Bayles*, 105 Ind. 371, 5 N. E. Rep. 8. The case of *Ex parte Ah Cha*, 40 Cal. 426, cited by petitioner, was overruled in *Ex parte Max*, 44 Cal. 580, where it was held that if the complaint was in all respects sufficient, and the offense of which the petitioner was convicted was one within the scope of the indictment, and the judgment one which the court had the authority to render upon the appearance and plea, there was jurisdiction, and all other questions were matters of mere error, which could not be inquired into upon the writ of *habeas corpus*.

It is contended that the judgment before us is void because it fails to state all the necessary elements,—the word "feloniously" and the date being omitted,—and that, therefore, the judgment would be no protection to the defendant upon another charge for the same offense alleged in the complaint. But, if the petitioner should ever have the misfortune to require evidence in support of such a plea of former conviction, he will be entitled to the whole record, and not simply to the judgment. *Ex parte Ring*, 28 Cal. 253. He will be entitled to introduce in evidence in support of that plea, not only the judgment, but the complaint, and the docket of the justice. The entries in the docket of the police judge show clearly a plea of not guilty, waiver of jury trial, date of trial, issuance of subpoenas, examination of witnesses, argument of counsel, and submission of the cause. It then recites: "The court finds

the defendant *guilty as charged*, and, he having waived time for sentence, and no cause being shown, the court renders its judgment that, whereas," etc. The failure of the court to state the elements of the crime in the judgment as fully as they were necessarily stated in the complaint does not render the judgment void. The offense is sufficiently designated in the judgment. To entitle the petitioner to a discharge we must necessarily assume that the record of conviction fails to show the commission of any offense. To reach this conclusion we should have to resort to a hypercritical, overnice, and technical examination of the commitment, convert the writ of *habeas corpus* into a writ of error, and defeat the ends of justice.

Petitioner is remanded.

71 Cal. 249

STANFORD v. FELT *et al.* (No. 8,117.)

(Supreme Court of California. October 30, 1886.)

1. TRIAL—VIEW OF PREMISES BY TRIAL JUDGE—FACTS DISCOVERED BY, ON INSPECTION.

Where the findings of the court below that no return of surplus water had been made to the stream, after diversion and use, appeared to be based on the testimony in the cause, and on facts discovered by the judge on inspection of the premises, held, that a judgment based on such finding could not be sustained.

2. RIPARIAN RIGHTS—REASONABLE USE OF WATER—QUESTION OF FACT.

A riparian proprietor is allowed to make a reasonable use and detention of the waters of a stream for domestic and other purposes; and whether such use and detention is reasonable or not is a question of fact for the court below.

In bank. Appeal from superior court, San Mateo county.

Action brought by Leland Stanford against J. J. Felt and another to restrain the diversion and detention of the waters of Trancos creek. In the district court of the Twelfth judicial district, San Mateo county, judgment was given for the plaintiff, and the superior court of that county refused to grant a new trial; whereupon defendants appeal.

Edward J. Pringle and *P. J. Galpin*, for appellants. *W. H. L. Barnes*, for respondent.

THORNTON, J. By the common law of England, the right of the riparian proprietor to the flow of a stream is inseparably annexed to the soil, and passes with it, not as an easement or appurtenance, but as part and parcel of it. Use does not create the right, and disuse cannot destroy or suspend it. The right of such proprietor extends to the natural and usual flow of all the water of the stream, unless when the quantity has been diminished as a consequence of the reasonable use or appropriation of it by other riparian owners for proper and legitimate purposes. *Ferrea v. Knipe*, 28 Cal. 340, 87 Amer. Dec. 128; *Lux v. Haggin*, 69 Cal. 255, 10 Pac. Rep. 674. The uses by the riparian owner of the water for domestic purposes, for irrigation, and for the propulsion of machinery, are recognized as proper and legitimate purposes. This we regard as the law of this state. See *Ferrea v. Knipe* and *Lux v. Haggin*, *supra*. It appears to be law that where all the water of a stream is needed for domestic purposes, and for watering cattle, and is thus consumed by one proprietor, the law allows such use. But, in making such reasonable use of water, such proprietor must return the surplus which remains after such use to the natural channel of the stream, (*Dilling v. Murray*, 6 Ind. 324, 63 Amer. Dec. 385; 3 Kent. Comm. 439; *Miller v. Miller*, 9 Pa. St. 74, 49 Amer. Dec. 545; Gould, Wat. § 213;) and, if this is not done, the diversion will be restrained at the suit of a riparian owner below. Nor is the owner lower down the stream required to show, in order to procure an injunction, any actual present damage. The diversion by lapse of time may grow into a right. *Crandall v. Woods*, 8 Cal. 136; *American Co. v. Bradford*, 27 Cal. 361; Gould, Wat. § 214; *Moore v. Water-Works*, 68 Cal. 146, 8 Pac. Rep. 816; *Navigation Co. v. Water-Works Co.*, L. R. 9 Ch. 451, L. R. 7 H. L.

697. To prevent such result, an injunction will be awarded. *Parker v. Griswold*, 17 Conn. 288, affirming *Chapman v. Manufacturing Co.*, 13 Conn. 269. It appears from the findings in this case that water has been diverted from the stream on which both plaintiff and defendants are riparian proprietors, but as to the fact whether it has been returned or not the finding is as follows: "That except by natural gravitation, and in the summer time over dry lands, no means of returning water diverted from the said Trancos creek to its bed has ever existed, and none are provided by the defendant Felt. That no return of any water so diverted as aforesaid is, or ever has been usually made; and, from personal inspection of the premises, I am satisfied that in the dry season of the year no such return of said waters has ever been made, and that none can be made under existing circumstances, except by so opening the defendant Felt's reservoir, or the short six-inch pipe which passes through the head thereof, and above mentioned, so as to rapidly exhaust its contents, and render it practically of no use, and a source of inconvenience, if not injury, to the use of his property. At all events, from my inspection of the premises, it is evident that while the outer end of the discharge pipe from said reservoir was open on the day I visited the premises, and was then discharging a torrent of water through the defendant Felt's lands in the direction of the Trancos creek, which plowed the ground, and made traveling uncomfortable, there had been no such previous customary discharge, and there was no visible indication of any connection or habitual flow between the waters of the reservoir and the bed of the creek ever having been maintained at any time. And I find as a fact that no return of discharged water, or any portion of it, has been usually made to the bed of the creek by the defendant Felt." From the language employed here, it is left in doubt whether the finding "that no return of any water so diverted as aforesaid is, or ever has been, usually made," is based on the testimony given in the case, or on facts ascertained by the personal inspection of the premises by the learned judge who made the finding. In such a state of the case, ought a judgment based on a diversion, and no return of the water diverted, (for such is the character of the judgment here,) to be rendered?

In *Wright v. Carpenter*, 49 Cal. 609, it was held that an instruction which authorized the jury to take into consideration the result of their own examination of the land in controversy, which they were sent by the court to inspect, in determining its character as swamp and overflowed or otherwise, was erroneous. The court made the following observations in regard to the instruction: "In authorizing the court to send the jury to view the premises in litigation it was not the purpose of the statute to convert the jurors into silent witnesses, acting on their own inspection of the land, but only to enable them the more clearly to understand and apply the evidence. If the rule were otherwise, the jury might base its verdict wholly on its own inspection of the premises, regardless of an overwhelming weight of evidence to the contrary, and the losing party would be without a remedy by motion for a new trial. It would be impossible to determine how much weight was due to the inspection by the jury, as contrasted with the opposing evidence, or (treating the inspection as in the nature of evidence) whether it was sufficient to raise a substantial conflict in the evidence. The cause would be determined, not upon evidence given in court, to be discussed by counsel and considered by the court in deciding a motion for a new trial, but upon the opinions of the jurors, founded on a personal inspection, the value or the accuracy of which there would be no method of ascertaining." See, also, *Wright v. Carpenter*, 50 Cal. 556. The reasons above given which render it error for a jury to base its verdict on evidence derived from a personal inspection of the land involved in the action tried before them are equally cogent when applied to a judge making such inspection. The findings of fact made should be upon the oral and documentary testimony introduced at the trial, and not on any fact ascer-

tained by the judge of the court on an examination of the premises involved in the controversy. As the finding above quoted may and appears to have been on the testimony in the cause, and on facts discovered by the judge on the inspection above referred to, we cannot regard it as a finding that the water diverted has not been returned as the law requires. In such a state of the case, a judgment which is manifestly based on the fact that the water has been diverted, and not returned, cannot be regarded as proper.

It may be contended from some of the other findings that the water has been detained for some space of time, but, as the defendant Felt is a riparian proprietor, he has a right to such a reasonable detention of the water in the use of it. The reasonableness of the detention is involved in the question of reasonable use. Whether the use of water is reasonable or not is always a question of fact, to be determined by the court below. Whether, then, the water is reasonably or unreasonably detained, must be a question of fact; and all such questions are to be determined by the tribunal above mentioned. Whether Felt, in using the water, has made an unreasonable detention of it, has not been clearly and distinctly found; and in this state of the case this court cannot act upon it as a fact in the cause. It must be remembered that no injunction can be awarded which can deprive the defendant of the reasonable use of the water for domestic purposes and for the support of life.

For the reasons given above the judgment and order must be reversed, and the cause remanded for a new trial. Ordered accordingly.

McKINSTRY, J., MYRICK, J., and SHARPSTEIN, J., (*concurring*.) We concur in the judgment. In our opinion the findings are too uncertain and indefinite to sustain the judgment of the court below.

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75 Cal. 225

TOMASINI *et al.* v. SUPERIOR COURT DEL NORTE Co. (No. 12,511.)

(*Supreme Court of California.* March 6, 1888.)

CERTIORARI—WHEN LIES—INSOLVENCY—ELECTION OF ASSIGNEE.

An order of a superior court of a county in California appointing an attorney to vote for an absent creditor at the election of an assignee in an insolvent proceeding, and appointing the person chosen at such election assignee, cannot be reviewed on a writ of *certiorari*, the court having jurisdiction of the proceedings.

Department 2. *Certiorari* to superior court, Del Norte county; JAMES E. MURPHY, Judge.

Louis Tomasini *et al.*, petitioners, against superior court, county of Del Norte, respondent.

L. F. Cooper, Sawyer & Burnett, and R. W. Miller, for petitioners.

PER CURIAM. Writ of *certiorari* to review orders of respondent appointing an attorney to vote for an absent creditor at the election of an assignee in an insolvent proceeding, and appointing as assignee the person chosen at such election.

If the petitioners were aggrieved at all by the action of the respondent it was by the order confirming the election and appointing the person selected assignee. But the court had jurisdiction of the proceeding, and the orders complained of, even if erroneous, cannot be reviewed on this writ. The prayer of the petitioners is denied and the writ dismissed.

75 Cal. 245

WINTERHALTER v. WORKMEN'S GUARANTEE FUND ASS'N OF SAN FRANCISCO. (No. 9,913.)

(*Supreme Court of California.* March 1, 1888.)

INSURANCE—ACTIONS ON POLICY—EXECUTORS AND ADMINISTRATORS—RIGHT TO SUE.

The executor of a testator, who, by his will, gave all of his estate after payment of his debts to his mother, is the proper party to sue for and receive the money due on a policy of insurance on testator's life, payable subject to the will of the insured.

Department 1. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Marcus Rosenthal, for respondent. J. G. Severance and Wm. Loewy, for appellants.

v.17p.no.1—1

SEARLS, C. J. Defendant is a corporation, and on the 16th day of March, 1880, plaintiff's testator, Fritz Hoffmeister, became a member of such corporation, and for a valuable consideration received therefrom its certain promise, agreement, and certificate in writing, in the words and figures following, viz.: "WORKMEN'S GUARANTEE FUND ASSOCIATION OF SAN FRANCISCO, CAL., No. 69.

"This is to certify that Fritz Hoffmeister is a member of the Workmen's Guarantee Fund Association of San Francisco, Cal., and as such is entitled to participate in the guarantee fund, to the extent of \$1 to each member of said association in good standing at the death of said Fritz Hoffmeister, provided the number of members at that time shall not exceed 1,000. Said sum of \$1,000 or less, at his death, shall be paid to ———, subject to his will. This certificate is issued upon the expressed condition that said Fritz Hoffmeister shall comply with all the laws, rules, and requirements which are now or may be hereafter enacted by the Workmen's Guarantee Fund Association. In witness whereof, the Workmen's Guarantee Fund Association has caused this certificate to be signed by its president and secretary, and the seal to be attested this 16th day of March, one thousand eight hundred and eighty.

"WORKMEN'S GUARANTEE FUND ASSOCIATION OF SAN FRANCISCO, CAL.
[Seal Corporation.] "P. VEASEY, Vice-President.

"E. M. READING, Secretary."

Hoffmeister never filled the blank in the certificate by inserting the name of a beneficiary, but died on the 4th day of October, 1882, leaving a last will whereby he gave, devised, and bequeathed to his mother, Louisa Hoffmeister, after payment of all his debts and liabilities, all his estate and effects. Plaintiff was named as executor of the will, which has been regularly admitted to probate, etc. Defendant answered, admitting its liability to the extent of \$1,000, but claimed that testator had, by his last will, designated his mother, Louisa Hoffmeister, as his beneficiary, and the person to whom said sum should be paid in the event of his death, and asked that said Louisa be made a party to the action, which was done. Plaintiff had judgment, from which, and from an order denying a new trial, defendants appeal. The articles of association of the defendant provide: "(2) That the purposes for which it is formed are to provide for the payment to the widow, heirs, and legatees of each deceased member thereof, a stipulated sum of money, by contributions from surviving members upon assessments duly made therefor." The constitution of defendant, article 2, provides as follows: "Art. 2. The object of this association is to provide for the payment to the husband, widow, heirs, or legatees of a deceased member, a stipulated sum of money, by contributions from its surviving members upon assessments duly made therefor." The defense also introduced the following in evidence: "The application of intestate for membership in the association contained the following clause: 'I hereby authorize and direct that the amount of said guarantee fund to which I may be entitled shall, at my death, be paid subject to my will.'"

The question presented for determination upon the facts is this: Is the executor entitled to recover the sum due decedent, or does it go directly to his mother, Louisa Hoffmeister? It may be stated that, where a policy of life insurance expressly designates a person as entitled to receive the insurance money, such designation is conclusive, in the absence of some question as to the rights of creditors. The receipt of the person designated will discharge the insurer, and he may sue for and recover the amount due at the maturity of the policy. In such cases the legal representative of the insured has no claim upon the money, and cannot maintain an action therefor. It forms no part of the assets of the estate of the insured. The exceptions to this rule, involving the rights of creditors, are not involved in this case, and need not be commented upon. Bliss, Ins. §§ 316, 317. The policy in the present instance, as will be seen, did not specifically name the beneficiary; it was to be

paid "*subject to my will*;" that is to say, subject to the will of the insured. Whether the term quoted should be interpreted as meaning subject to the last will and testament of the insured, or in the broader sense of subject to his will as expressed by inserting the name of the beneficiary in the blank space left in the policy, apparently for that purpose, need not concern us here, as such blank was never filled. Nor was there any special designation of the mother of deceased as the beneficiary of the amount to be realized on this policy in the will of the deceased, except that all of his property was bequeathed to her after the payment of his debts and liabilities. He left no widow, and we may suppose that, had he left no last will, the sum for which he was insured would, under the articles of association and the constitution of defendant, quoted above, have gone to his heirs. Either this result must follow in such a case, or the policy be held to have lapsed for want of a beneficiary. Such a contingency cannot arise in any event here, for defendant admits its liability, has paid the money into court, and only asks that the question as to the right of the two claimants may be determined, so as to absolve it from liability. Had the testator in his last will specifically nominated his mother as the recipient of the sum to fall due upon his death, it might be contended, alike upon reason and authority, that, under his contract with defendant, she alone was entitled to recover. The undertaking of the corporation defendant was to pay not exceeding \$1,000, subject to the will of deceased. That will, as expressed, is that this sum, in common with all his property, "after payment of all his debts and liabilities," shall go to his mother, Louisa Hoffmeister. It is true that by subdivision 10 of section 690 of our Code of Civil Procedure, this money is not subject to execution and forced sale. So, too, in case of the death of a husband, the probate court may set aside for the use of his family the property exempt from execution, but these provisions cut no figure here, as there is not, so far as appears, any family. The simple fact is that testator has bequeathed the fund in question to his mother, subject to the payment of his debts, and as these debts can only be paid through the interposition of his executor, the court below was correct in its conclusion that the executor was a proper party to have and recover the fund out of which such debts, if any, were to be paid. The executor is the trustee of an express trust, and, as such, under our Code, may sue without uniting with him those beneficially interested. Code Civil Proc. § 369.

We have examined the several decisions quoted from various states in appellant's brief. Most of them depend upon the peculiar statutes of the states in which they were rendered, which are different from our own, and, while we are in accord with most of the reasoning of those cases, we are still of opinion the peculiar facts of this case are sufficient to differentiate it from those referred to. The judgment and order appealed from are affirmed.

We concur: MCKINSTRY, J.; PATERSON, J.

75 Cal. 234

ELLIS v. BRADBURY. (No. 9,725.)

(Supreme Court of California. March 14, 1888.)

1. LANDLORD AND TENANT—LEASES—COVENANT TO PAY TAXES—ACTION ON—PLEADING.
In a suit brought by a lessor for the recovery of taxes paid by him on demised premises which, by the terms of the lease were to be paid by the lessee, it is not necessary to specifically set forth in the complaint the steps necessary to constitute a valid assessment.
2. SAME—ACTION AGAINST SUBLESSEE—AMOUNT OF RECOVERY.
In a suit by a lessor against a sublessee of a portion of the demised premises, where the lease bound the lessee to pay taxes, for taxes paid by the lessor, it is ex-

ror to render judgment in favor of the plaintiff for an amount in the same proportion to the tax on the whole tract that the sublet portion bears to said tract, without reference to the proportionate value of the tracts.

Department 1. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Complaint by Moses Ellis against W. B. Bradbury. Ellis leased certain real estate to Tyler, who agreed in the lease to pay, as the same became due, all taxes levied on the demised premises or any tract thereof levied by any lawful authority during the demised term, and, if paid by the lessor, should be repaid to him by the lessee. Tyler assigned his interest under said lease in a part of said demised premises to Bradbury, who failed to pay the taxes, and the same were paid by the lessor, who brings this suit to recover a proportionate part of the total tax on said premises. The demised tract was assessed as a whole at the same amount per front foot, and the improvements thereon were assessed separately. The portion sublet to Bradbury had a less depth than the remaining portion. Judgment was rendered in favor of plaintiff for an amount in the same proportion to the total tax as the assignee's portion bears to the whole tract. Defendant appeals.

Joseph R. Brandon, for appellant. *T. C. Van Ness*, for respondent.

TEMPLE, J. Plaintiff, by indenture in writing, leased to Samuel Tyler certain lots of land in San Francisco for a term of 15 years. The lessee covenanted to pay all taxes levied or imposed upon said premises or any part thereof, or upon the owner on account thereof. The lessee assigned all his right, title, and interest in said indenture as to a portion of one of said lots leased, to the defendant, Bradbury. This action is to recover a proportion of the taxes on the whole lot, levied after such assignment, and alleged to have been paid by plaintiff under authority given in the lease. In addition to the covenant on the part of the tenant to pay the taxes when they became due, the lease provides that, "if any of said taxes, charges, assessments, or impositions should become due and payable and remain unpaid, and the said demised property should be offered for sale, then the party of the first part may pay the same; or, if said premises, or any part thereof, should be sold, then the party of the first part may redeem the property so sold therefrom; and all sums of money by said party of the first part paid as aforesaid shall be repaid by the party of the second part within ten days, with interest at the rate of 2 per cent. per month." To this complaint a general demurrer was interposed, and the point is made that the steps necessary to constitute a valid assessment are not specifically set forth. It is alleged in general terms that the whole of the lot in question was assessed for state and county taxes, and that the proportionate amount of taxes due upon the portion sublet to defendant is a certain sum.

This suit is upon a covenant in the lease, and the assessment is a collateral matter. Under such circumstances we think the complaint not obnoxious to a general demurrer. We think the covenant was one running with the land, and was divisible, but we think the method adopted to ascertain the proportionate tax upon the portion sublet was clearly erroneous. Property is assessed in proportion to its value, and the division should be made on that basis. The court cannot assume that each portion of the lot had the same value per front foot; especially where, as in this case, the portion sublet had less depth than the remaining portion. Upon this question the method followed by the assessor was an entirely immaterial circumstance. That might or might not be a correct mode of ascertaining the value of the whole lot; but it would not follow that it would be a proper criterion of the relative value of the portion sublet to defendant. Defendant is not sued upon the covenant for allowing the tax to become delinquent, or a sale of the property to be made. The action is for money laid out and expended for his use; and, since it was

his duty to pay when it became due and payable, and the lessor had an interest in its payment, we think he could recover it with interest, after demand. The case will have to be reversed, however, for the error above specified.

Judgment and order reversed, and new trial ordered.

We concur: MCKINSTRY, J.; PATERSON, J.

2 Cal. Unrep. 851

DUNPHY v. HEINMANN. (No. 11,189.)

(*Supreme Court of California.* March 15, 1888.)

APPEAL—FRIVOLOUS.

Where the finding in ejectment is that defendant did not "wrongfully or unlawfully enter upon or oust plaintiff" from the possession of the premises, an appeal on the ground that there was no finding upon the issue as to ouster is frivolous.

Department 1. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

Ejectment by William Dunphy, plaintiff, against Fritz Heinmann, defendant. Judgment for defendant, and plaintiff appeals.

Wm. H. Webb, for appellant. *Geil & Morehouse*, for respondent.

PER CURIAM. Appeal from the judgment. The only point made is that there was no finding upon the issue as to ouster. It is found that plaintiff was not at any time the owner of the premises, or entitled to the possession thereof or any part of the same, "nor did defendant, during any of said time, wrongfully or unlawfully enter upon or oust the plaintiff therefrom, nor then nor now wrongfully withhold the same or any part thereof from plaintiff." This appeal was evidently not taken in good faith, and is frivolous.

Judgment affirmed, with \$50 damages for taking a frivolous appeal.

Cal.Rep. 16-19 P.—19

75 Cal. 256

In re RETY's ESTATE. (No. 12,331.)

(Supreme Court of California. March 16, 1888.)

WILL—CONTEST—ATTORNEY'S FEE—DISCRETION OF COURT.

The appointment of an attorney for absent heirs in the contest of a will, and the allowance to him of a fee, to be paid by the estate, are matters entirely within the discretion of the probate court; and if such allowance be improvident or indiscreet, the court may vacate it at the suggestion of any one, or upon its own motion.

Department 2. Appeal from superior court, Marin county; E. B. MAHON, Judge.

M. C. Baum, pro se. H. Wilkins and J. M. Chretien, for respondents.

McFARLAND, J. At the hearing of the petition for the probate of the will of the deceased, the appellant, M. C. Baum, appeared and contested the same for certain absent heirs. So far as we can learn from the very meager record this contest took place in August, 1886. He was not appointed by the court to represent said heirs at the hearing of the petition for the probate of the will, and it seems that he had no authority from said heirs to appear for them. Afterwards, on April 11, 1887, when, for aught that appears, the contest had been determined, the court made an order "*nunc pro tunc* as of the 2d day of August, 1886," appointing appellant attorney for said absent heirs; and on May 3, 1887, the court made another order directing the executors of the estate to pay said appellant \$800, "as such attorney, and under order of court, *nunc pro tunc* as of August 2, 1886." On June 6, 1887, on motion of the residuary legatee, and upon notice to appellant and the executors, the court made an order vacating and setting aside both of said orders above mentioned. From this order appellant appeals, and also from an order overruling certain objections to the appearance of the said legatee.

Waiving the questions whether or not the order appealed from was an appealable order, and whether or not there was power in the court to make the *nunc pro tunc* order at all, and whether or not the residuary legatee could rightfully appear and make the motion to vacate, still we think that the appointment of an attorney for absent heirs, and the allowance to him of a fee, are matters entirely within the discretion of the probate court, and that if such allowance be improvident or indiscreet, the court may vacate it, at the suggestion of any one, or upon its own motion. Orders affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

75 Cal. 117

HEILBRON *et al.* v. LAST CHANCE WATER DITCH CO. (No. 11,391.)

(Supreme Court of California. February 15, 1888.)

1. LIMITATION OF ACTIONS—ADVERSE USER—LEASED PREMISES.

In an action brought by the lessees to restrain defendant from diverting water from a natural water-course which flowed over the leased land, the defense was adverse user of the water diverted for more than five years prior to the commencement of the suit, and the statute of limitations. *Held*, that even if it were the law that the lessor could not bring such suit while the land was in possession of the lessees, yet if, after the adverse user had commenced, the term of the lease had expired, thus giving the lessor the right of possession, he could not continue to make new leases, and thus indefinitely postpone the running of the statute of limitations.

2. SAME—FAILURE OF LESSOR TO SUE—LESSEE ALSO BARRED.

The land was all the time in the possession of lessees. *Held* that, under Civil Code Cal. § 826, which provides that "a person having an estate in fee, in remainder, or reversion, may maintain an action for any injury done to the inheritance, notwithstanding an intervening estate for life or years," the lessor could have maintained an action against defendant for the alleged diversion at any time within five years after it commenced, and not having done so, he and the plaintiffs, lessees, were barred, and defendant acquired title by adverse user.

v.17p.no.2—5

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

McAllister & Bergin, D. S. Terry, and Brown & Daggett, for appellants. *Bronson & Wells, Atwell & Bradley, and Wells, Van Dyke & Lee*, for respondents.

MCFARLAND, J. This is an action to restrain defendant (a corporation) from diverting water from a natural water-course called "King's River," and for damages for past diversion. The court below, sitting without a jury, gave judgment for defendant, and from the judgment, and an order denying a new trial, the plaintiffs appeal. The plaintiffs, who are August Heilbron, Adolph Heilbron, S. Clayburgh, and S. C. Lillis, aver in their complaint that they "are now, and they and their predecessors and grantors for more than five years last past have been, the owners and in lawful possession of" a large tract of land in Fresno and Tulare counties, in this state, called the "Rancho Laguna de Tache." The facts about their title and possession, as proven and found by the court, are these: On and prior to September 23, 1868, the title in fee to the said *rancho* was in Jeremiah Clarke, to whom it had come by mesne conveyances from Manuel Castro, to whom before that time it had been patented by the United States government. On said September 23, 1868, said Clarke leased the *rancho* to Edwin St. John for a term of 10 years from and after November 1, 1868. St. John took possession under the lease, and so held possession until the 10th day of September, 1874, on which day, with consent of Clarke, he transferred his unexpired leasehold to the plaintiffs herein, who then entered and have been in possession continuously until the commencement of this action, which was October 12, 1883. On April 24, 1877, Clarke made a contract with plaintiffs by which the term of the lease to St. John was extended for the further period of six years, ending November 1, 1884, and plaintiffs were given the privilege of buying a part of the land at a specified price. On May 1, 1880, Clarke made another contract with plaintiffs, by which he leased said *rancho* to plaintiffs for the term of 10 years from said May 1st, with the privilege of buying the whole of the land, and canceled the contract and lease of April 24, 1877. And since May 1, 1880, plaintiff's possession has been under the said contract made that day. Clarke is still the owner in fee of the land. He is not a party to this action. Along this land, and forming a boundary of it for many miles, there is a natural water-course, called "King's River." The defendant, by means of a dam and ditch, has diverted a large amount of the water of this river and carried it away from said land, and continues to so divert and carry it. Plaintiffs bring this action to restrain such diversion, and for damages, basing their cause of action upon the right of a riparian owner to have a natural stream continue to flow as by nature it is wont to flow, over, through, or along his land. Defendant contends that, by an adverse user for a period of more than five years before the commencement of the action, it has acquired the right to have the water continue to flow in its ditch, and pleads the statute of limitations. The court below finds that in 1874 defendant constructed the ditch through which the diversion complained of is accomplished, and that in that year it turned the water of said stream to the extent of a certain number of inches into said ditch, and has ever since continuously used and diverted that amount of water, and no more, claiming the right to do so; "and that said use and diversion by defendant was actual and continuous, open, peaceful, notorious, and known to plaintiffs, and adverse to them for a period of more than five years immediately preceding the commencement of this action." And there is clearly evidence sufficient to support this finding. Plaintiffs contend, however, (and this contention raises the main issue in the case,) that during the lease to St. John, the land being in possession of tenants, the landlord or reversioner, Clarke, could not have maintained an action for the diversion of the water; and that therefore the

statute of limitations did not begin to run against him during the tenancy. And they invoke the doctrine that title by prescription is based upon the fiction of a lost grant; that no grant can be presumed as against the reversioner, because he has no means of resisting the adverse user; and that a tenant for years can make no grant longer in duration than his term.

It is not entirely clear how this proposition, if tenable, could be made available upon the facts in this case. If the principle contended for were correct, still if after the adverse user had commenced the term of lease had expired, thus giving the landlord the right to the possession, he could not continue to make new leases, and thus indefinitely postpone the running of the statute of limitations. The theory of appellants is that as the first lease to St. John did not expire until November 1, 1878, and the complaint was filed October 12, 1883, therefore, the action—according to their contention—was commenced in time. But in April, 1877, while the adverse user was in full force, Clarke, by written contract, extended the lease for six years; thus putting it out of his power, according to the principle asserted, to sue at the end of the first lease. And by contracts and leases overlapping each other, Clarke has, by the rule contended for, disabled himself indefinitely from bringing an action for the alleged diversion of the water. We mention these difficulties in appellants' way because they are obvious; but, as counsel for respondent have not very strenuously insisted upon them, we will examine the case as though the only question presented were: Can the owner in fee of land, having leased it, and while it is in the possession of the tenant for years, maintain an action against a third party for the diversion of water from a natural stream running through the land? Section 826 of the Civil Code provides that "a person having an estate in fee in remainder, or reversion, may maintain an action for any injury done to the inheritance, notwithstanding an intervening estate for life, or years." And it seems clear upon principle and authority that the diversion of natural water from land is "an injury done to the inheritance." The flow of natural water over land is a continuous source of fertility and benefit, and its withdrawal is followed by consequences which are perpetually injurious to the freehold. This is strikingly illustrated by the averments in the complaint in this case, "that the waters of said King's river have hitherto been accustomed to overflow,—seep through and moisten the lands of said *ranch*; whereby the fertility of said lands was greatly increased, and a large and valuable quantity of natural grass was produced upon said lands;" and that, by reason of the diversion of the water by defendant, "said lands have failed to produce their accustomed crops of natural grass." The flow of the water of a stream, whether it overflow the banks or not, naturally irrigates and moistens the ground to a great and unknown extent, and thus stimulates vegetation; and the growth and decay of vegetation add, not only to the fertility, but to the very substance and quantity of the soil. It is not true, therefore, as claimed by appellants, that the water of a natural stream may be taken away from land for a great number of years, and then turned back, without any permanent injury to the land. Moreover, according to the riparian doctrine (upon which appellants rely in this case) "the right to the flow of water is inseparably annexed to the soil, and passes with it, not as an easement or appurtenant, but as a parcel." *Lux v. Haggin*, 69 Cal. 390, 10 Pac. Rep. 674, and cases there cited. In *Cary v. Daniels*, 5 Metc. 238, the court say that the right to the use of water flowing over land is undoubtedly identified with the realty, and is a real and corporeal hereditament. And consequently it has been repeatedly held that a reversioner may maintain an action for interference with natural water, although the land be in the actual possession of a tenant for years. In section 378 of Gould on Waters it is said that "the reversioner may sue for any wrongful interference with the future enjoyment of property. This includes all acts directly injuring his freehold, and all adverse uses tending to establish easements or to abridge his rights." And at section 379 the learned author

says: "In America it has been held that the freehold is injured by causing water to flow back upon the plaintiff's land, or into his race, or by the obstruction of his mill by backwater; or again by withholding water from his mill, or by diverting a natural water-course from his land, or by polluting the stream; and that the reversioner may recover for such injuries." In *Hart v. Evans*, 8 Pa. St. 14, it was held that "the water-course was a permanent advantage to the inheritance, and taking it away was an injury to the inheritance, for which an action would lie;" and that "the gist of the action for diverting a water-course is the diversion, which, in whatever way it is done, is an injury both to the freehold and the possession." It seems clear, therefore, that Clarke might have maintained an action against the defendant for the alleged diversion at any time after it commenced in 1874, and within the statutory period of limitation, (whether that period be four or five years,) and that, not having done so until nearly nine years afterwards, he and the plaintiffs were barred, and defendant acquired title by adverse user. And this is so without considering section 738, Code Civil Proc., which provides that "an action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim;" and without regard to the contention of respondents that the statute of limitations cuts off the remedies off all persons whom it does not expressly except. The point that respondents are not found to "have paid all the taxes, state, county, or municipal, which have been levied and assessed upon said land," (section 325, subsec. 2, Code Civil Proc.,) is sufficiently answered by the fact that it does not appear that any taxes were ever levied or assessed upon the ditch and water-right in question to defendant, or to any person or persons, known or unknown. Judgment and order affirmed.

We concur: SEARLS, C. J.; THORNTON, J.; SHARPSTEIN, J.; MCKINSTRY, J.

PATERSON, J. I dissent. The findings respecting adverse use are contradictory; there can be no adverse use to set the statute in motion where the use is by consent.

The description of the quantity, viz., "14,400 cubic inches per second under a 4-inch pressure of the waters of said river," is uncertain. If it means "14,400 cubic inches per second," or "14,400 inches under a 4-inch pressure," it is not supported by the evidence.

HEILBRON *et al.* v. EMIGRANT DITCH CO. (No. 11,468.)

(*Supreme Court of California.* February 15, 1888.)

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

D. S. Terry and *Brown & Daggett*, for appellant. *Tupper & Tupper*, for respondents.

PER CURIAM. The points in this case are so nearly identical with those passed on in the case of *Heilbron v. Ditch Co.*, *ante*, 65, (No. 11,391,) that another opinion on those points is unnecessary. On the authority, therefore, of the last-named case, the judgment and order are affirmed.

HEILBRON *et al.* v. PEOPLE'S DITCH CO. (No. 11,393.)

(Supreme Court of California. February 15, 1888.)

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Brown & Daggett and *D. S. Terry*, for appellants. *Wells, Van Dyke & Lee* and *Atwell & Bradley*, for respondents.

PER CURIAM. Upon the authority of *Heilbron v. Ditch Co.*, ante, 65, (No. 11,391,) the judgment and order are affirmed.

LOWER KING'S RIVER WATER DITCH CO. v. HEILBRON *et al.* (No. 11,443.)

(Supreme Court of California. February 15, 1888.)

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Brown & Daggett and *D. S. Terry*, for appellants. *Bronson & Wells, Atwell & Bradley*, and *Wells, Van Dyke & Lee*, for respondents.

PER CURIAM. Upon the authority of *Heilbron v. Ditch Co.*, ante, 65, (No. 11,391,) the judgment and order are affirmed.

75 Cal. 250

QUINLAN v. NOBLE. (No. 12,113.)

(Supreme Court of California. March 14, 1888.)

EASEMENT—PURCHASER TAKES SUBJECT TO.

The owner of a tract of land through which a water-ditch had been dug, divided the tract, and conveyed the same to different grantees, one of whom obstructed the ditch, so as to cut off the supply of water to the other's land. Held, that he took subject to the easement, and could not obstruct it.

In bank. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

Action by Michael Quinlan against George A. Noble to remove an obstruction in a water-ditch. Judgment for plaintiff, and defendant appeals.

Ward & Grady and *Stuart S. Wright*, for appellant. *R. B. Terry*, (*H. S. Dixon*, of counsel,) for respondent.

McFARLAND, J. This is an action to remove an obstruction in a water-ditch. The verdict and judgment were for plaintiff, and defendant appeals. At the close of plaintiff's evidence defendant moved for a nonsuit, which was denied. It does not appear that any evidence was offered by defendant, and the verdict went for plaintiff. Appellant's argument is addressed mainly to the point that the court erred in denying the nonsuit.

The evidence was sufficient to warrant the court and jury in finding the following facts: At the commencement of the action, June 1, 1886, plaintiff was the owner of a certain tract of land called "Lot No. 10," and defendant was the owner of a tract of land adjoining said lot 10. On the 18th day of May, 1873, William S. Chapman was the owner in fee of both these tracts, and continued to be the owner thereof until he disposed of them as herein-after mentioned. In November, 1875, he made a written contract with one F. A. Pierce for the conveyance to the latter of said lot 10, and put Pierce in possession. In May, 1878, Pierce assigned and conveyed all his title and interest in the contract and land to D. W. Shepard; and in March, 1879, Shepard, in like manner, assigned and conveyed to Julia A. Fink Smith (widow.) In January, 1881, Chapman conveyed said lot 10 to said Mrs. Smith and T. C. White in fee-simple, in pursuance of the said contract with said Pierce.

Afterwards, through mesne conveyance, the title to said lot 10 was vested in plaintiff on September 1, 1885. The said adjoining tract, owned by defendant, was conveyed by said Chapman to the Bank of California on the 20th of April, 1879; and, through mesne conveyances, the title to it vested in defendant in December, 1882. As early as 1877 Chapman, while he owned both tracts, built a ditch across the tract now owned by defendant, to said lot 10, for the purpose of irrigating the latter; and from 1877 until after the conveyance of lot 10 to plaintiff in September, 1885, there has continuously been a ditch across the tract owned by defendant to lot 10, and used by the owners of the latter for its irrigation, although the course of the ditch over defendant's tract was at one time changed by the owners of said tract from what was called "Ditch No. 1" to "Ditch No. 2." It was there when plaintiff purchased lot 10, in September, 1885, but was obstructed shortly afterwards by defendant.

Taking these to be the facts, we think that the judgment of the court below was right, and that without reference to the question of adverse user. While Chapman owned all the land there probably could have been no relation of dominant and servient tenement between the tracts, but when he severed them by sale and conveyance, the grantee of each took it in the form which it assumed when he acquired it. This was held to be the law in *Cave v. Crafts*, 53 Cal. 139. In that case Mr. Justice MCKINSTRY, delivering the opinion of the court, quotes approvingly the language of DENIO, J., in *Lampman v. Mills*, 21 N. Y. 505, as follows: "The rule of the common law on this subject is well settled. The principle is that where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion of it, the purchaser takes the tenement or portion sold with all the benefits and burdens that appear at the time of sale to belong to it, as between it and the property which the vendor retains. * * * No easement exists so long as the unity of possession remains, because the owner of the whole may at any time rearrange the quality of the several servitudes; but upon severance by the sale of a part, the right of the owner to redistribute ceases, and easements or servitudes are created corresponding to the benefits or burdens existing at the time of sale."

Judgment and order denying a new trial affirmed.

We concur: SEARLS, C. J.; MCKINSTRY, J.; SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.

75 Cal. 284

PHARIS v. MULDOON. (No. 12,208.)

(Supreme Court of California. March 20, 1888.)

MINES AND MINING—RELOCATION—WHAT CONSTITUTES.

Rev. St. U. S. § 2324, provides, upon failure of a locator to expend \$100 each year on his mining claim, the same shall be open to relocation, unless the original locator resume work thereon before such relocation. Defendant's claim became, under that statute, open to relocation January 1, 1886, and at 1 A. M. plaintiff posted his notice. He did not, however, mark out his boundaries until January 5th, and defendant, on January 1st, at the usual hour in the morning, resumed labor, did work to the amount of \$10 up to January 5th, and \$200 during that year. *Held*, plaintiff's proceedings, not amounting to location before work was resumed, conferred no right upon him.

Commissioners' decision. Department 2. Appeal from superior court, Amador county; C. B. ARMSTRONG, Judge.

Defendant, E. Muldoon, on July 14, 1884, located the claim in controversy, but during the year of 1885 expended thereon no more than \$60. Plaintiff, Alfred Pharis, claiming under a relocation, on January 1, 1886, brought this action to quiet title. Judgment was entered for defendant, and plaintiff appeals.

Curtis H. Lindley and *D. B. Spagnoli*, for appellant. *Eaton & Rust*, for respondent.

FOOTE, C. Action to quiet title to a mining claim. It is found by the court, and assumed by counsel upon both sides, that the claim of the defendant was not open to relocation until January 1, 1886. At 1 o'clock A. M. of that day plaintiff posted his notice, but did not mark out his boundaries until January 5th. In the mean time, that is to say, at the usual hour of commencing work of that kind, on the 1st day of January, 1886, the defendant resumed labor on his claim, did \$10 worth of work on it up to the 5th of January, 1886, and afterwards, during that year, performed labor upon it to the amount of \$200 more. The marking of boundaries is a necessary part of the location, (*Newbill v. Thurston*, 65 Cal. 419, 4 Pac. Rep. 409,) and this was not done until January 5, 1886. The defendant had resumed work "after failure and before location." This being the case, the plaintiff's proceedings conferred no right upon him, (*Mining Co. v. Deferrari*, 62 Cal. 163,) even if we concede, what we are not prepared to admit, that an entry by stealth at 1 o'clock in the morning is within the contemplation of the act of congress (section 2324, Rev. St. U. S.) The other points made require no special notice. It results that the judgment should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

75 Cal. 282

SCHUMACHER v. CONNOLLY, Sheriff. (9,711.)

(Supreme Court of California. March 20, 1888.)

ATTACHMENT—WRONGFUL—DAMAGES—EVIDENCE.

Judgment for \$300 damages for wrongful attachment sustained, the evidence being conflicting as to the value of the property attached.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Action for damages for wrongful seizure of property under writ of attachment against a third party, brought by Frederick Schumacher against Patrick Connolly, Sheriff. Judgment for plaintiff, and defendant appeals.

Geo. A. Knight, for appellant. *Henry Eickhoff*, for respondent.

FOOTE, C. This was an action for damages against Connolly, as sheriff, for the alleged wrongful seizure of the plaintiff's property, under writ of attachment against one R. White. The cause was tried by a jury. The plaintiff had a verdict for \$600. A motion for a new trial was duly made, and the court below ordered "that said motion be granted, unless the plaintiff shall consent in writing to a reduction of the judgment herein from the sum of six hundred dollars to the sum of three hundred dollars, in which case the judgment will be modified accordingly, and the said motion for a new trial denied." The plaintiff consented to have the judgment modified as required by the court, and from the judgment thus made and given, and the order denying a new trial, this appeal is taken.

The point is made by the appellant that the judgment should be reversed because the evidence shows that there was no immediate transfer and actual and continued change of possession of the property attached, either from White, the defendant in the attachment suit, to one Seligman, who first bought the goods, or to his vendee, Schumacher, the present plaintiff. It was also claimed that the sale was fraudulent. We perceive nothing in the record to warrant us in sustaining the last contention. The evidence sufficiently shows

an immediate transfer, and an actual and continued change of possession of the property attached from White, the defendant in attachment, to Seligman, and from him to the plaintiff. There was a conflict in the evidence as to the value of the property attached, and the modification of the judgment under the order of the trial court should stand.

We advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

WARD v. DOUGHERTY. (No. 11,085.)

(Supreme Court of California. March 14, 1888.)

1. DEED—DELIVERY—PRESUMPTION.

In an action to quiet title, plaintiff produced at the trial a deed from defendant, executed and acknowledged by him, duly recorded, and forming part of the chain of title from defendant to plaintiff. *Held*, that such facts constitute *prima facie* evidence of delivery, and, under Civil Code Cal. § 1055, providing that "a grant duly executed is presumed to have been delivered at its date," such delivery will be presumed to have been at the date of the deed.

2. SAME—IDENTITY OF GRANTOR—PRESUMPTION.

Code Civil Proc. Cal. § 1963, provides that identity of person shall be presumed from identity of name. *Held* that, in an action to quiet title, where plaintiff claimed under a deed executed in the name of defendant, it will be presumed to be defendant's deed.

3. RES ADJUDICATA—LIEN FOR STREET ASSESSMENT—FORECLOSURE.

In an action to quiet title, plaintiff claimed under a sheriff's sale, made in pursuance of a decree of foreclosure of the lien of a street assessment. Such assessment was, in that decree, declared paramount to the lien of a mortgage, the mortgagee under whom defendant claimed having been made a party to such proceeding to foreclose. *Held*, that defendant, being in privity of estate with such mortgagee, and the court rendering such decree having jurisdiction of the subject-matter and of the person of the defendant in such proceeding, it cannot be attacked collaterally by defendant's showing that the assessment had been paid.

4. MORTGAGES—FORECLOSURE—SHERIFF'S DEED TO PURCHASER AFTER CONVEYANCE BY LATTEK.

Defendant held a certificate of purchase under a foreclosure sale. The time for redemption had passed, and he conveyed the premises by quitclaim deed to plaintiff's grantor before the sheriff's deed had been made to him. *Held*, that the sheriff's deed subsequently made to defendant is void as between him and plaintiff.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

John J. Coffey, for appellant. *Wm. M. Pierson*, for respondent.

SEARLS, C. J. This is an action to quiet title to a lot of land at the corner of Van Ness avenue and Broadway, San Francisco. Plaintiff deraigned title through a quitclaim deed executed by the defendant, John Dougherty, on the 14th day of June, 1870, to one Patrick J. Tannian, and recorded June 18, 1870, at the request of one Julius George. Plaintiff, in further support of title in herself, introduced a deed from P. J. White, sheriff of the city and county of San Francisco, to James Gaffney, under whom plaintiff claims by sundry mesne conveyances, dated July 5, 1883, and executed pursuant to a decree, order of sale, and sale in the case of *James Gaffney v. Barnaby Dougherty*, in an action to foreclose the lien of a street assessment under a contract made the 9th day of September, 1866. It appears from the judgment roll that Denis Mahoney, one of the defendants in the action, set up in a cross-complaint the prior lien upon the property of a mortgage thereon executed May 26, 1864, by Barnaby Dougherty to David Mahoney, and assigned to him, the said Denis Mahoney, by the mortgagee, David Mahoney. The lien of the street assessment was declared to be paramount to that of the mortgage. Date of decree, December 14, 1867; date of sale thereunder, January 22, 1868. Defendant claims title to the premises under a sheriff's deed, dated July 3, 1883, and executed pursuant to a foreclosure and sale of the premises under the mortgage above mentioned, in an action in which Denis Mahoney was plaintiff and B. Dougherty defendant. Decree entered March 19, 1868; sale April 14, 1868, to Denis Mahoney, who received a certificate of sale, and assigned the same to the defendant on the 22d day of September, 1868, with all his right, title, and interest in the premises. James Gaffney was made a party defendant in this last-named action, but there was a dismissal as to him, and no decree was taken against him. Upon the closing of the testimony on the part of plaintiff, defendant moved for judgment as in case of nonsuit, upon the ground that there was no proof of delivery of the deed from defendant

Dougherty to P. J. Tannian. The motion was overruled, and this action is assigned as error.

We find in the record no specification of the particulars in which the evidence is alleged to be insufficient, but, waiving this point, we think there was sufficient evidence of the delivery of the deed by the defendant to the grantee therein named. It was regularly executed, acknowledged, and recorded as a conveyance of title to the premises in dispute. It formed a part of the regular chain of title from the defendant to plaintiff, and was produced and offered in evidence at the trial by the attorney of the latter. It is hardly necessary to say that a deed only takes effect upon delivery, and that without such delivery it has no validity. Possession of a deed of property, however, by the grantee therein named, and upon the same principle by one holding by conveyance of the same property under him, is *prima facie* evidence of its delivery. The question of delivery being one of fact, and possession being only primary evidence of delivery, he who disputes such fact may rebut the presumption arising from possession by showing that there has in fact been no delivery; but it has been said that where a deed is found in possession of the grantee, nothing but the most satisfactory evidence of non-delivery should prevail against the presumption. Devl. Deeds, § 294. In *Tunison v. Chamblin*, 88 Ill. 379, it was said: "When a deed duly executed is found in the hands of a grantee, there is a strong implication that it has been delivered, and only clear and convincing evidence can overcome the presumption. Otherwise titles could be easily defeated, and no one could be regarded as being secure in the ownership of the land. It cannot be that a grantor may assail a conveyance fifteen or twenty years after a deed has been made, and recover the land by merely swearing that he never delivered the deed. The unsupported evidence of the grantor surely cannot be permitted to have such effect, especially when the evidence of such a grantor is in many material matters contradicted, and who seems to act on a low moral plane. To so hold would render all titles insecure, and would be disastrous in the extreme. Any system of jurisprudence adopting rules for the attainment of justice can never sanction a rule fraught with such unjust and iniquitous results." In *Branson v. Caruthers*, 49 Cal. 374, it was said: "The production of the deed of gift by the attorneys of the wife (the grantee) was sufficient evidence of its delivery and acceptance." *Barr v. Shroeder*, 32 Cal. 609. Section 1055 of the Civil Code provides that "a grant duly executed is presumed to have been delivered at its date." It may be inferred from the decision in *Boyd v. Slayback*, 63 Cal. 493, that this court was of opinion that this inference only applied to the time, and not to the fact, of delivery. In other words, that the fact of delivery must be proven by other and competent evidence, and that, when proven, the presumption of the Code as to the time of such delivery applies. In view of this interpretation the fact of delivery of the deed from defendant to Tannian having been sufficiently proven by its production by the attorneys of plaintiff, who held under him, the date of such delivery will, under the Code, be deemed to have been the date of the instrument, viz., June 14, 1870. So, too, John Dougherty, who executed the deed, is presumed, under section 1963 of our Code of Civil Procedure, to be the John Dougherty who is defendant in the cause, upon the theory that identity of person is presumed from identity of name. What is said here will apply with like effect to similar errors assigned upon the introduction of other deeds. The only other alleged error is predicated upon the refusal of the court to permit defendant to testify in answer to the following question: "Do you know of your own knowledge whether the assessment for that street work was paid by Denis Mahoney?" The proffered evidence involved an attempt to show by parol, in a collateral attack, that the decree of foreclosure of the lien of the street assessment, and the sale and deed thereunder, were void by reason of the payment of such assessment. Both plaintiff and defendant are in privity of es-

tate with Denis Mahoney, and the decree, being fair on its face, and rendered in a case where the court had jurisdiction of the subject-matter, and of the person of defendant, is not subject to collateral attack. Again, if we dismiss from view the title of plaintiff, based upon the sale under foreclosure of the lien for street assessment, which was found to be paramount to the lien of the mortgage, under which defendant claims title, and the case stands thus: Defendant held a certificate of purchase under the foreclosure sale. The time for redemption had expired. He had a perfect equitable title, which only lacked a sheriff's deed to turn it into a legal title. In this condition of things he conveyed by his quitclaim deed on the 14th day of June, 1870, to Tannian, from whom plaintiff derains title. In *Green v. Clark*, 31 Cal. 592, it was held that if one who has purchased land at sheriff's sale quitclaims his interest in the same, before a sheriff's deed is given, the quitclaim is equivalent to an assignment of the sheriff's certificate of sale, and if the sheriff afterwards give a deed to the purchaser, the deed is void as between the parties.

It follows that, were we to concede the error upon the exclusion of defendant's testimony to be well assigned, the conclusion rendered by the court below was correct. Judgment affirmed.

We concur: MCKINSTRY, J.; PATERSON, J.

75 Cal. 253

REAGAN v. JUSTICE'S COURT OF THE CITY AND COUNTY OF SAN FRANCISCO
et al. (No. 11,228.)

(*Supreme Court of California.* March 15, 1888.)

1. REVIEW, WRIT OF—WHEN LIES—JUDGMENT BY DEFAULT.

A judgment rendered upon default by a court having jurisdiction of the parties and the subject-matter cannot be questioned upon a writ of review.

2. PLEADING—COMPLAINT—SUFFICIENCY.

A complaint upon contract, to which the plea of the statute of limitations or of frauds has not been properly interposed, will be presumed to state a good cause of action as to these defenses, unless the contract is one which must be in writing, to confer jurisdiction on the court.

Department 1. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

Appeal from a judgment dismissing a writ of review in the case of Daniel Reagan, plaintiff and appellant, against the justice's court of the city and county of San Francisco, and William B. Smith, a justice of said court, and Bridget Fitzgerald, executrix of the last will and testament of Patrick Fitzgerald, deceased, defendants and respondents.

John D. Whaley, for appellant. *M. Cooney*, for respondents.

SEARLS, C. J. This is an appeal from a judgment of the superior court of the city and county of San Francisco dismissing a writ of review to the justice's court of said city and county. An action was commenced in the justice's court. The following is a copy of the complaint:

"IN THE JUSTICE'S COURT OF THE CITY AND COUNTY OF SAN FRANCISCO,
STATE OF CALIFORNIA.

"*Bridget Fitzgerald, Executrix of the Last Will of Patrick Fitzgerald, Deceased, Plaintiff*, vs. *Daniel Reagan and Ann Reagan, Defendants*.

"The above-named plaintiff complains of the above-named defendants, and alleges that the said Patrick Fitzgerald died in said city and county on or about the 28th day of July, 1884, leaving a will, which, after due proceedings had, was admitted to probate as his last will and testament on the 13th day of August, 1884, in and by the order and decree of the superior court of said city and county, duly made and given herein. And on or about the same day letters testamentary upon his estate issued to said plaintiff, Bridget Fitzgerald,

out of said court, and she then and there qualified as executrix of said will, and she ever since has been, and now is, such executrix. That at the time of the death of said Patrick Fitzgerald the said defendants were indebted to him in the sum of \$381, gold coin of the United States, for money loaned by said deceased to the defendants in his life-time, and legal interest on the same. That in about three months after the said death the defendants promised to pay said sum of \$381 to said executrix, but they have not paid the same, or any part thereof, except the sum of \$101, leaving a balance of \$280 still due and unpaid, which sum is now payable to said plaintiff as executrix. Wherefore the plaintiff prays for judgment against the defendants for the sum of \$280, with interest and costs. M. COONEY, Attorney for Plaintiff."

Indorsed: "Filed February 4, 1885.

"FRANK MURPHY, Clerk.

"By M. T. DWYER, Deputy-Clerk."

Summons in due form was issued, returnable February 9, 1885, which was duly served, together with a copy of the complaint upon the defendant. He failed to appear to the action on the 9th, but on a day later, on the 10th, filed a demurrer to the complaint, which was stricken out, and judgment entered against him by default, as prayed for in the complaint. Before the expiration of 10 days he moved, on notice and affidavit under section 859, Code Civil Proc., to set aside the default, and for leave to answer. The motion was met by counter-affidavits, and was denied by the court, whereupon a writ of review was sued out from the superior court, which, upon the coming in of the return, was dismissed, as hereinbefore stated.

The complaint stated a cause of action against the defendant. The right to interpose the plea of the statute of limitations is waived, unless taken advantage of by demurrer or answer; and, had the complaint shown affirmatively on its face that the demand was so barred, it could have availed defendant nothing, in the absence of such demurrer or answer. So, too, where, under the statute, an agreement is required to be in writing, such agreement, if in other respects properly pleaded, will be presumed, for the purpose of testing the sufficiency of the pleading, to have been in writing. *Wakefield v. Greenwood*, 29 Cal. 598; *Miles v. Thorne*, 38 Cal. 335; *Vassault v. Edwards*, 43 Cal. 458; *Blennan v. Ford*, 46 Cal. 8. The exception to the rule arises in cases where the contract must necessarily be in writing, to confer jurisdiction on the court. *Cory v. Hyde*, 49 Cal. 469. In justices' courts, pleadings are not held to any great degree of strictness; but waiving this leniency to the pleading, and we are of opinion it was quite sufficient, in the absence of objection, to constitute a cause of action, under our Code, in any court. The court had jurisdiction of the subject-matter, and of the person of the defendant. We see nothing in the record to indicate that the court did not regularly pursue the authority conferred upon it by law. If, in so doing, it committed errors, it is not the province of the writ of review to correct them, as it only issues in case where the inferior tribunal, board, or officer, exercising judicial functions, has exceeded its jurisdiction, and there is no appeal or other plain, speedy, and adequate remedy. In *Clark v. Superior Court*, 55 Cal. 199, this court held that should the superior court, having jurisdiction, order judgment for one of the parties without a trial, the judgment, while erroneous, would not be in excess of jurisdiction, and the only remedy would be by appeal. The decision proceeds upon the theory that such action would not be without or in excess of the jurisdiction of the court. Applying the reasoning of that case to the question involved here, we are of opinion no proper foundation was laid for the issue of the writ, and that it was properly dismissed. Judgment affirmed.

We concur: MCKINSTRY, J.; PATERSON, J.

75 Cal. 237

POWERS et al. v. BRALY et al. (No. 9,994.)*(Supreme Court of California. March 14, 1888.)***1. APPEARANCE—WHAT CONSTITUTES—BY ATTORNEY.**

An attorney having appeared for the purpose of striking out an amended complaint, and having asked for an extension of time in which to plead until the motion to strike out is decided, has not so appeared as to constitute a waiver of the service of summons by defendant, under Code Civil Proc. Cal. § 416, which provides that a defendant appears in an action when an attorney gives notice of appearance for him.

2. PRACTICE—SERVICE OF AMENDED COMPLAINT—DEFENDANT NOT SUMMONED.

The service of an amended complaint upon a defendant who was not a party to the suit in the first instance, and has never been served with summons, is void.

3. SAME—SERVICE ON ATTORNEY.

The service of an amended complaint upon an attorney, prior to his appearance in a cause for the defendant, does not constitute a valid service of such complaint upon the defendant.

Department 1. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Action by John Powers and Catherine Powers against Margaret J. Braly, executrix, and William R. Sloan, executor, to quiet title. Judgment was rendered by default in favor of plaintiff. Defendants appeal.

W. R. Daingerfield, for appellants. *J. B. Hart*, for respondents.

SEARLES, C. J. This is an appeal from a final judgment by default in favor of plaintiffs, and against all the defendants. The action was originally brought by John Powers against Margaret J. Braly to quiet title to a parcel of land, by filing a complaint. Some time afterwards, and without any order or leave of the court, plaintiff filed an amended complaint making Catherine Powers, a party plaintiff with himself, and adding William R. Sloan, executor, and Margaret J. Braly, executrix, of Marcus Braly, deceased, as parties defendant. *W. R. Daingerfield, Esq.*, was the general attorney of the defendants, and of all of them. The amended complaint was served upon defendant Sloan, and upon Daingerfield as and for defendant Margaret J. Braly. Two extensions of time were granted by plaintiffs' attorney to Daingerfield to answer. On the 22d day of December, 1882, Daingerfield gave notice that on December 29, 1882, he would move the court to strike out the amended complaint, and dismiss the action as to Sloan. This notice specified that Daingerfield appeared specially. On the same day said Daingerfield applied to the court for extension of time for defendants to move and plead until it was determined which complaint he should plead to; and on the 23d day of December, 1882, the court made an order granting all the defendants until five days "after notice of decision of motion to strike out amended complaint in which to plead." The notice to strike out was denied on the 23d day of January, 1883, and notice thereof served upon Daingerfield the same day. The summons (if any there was) was never served upon any of the defendants, and never was amended to meet the changes of parties plaintiffs and defendants.

1. The service of the amended complaint was void as to the defendant Sloan, because no service of a summons upon him or his co-defendants was had, and equally void as to defendant Braly, because, at the date of such service, Daingerfield, upon whom it was served, had not appeared as an attorney in the cause.

2. Daingerfield never appeared as an attorney of record in the cause so as to waive service of summons and complaint under section 416, Code Civil Proc. "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." Code Civil Proc. § 1014. None of these things were done. The appearance of Daingerfield to strike out the amended complaint was special, for that particular purpose, and in no sense a general ap-

pearance in the cause, and his asking the court for an extension of time to move or plead, until the motion was disposed of, was an act ancillary to the motion, which neither in letter nor spirit complied with the provision of the Code as to an appearance as attorney of record for the defendants. It follows that there was no waiver of service, and the defaults of defendants were improperly entered.

The judgment appealed from is reversed, and the cause remanded.

We concur: MCKINSTRY, J.; PATERSON, J.

75 Cal. 230

REAGAN v. FITZGERALD. (No. 11,148.)

(Supreme Court of California. March 14, 1888.)

JUDGMENT—BY DEFAULT—ACTIONS TO SET ASIDE.

In an action brought to annul a judgment rendered in justice's court by default, regular on its face, and for an injunction restraining the collection of the same, where the complaint showed that a motion, made under Code Civil Proc. Cal. § 859, giving to justices of the peace the power to relieve from judgments by default in case of mistake, etc., on good cause being shown, was denied, it appearing that plaintiff had pursued an adequate remedy at law, a demurrer to the complaint is properly sustained, and, on refusal to amend, the injunction should be dismissed.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN J. FINN, Judge.

Action brought by Daniel Reagan to annul a judgment against him by default in a justice's court, and for an injunction restraining the collection or assignment thereof, against Bridget Fitzgerald, executrix of the will of Patrick Fitzgerald, deceased. Plaintiff appeals from a final judgment for defendant and from an order dissolving an injunction.

John D. Whaley, for appellant. M. Cooney, for respondent.

SEARLS, C. J. This is an appeal from a final judgment render in favor of defendant on sustaining a demurrer to plaintiff's complaint, and refusal by the latter to amend, and from an order dissolving an injunction. The action was brought to annul a judgment rendered in favor of the plaintiff by default in a justice's court, and for an injunction restraining the collection or assignment thereof. It appears from the complaint that the defendant, as executrix of the last will of Patrick Fitzgerald, deceased, brought suit against the plaintiff herein in a justice's court to recover \$280, as for money loaned to the latter by defendant's testator. Summons was regularly served upon plaintiff, but the latter, being unable to read, made a mistake as to the return-day, which was February 9, 1885, and did not appear in the cause until the following day, when he caused a demurrer to be filed to the complaint. This demurrer was on the 18th of February stricken out, on motion of plaintiff's counsel therein, and judgment entered against the defendant. On the 21st day of February, 1885, defendant in that case moved the court to vacate the judgment and permit him to file an answer, basing his motion on the ground of mistake, inadvertence, and excusable neglect, and averring that he had a good and meritorious defense to the action on the merits. What particular facts were set out in the justice's court, to show a meritorious defense to the action, beyond a statement of non-indebtedness, does not appear. The motion to set aside the default was denied March 5, 1885, and thereupon this action was instituted. Section 859, Code Civil Proc., gives to justices' courts power, "on such terms as may be just, and on payment of costs, [to] relieve a party from a judgment by default taken against him by his mistake, inadvertence, surprise, or excusable neglect, but the application for such relief must be made within ten days after the entry of the judgment and upon affidavit showing good cause therefor." The application to set aside the default was in due time. Injunctions to restrain proceedings at law are granted

in instances where the facts show it to be against conscience to enforce such proceedings, and at the same time show that the injured party could not have availed himself of such facts in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence on his part. In such cases it mattered not whether the application was made before or after judgment or execution, and upon a proper showing a court of equity would interfere by injunction to restrain the adverse party. Bills of this sort are frequently termed bills for a new trial. Story, Eq. Jur. § 887. Not that a new trial was in fact ordered in the court of law, for this could not be done, but that the result reached was tantamount thereto. As above stated, a case for relief by way of injunction against a judgment at law must present facts not only showing the equitable rights of the complainant, but also showing that he could not have availed himself of such facts in the legal forum. The tendency of modern legislation and practice has been to greatly abridge the necessity for this class of bills by providing remedies in the courts of law for many of the exigencies which called them into existence.

Thus, in the present case, we may assume that default was taken against the plaintiff herein by his inadvertence and excusable neglect, and that he had a perfect defense to the action; a case in which he would formerly have been entitled to relief in equity. But we cannot say he was powerless to take advantage of this mistake at law, for the reason that section 859, quoted above, is expressly designed to give relief in such cases, and thus, by a short and adequate process, to secure the ends formerly attained by the long and cumbersome process of a bill in equity. He not only could, but did, move under this section in the justice's court. The contention of plaintiff is that the justice improperly decided against him, and that he has no appeal. The answer is that a court of equity does not sit as a court for the correction of errors in actions at law, and it never grants relief upon the ground of error or mistake in the judgment of the court of law, or because the court of equity, in deciding the same questions, passed upon by the law court, would have reached a different conclusion. Story, Eq. Jur. (3d Ed.) § 1575. We are, of course, speaking of judgments fair upon their face, and not of void judgments, which may be impugned anywhere, and by direct or collateral attack. Even were we authorized to examine into the propriety of the action of the court in refusing to set aside the default of plaintiff, which we are not, we have not the record before us upon which he acted; *non constat*, but there may have been good reasons appearing for the refusal complained of. It follows that, as it appears affirmatively from the law and the complaint, not only that plaintiff had an adequate remedy in the action at law, but that he pursued it, the complaint is insufficient to warrant the relief asked, and the demurrer was properly sustained; and, as he declined to amend, and final judgment was rendered against him, the injunction was properly dismissed.

Judgment and order affirmed.

We concur: MCKINSTRY, J.; PATERSON, J.

75 Cal. 261

DAVIS v. HEIMBACH *et al.* (No. 12,383.)

(Supreme Court of California. March 20, 1888.)

I. PRINCIPAL AND SURETY—CONTRIBUTION BETWEEN SURETIES—NOTICE OF CLAIM.

Code Civil Proc. Cal. § 709, provides that, in an action against a principal and sureties, a surety is entitled to the benefit of the judgment to compel contribution from his co-sureties, provided he file with the clerk notice of his payment and claim to contribution. *Held*, in view of such provision requiring the filing of notice, an execution by a surety against his co-sureties will be quashed when obtained without serving notice upon them.

Cal.Rep. 16-19 P.—20

2. SAME—AGREEMENT BETWEEN SURETY AND PRINCIPAL—EFFECT ON REMEDY AGAINST CO-SURETIES.

A surety who agrees with his principal, in a written contract entered into before judgment recovered against them, to pay the whole of his principal's debt, is not entitled to execution against his co-sureties, nor to show in such summary proceeding that the contract was entered into by him through mistake, and should be set aside.

Commissioners' decision Department 1. Appeal from superior court, Colusa county; E. A. BRIDGFORD, Judge.

H. M. Albery, for appellant. *Richard Bayne*, for respondent.

HAYNE, C. This is an appeal by defendants McDaniel and Miller from an order quashing an execution issued at their instance against their co-defendants Wiles and Ludy. It appears that these four parties were sureties upon a note of defendant Heimbach to the plaintiff, Davis, and were all defendants in the action, which was upon the note. Judgment having been entered against them, McDaniel and Miller paid the whole amount, and then, under section 709, Code Civil Proc., took out a writ of execution against their co-defendants, Wiles and Ludy, for their proportion. This execution was quashed by order of the court, and from this order the appeal is taken. The section referred to provides that contribution may be enforced in this summary manner "if, within ten days after his payment," the party files a notice, etc. The whole sum paid was \$5,600.58. Of this \$3,354.30 was paid on May 18th, and the remainder not until June 24th. The notice and claim were filed on June 27th. It is open to doubt whether such filing was "within ten days after his payment;" for, the proceeding being statutory, the course pointed out by the statute must be strictly pursued. *Hansen v. Martin*, 63 Cal. 282. But, without expressing an opinion upon this point, we think there are other grounds upon which the order should be affirmed.

1. The order directing the issuance of the execution was obtained without notice to the parties to be affected by it. We have not been referred to any decision in relation to the section under which the proceedings were taken. But there are several decisions in relation to section 942, which provides for the entry of judgment against sureties on appeal-bonds. In *Ladd v. Parnell*, 57 Cal. 232, the court said that it saw nothing in the point that that section was unconstitutional. But in that case it appears from the opinion that notice had been given, and from the argument of counsel it would seem that the point in which the court could see nothing was that the sureties were entitled to a trial by jury. In the subsequent case of *Meredith v. Mining Ass'n*, 60 Cal. 617, it was held that the sureties on an appeal-bond were not entitled to notice of an application for judgment against them. The ground of the decision seems to have been that the section did not provide for notice, and that it must be presumed that the sureties contracted with reference to existing law, which therefore entered into and formed a part of their contract. It is to be observed of this case that the statute construed does not in terms dispense with notice. It is simply silent upon the subject. And if it be true that, when taken in connection with other provisions of the same Code, (sections 1005 and 1011,) it does not provide for notice, yet it is deserving of consideration whether, in view of the importance of an opportunity to be heard,—a right which almost always exists,—it ought not to be presumed that the parties contracted with reference to it, and that it formed a part of their contract. To say otherwise is to dispense with a fundamental and important right by a somewhat strained application of an artificial rule of construction of a contract. But, however this may be as to the section in relation to appeal-bonds, the doctrine of the case has no application to the section involved here. This section provides that the party seeking the entry of judgment shall "file with the clerk of the court where the judgment is rendered notice of his payment, and claim to contribution or repayment." It is true that it does not specify

the person to whom the notice is to be given, or its period, or the manner in which it is to be given. But the natural meaning of the word "notice" is a notice to some one, and, if the person be not indicated, the plain inference is that the party intended is the person who is interested,—the one who is to be proceeded against. Even if this were not the natural meaning of the word, we should hesitate long before concluding that the legislature intended to provide for judgment against a man in a court of justice without giving him an opportunity to be heard in his defense. But, as above stated, it is not straining the language to hold that some notice to the parties interested is necessary, and, if this is so, the period and manner of giving it are provided in other parts of the Code. Code Civil Proc. §§ 1005-1011, *et seq.* The order directing the execution having been without notice, the proceedings were properly vacated.

2. The showing made by the respondents upon the motion to quash was sufficient to sustain the order made. The respondents produced a written contract, made before the judgment, by which the appellant McDaniel, in consideration of the assignment to him of the principal's interest in a certain firm, and the conveyance by the principal's wife of a piece of real estate, (which transfers were duly made,) agreed to pay the whole debt himself. McDaniel admitted that he signed the agreement, but urged that he did so "without first having read it, and without knowing what it contained," and that it did not truly express what was in fact the understanding of the parties. Without expressing any opinion as to whether the showing made would entitle McDaniel to maintain a suit in equity to have the contract set aside, it is sufficient to say that as long as it stands it is a good answer to an application for contribution, whether by motion or action. *John v. Jones*, 16 Ala. 464; and compare *Taylor v. Reynolds*, 53 Cal. 687, and *Logan v. Talbot*, 59 Cal. 653. And we think it clear that he cannot have the contract set aside, and all the equities adjusted, in this summary proceeding, based upon affidavits. Still less can he ignore the contract entirely, and calmly proceed to take out his execution in defiance of it, and without so much as notice to those interested.

The other points made do not seem to require special notice. We therefore advise that the order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

75 Cal. 277

BYRNE v. REED *et al.* (No. 11,714.)

(Supreme Court of California. March 20, 1888.)

1. FRAUDULENT CONVEYANCES—EVIDENCE—DECLARATIONS AGAINST INTEREST.

In an action by plaintiff claiming for his testator that defendant conveyed property in fraud of creditors, the defendant claiming that she conveyed in good faith & discharge an indebtedness to her grantee, testimony that plaintiff's testator had spoken about such indebtedness was competent, being a declaration against interest.

2. SAME.

And in such action, where the grantee, being asked by plaintiff how the indebtedness arose, replied that her mother had given \$500 to the defendant, and being asked how she knew that, answered that defendant told her so, the evidence was responsive to the question and admissible.

3. SAME—GOOD FAITH OF GRANTEE.

In an action to set aside a deed for fraud on the part of both grantor and grantee, a question to the grantee as to whether she took the deed for the purpose of preventing any one else from getting the property, was relevant to the question in issue whether witness took the deed in good faith.

4. SAME—GOOD FAITH OF GRANTOR.

Whether defendant conveyed property in fraud of creditors being in issue, testimony as to what plaintiff said about the value of other property, which defendant had mortgaged to him, was admissible to show that she might honestly have believed, when she made the conveyance in controversy, that the mortgaged property was sufficient to pay all incumbrances on it.

5. SAME.

And her petition to set aside the sale of such mortgaged land was also admissible for the same reason.

6. SAME.

And where it appeared that the grantee had asked plaintiff if he could hold liable the rest of defendant's property if the mortgaged property should be insufficient to satisfy the mortgage, and plaintiff had answered "No," testimony as to plaintiff's motive in so answering was inadmissible.

7. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—SUFFICIENCY.

An application for a new trial on the ground of newly-discovered evidence, which would probably not produce any different result, is properly denied.

Commissioners' decision. Department 1. Appeal from superior court, Placer county; B. F. MYERS, Judge.

C. A. & F. P. Tuttle, for appellant. *J. M. Fulweiler* and *Hale & Craig*, for respondents.

BELCHER, C. C. This is an appeal by the plaintiff from a judgment, and order denying him a new trial. The action was brought to remove an alleged cloud on the plaintiff's title to certain mining claims, situate near Iowa Hill, in Placer county. The mining claims in controversy were formerly owned by the defendant Adelia Hill, and the plaintiff asserts title to them under a sale on execution, issued upon a judgment against her, made to him as executor of the last will of Matthew Reed, deceased, on the 24th day of September, 1883, and under a sheriff's deed made to him, in pursuance of the sale, on the 26th day of March, 1884. The defendant Julia S. Reed asserts title to the claims under a deed made to her by her co-defendant Adelia Hill, on the 18th day of May, 1883. It is alleged in the complaint that this deed to the defendant Reed was made without any consideration, and with the intent, on the part of both grantor and grantee, to hinder, delay, and defraud the creditors of the grantor, of whom the plaintiff was and is one; and that it consequently is a cloud on his title, which he asks to have removed. The answer denies that the deed in question was made without consideration, or with any intent to hinder, delay, or defraud the creditors of defendant Hill, or any of them, and alleges that on the 18th of May, 1883, defendant Reed, for a full, sufficient, and valuable consideration, purchased the claims, and ever since has been and now is the *bona fide* and lawful owner and holder of the same, and of every part and parcel thereof. The court below found that on the 18th day of May, 1883, the aggregate value of the mining claims in controversy was not over \$1,100; that on that day the defendant Hill was justly indebted to the defendant Reed in the sum of \$1,976.33, "and on said day, by agreement thereto with said Reed, said Hill executed and delivered to said Reed the conveyance of said properties mentioned in the complaint herein, and certain other mining property not described in the complaint, in full satisfaction, discharge, and payment of said indebtedness, and said Reed accepted said conveyance in full satisfaction, payment, and discharge of said indebtedness; that the said indebtedness, and the satisfaction and discharge thereof, was a full and adequate consideration for the properties thus conveyed; that the said conveyance was made and accepted in good faith, and without any intent to hinder, delay, or defraud plaintiff, or any creditor or creditors of defendant Hill; that the defendants Reed and Hill did not collude or intend, by said conveyance or otherwise, nor did either of them intend, thereby to hinder, delay, or defraud the plaintiff or his co-executor, or any creditor or creditors of the defendant Hill, from collecting, by execution or otherwise, any anticipated or other judgment that might be rendered against defendant Hill, or to prevent,

hinder, or delay the collection of any debt or demand due by defendant Hill to any one." It was accordingly adjudged and decreed that the defendant Julia S. Reed is, and since the 18th day of May, 1883, has been, the owner of all the properties conveyed to her on that day by defendant Hill, and is entitled to hold the same as against the plaintiff; and that neither the plaintiff nor the estate of Matthew Reed, deceased, ever acquired or had or held any title to, or right, interest, or estate in, said properties, or any part thereof.

It is claimed for the appellant that the findings were not justified by the evidence, and that the judgment should be reversed, and a new trial granted for that reason. The answer is that as to all of the disputed facts there was a clear conflict in the evidence, that given in behalf of respondents being quite sufficient to justify each of the findings. The well-settled rule in regard to conflicting testimony must therefore control the action of this court. It is also claimed that the court committed several errors in admitting and rejecting evidence, which should cause a reversal of the judgment. We shall speak briefly of each of these alleged errors. The plaintiff was called as a witness in his own behalf, and testified that he told defendant Hill in presence of defendant Reed that he must foreclose, and that defendant Reed asked him if he could come on the other claims if the property mortgaged did not bring the amount due, and he answered, "No." Counsel for plaintiff then asked why he said "No." The question was objected to and excluded by the court, and we see no error in the ruling. It was certainly immaterial for the court to know what secret motives induced the witness to answer as he did. The defendant Reed was called as a witness by the plaintiff, and was asked how she paid for the property conveyed to her. She answered that when she purchased the property her aunt (defendant Hill) owed her \$1,976.33, and added: "The consideration of the indebtedness was this: my mother gave my aunt \$500 for me September 10, 1868." She was then asked how she knew her mother gave \$500 to her aunt, and she answered that her aunt told her so. Counsel for plaintiff moved to strike out the answer, and the court denied their motion. We see no error in this ruling. The answer was responsive to the question, and the fact that it was hearsay was no reason for striking it out. Indeed, the plaintiff would seem to have been left in a better position with the answer in than out. On cross-examination the same witness was asked if Matthew Reed, in his life-time, said anything to her about her aunt owing her this money. The question was objected to, and the objection overruled. This ruling was proper. The plaintiff was claiming for the estate of Matthew Reed that the conveyance to the witness was made without any consideration, and it was proper, therefore, to show, as a declaration against his interest, that Reed, in his life-time, knew and spoke of the indebtedness. The witness was also asked, on her cross-examination, if she took the deed for the purpose of preventing anyone else from getting the property; and the question was objected to but allowed. The question was entirely relevant and proper. It was insisted for the plaintiff that the witness took the deed to hinder, delay, and defraud creditors, and, whether she did so or not, was the principal issue to be decided. She was a competent witness, and it was proper for her to state what her purpose was. The defendants were permitted, against the objection of plaintiff, to prove by the witness Hobson that in 1879 plaintiff's testator told him that defendant Hill held \$500 in trust for defendant Reed. For the reasons above stated, we see no error in this ruling. The testimony of Hobson as to what plaintiff said about the value of the mortgaged property, and the petition of defendant Hill to set aside the sale under the Gleason mortgage, were admissible to show that defendant Hill might honestly have believed, and did believe, when she conveyed the claims in controversy to defendant Reed, that the mortgaged property was more than sufficient to pay all incumbrances upon it. One of the grounds upon which the plaintiff made his motion for a new trial was newly-discovered evidence, which

he could not with reasonable diligence have discovered and produced at the trial. Applications for new trial are addressed to the sound legal discretion of the trial court, and the action of that court will not be disturbed, except for an abuse of its discretion; the presumption being that the discretion was properly exercised. And to entitle a party to a new trial on the ground of newly-discovered evidence, it must appear—"First, that the evidence, and not merely its materiality, be newly discovered; second, that the evidence be not cumulative merely; third, that it be such as to render a different result probable on a retrial of the cause; fourth, that the party could not, with reasonable diligence, have discovered and produced it at the trial; and, fifth, that these facts be shown by the best evidence of which the case admits." Hayne, New Trial & App. § 88. In support of his motion the plaintiff filed two affidavits, and these were met by counter-affidavits on the part of defendants. After carefully reading all of the affidavits, we are of the opinion, assuming what is said in them to be true, that the court below acted rightly in denying the motion, as a retrial probably would not and ought not to produce any different result.

We find nothing in the record which calls for a reversal of the judgment, and therefore advise that the judgment and order be affirmed.

We concur FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

75 Cal. 268

STRICKLAND v. HOLBROOKE. (No. 12,170.)

(Supreme Court of California. March 20, 1888.)

NEGOTIABLE INSTRUMENTS—PROMISSORY NOTE—WHAT CONSTITUTES.

Suit was brought on an instrument reading as follows: "\$1,000. Three years from date, I promise to pay to Daniel Strickland, for value received, in United States gold coin, at the rate of 10 per cent. per annual," and dated and signed. Held a valid promissory note.¹

Commissioners' decision. Department 1. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

Action upon a written instrument, brought by Daniel Strickland against Ellen E. Holbrooke. Judgment for plaintiff, and defendant appeals.

Cross & Simonds and A. B. Dibble, for appellant. A. J. Ridge and J. I. Caldwell, for respondent.

FOOTE, C. This action was brought against Ellen E. Holbrooke, to recover a money judgment upon a writing as follows:

"GRASS VALLEY, July 8, 1882.

"\$1,000. Three years from date, I promise to pay to Daniel Strickland, for value received, in United States gold coin, at the rate of 10 per cent. per annual.

DANIEL P. HOLBROOKE.

"ELLEN E. HOLBROOKE."

Had the \$1,000, in figures and dollar-mark, been expressed in words, the writing would have read thus:

"GRASS VALLEY, July 8, 1882.

"One thousand dollars. Three years from date, I promise to pay Daniel Strickland, for value received, in United States gold coin, at the rate of 10 per cent. per annual.

DANIEL P. HOLBROOKE.

"ELLEN E. HOLBROOKE."

¹Where the maker's obligation is not an independent, absolute, and unconditional one for the payment of a precise and definite sum of money, at all events, without contingency, the instrument is not a promissory note. *Edwards v. Ramsey*, (Minn.) 14 N. W. Rep. 272.

The action was brought upon this instrument as if it was a promissory note for the payment of money. The prayer of the complaint was a judgment against Ellen E. Holbrooke for \$1,000, and interest at the rate of 10 per cent. per annum from date. A demurrer to the complaint being overruled, an answer was filed denying all the allegations of the first-mentioned pleading. Judgment was rendered as prayed for, and an order made denying the defendant's motion for a new trial. From the judgment and order this appeal is taken.

The instrument above set out was offered in evidence. It was objected to, but admitted by the court. It was read, and the plaintiff offered evidence which tended to prove that no portion of the principal sum of money or interest thereon had ever been paid. The defendant offered no evidence whatever. The question for determination is, what is the legal effect of the alleged promissory note? To us it seems that by the terms thereof, at Grass Valley, on the 8th of July, 1882, Daniel P. and Ellen E. Holbrooke, \$1,000, three years after said 8th of July, 1882, promised to pay Daniel Strickland, for value received, in United States gold coin, with 10 per cent. per annum; or, what is the same thing, at Grass Valley, on the 8th day of July, 1882, Daniel P. and Ellen E. Holbrooke promised to pay, three years after the said 8th day of July, 1882, Daniel Strickland, \$1,000 in United States gold coin, for value received, with interest at the rate of 10 per cent. per annum from said last-mentioned date. Taking the whole instrument, in all its terms, it is evident that it was a written engagement, by the signers thereof, to pay a certain sum of money at a certain time, with interest from the date of the instrument, for value received. The sum or amount of such an instrument need not necessarily be expressed in words; if expressed in figures or ciphers, it has the same effect. Story, Prom. Notes, §§ 20, 21. No particular form of words is necessary to constitute such a writing. The form of it may be varied at the pleasure of the individual executing it, provided that in all cases the form adopted amounts, in legal effect, to a written promise for the payment of money, absolutely and at all events, and it interferes with no statute regulation. *Id.* § 12. The instrument in question needed no correction or addition to or subtraction of words therefrom, to make it a promissory note. It was just as certainly a promise to pay, for value received, \$1,000 in gold coin, three years after a certain date, with interest at a certain rate, as if the \$1,000 had been written after the word "pay" in the body of the note, instead of being written, as it was, before the word "three." For these reasons we are of the opinion that the judgment and order of the court below should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

75 Cal. 287

DIEMER v. HERBER. (No. 9,838.)

(Supreme Court of California. March 20, 1888.)

MALICIOUS PROSECUTION—PROBABLE CAUSE—COMMITMENT ON PRELIMINARY HEARING.

In an action for malicious prosecution, it appeared that plaintiff won money from defendant on a wager; that defendant threatened to have plaintiff arrested if he did not return such money; that plaintiff was arrested, at defendant's instance, and committed on a charge of larceny; that an information, duly filed, charging plaintiff with such crime, was dismissed for want of evidence. *Held*, that such commitment was only *prima facie* evidence of probable cause for such prosecution, and that it was fully rebutted by the other evidence.¹

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

¹See, also, *Finchim v. Com.*, (Va.) 3 S. E. Rep. 343, and note.

Action by John Diemer against John Herber for malicious prosecution. Judgment for defendant, and plaintiff appeals.

L. Quint, for appellant. *Edw. Salomon*, (*Henry Eickhoff*, of counsel,) for respondent.

FOOTE, C. This is an action for damages for a malicious prosecution. A jury was impaneled to try the issues joined, and evidence was introduced on the part of the plaintiff. Thereupon the defendant moved for a nonsuit, and it was granted. From the judgment therein given and made, and from an order refusing a new trial, this appeal is prosecuted. The facts of the case as they appeared in evidence are as follows: The plaintiff and the defendant got into a discussion as to whether any watch could be found in San Francisco which would run longer than a week without being wound up. The defendant was willing to bet five dollars against a hundred that no such watch could be produced. Finally the parties each bet and put up a hundred dollars; the plaintiff betting that sum that he could, and the defendant betting that he could not, produce such a watch. Then the plaintiff produced a watch that he said would run longer than a week, and was told by the defendant to take the money which had been put upon the wager. The plaintiff, in accordance with this permission and request, took the money, and went out of the defendant's premises. In a very few minutes the defendant sent a messenger after him to bring back the money, or he would be arrested. The plaintiff, thinking he had won the money fairly, treated the demand with scorn. Afterwards, through his attorney and others, the defendant endeavored to induce the plaintiff to return the whole, and then a part, of the money; one of the propositions made being that, if the plaintiff would pay back \$50, the defendant would "have it published in all the papers in San Francisco that he was wrong." Finally, the defendant and one McPherson came to the plaintiff to see him about the matter, and were told that the plaintiff would not pay a cent. Then the defendant had the plaintiff arrested, and, after a preliminary examination, he was bound over to the superior court to answer a charge of grand larceny. An information was duly filed against the plaintiff accusing him of that crime in stealing \$100 from the defendant. This information was dismissed, upon motion of the prosecuting attorney, for the reason that there was "no evidence to convict." The plaintiff then instituted this action.

As the matter appears to us, the defendant having made a foolish bet in a vein of braggadocio, and given up the money he had staked, repented of it in a very short time, and sought to get his money back. Finding that the person he had bet with treated the affair as serious, he tried the influence of lawyers and friends to get back that which he had thus wagered. This not bringing about the desired result, he had the defendant arrested, charged with an infamous offense, and he sued him, also, civilly, to recover the money, and obtained a judgment. He succeeded by this latter means in accomplishing the desired result. From the evidence before us there does not appear to have been the least ground to believe that the plaintiff had committed a larceny; and it is hardly comprehensible how the defendant could have believed, in good faith, that such a crime had been committed. The whole affair, so far as the defendant is concerned, exhibits a reckless disregard of the rights and character of the plaintiff, and a willingness to resort unjustly, and without any proper foundation, to the harsh arm of the law, in the shape of a criminal prosecution. The fact that plaintiff was held to answer by the committing magistrate does not alter the case. The fact is *prima facie* evidence of probable cause, (*Ganea v. Railroad*, 51 Cal. 140,) but it is not conclusive. That is to say, if the defendant was clearly guilty of having instituted a malicious prosecution against plaintiff without probable cause, the fact that the committing magistrate held plaintiff to answer does not take away the malice,

or establish conclusively that there was probable cause. We do not understand the case of *Jones v. Jones*, 71 Cal. 89, 11 Pac. Rep. 817, or *Hahn v. Schmidt*, 64 Cal. 284, to be in conflict with the foregoing. Those cases, as we understand them, went upon the theory that there was reliance upon the advice of counsel after a full disclosure of the fact; the counsel being the officers designated by the law to act in such affairs.

The judgment and order should be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

75 Cal. 290

GERLACH v. TERRY. (No. 9,923.)

(Supreme Court of California. March 20, 1888.)

EXECUTORS AND ADMINISTRATORS—ALLOWANCE OF DEMANDS—EVIDENCE.

In an action against an administrator for medical services, where the answer denied the employment of plaintiff by deceased, evidence that one T. and deceased had lived together for many years as husband and wife, and that plaintiff stated that he looked to T., who employed him, for payment and not to deceased, was admissible as tending to show that deceased did not employ plaintiff.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Action by George Gerlach against L. A. Terry, administrator of the estate of Mary J. Turner, for medical services rendered deceased. Judgment for defendant, and plaintiff appeals.

A. P. Needles, for appellant. Stetson & Houghton, for respondent.

FOOTE, C. Plaintiff instituted this action to recover a sum of money for services as a physician, performed, as he alleged, at the special instance and request of the defendant's decedent. The court below gave judgment in favor of the defendant, and from that and an order refusing a new trial the plaintiff has appealed.

There seems to have been no conflict as to any of the allegations of the complaint, except as to whether or not the services had been rendered at the request of the decedent, and on her employment of the physician. The complaint alleged that the physician had performed the services at the special instance and request of the reputed Mrs. Turner, and the answer denied that such was the case. It is claimed that all the evidence, which tended to show the marital relations between the decedent and J. W. Turner, which the court below allowed to be introduced on the trial, was not admissible, because the answer did not set up as a special defense the coverture of the decedent. "Anything which rebuts the idea of a contract, express or implied, is proper evidence," where an action is brought for services rendered on a contract to pay for them, either express or implied. *Angulo v. Sunol*, 14 Cal. 403. According to the evidence in this cause, Turner had lived for many years with the decedent, openly claiming her as his wife, and the marriage ceremony had been performed between them, both, at that time, being in ignorance of the fact that Turner was not divorced from a former wife. It was also in evidence that when the decedent was taken sick, in her last illness her reputed husband, Turner, employed Dr. Gerlach, and that Dr. Gerlach afterwards, while attending her, stated that he looked to him for payment, and not to the decedent.

As it appears to us the evidence introduced as to the marriage of the parties was not introduced for the purpose of showing that Turner was respon-

sible for medical services performed for his wife, as such, and under cover-ture, but that it was introduced for the purpose of showing the relations actually existing between the parties, which, taken in connection with the other evidence in the case, tended to show the probability of the defense set up, viz., that the decedent did not employ the plaintiff, but that the person who, in all respects, had in good faith for many years assumed towards her the relation of a husband, and towards whom she, in the same way, had held the relations of a wife, had made the contract of employment. This certainly went to rebut the allegation that she had employed Dr. Gerlach, and requested the services which he rendered, viz., had made a contract for them as was alleged in the complaint. The findings seem to us responsive to the issues made by the pleadings, and are supported by the evidence. We perceive no prejudicial error in the record, and the judgment and order should be affirmed.

I concur: BELCHER, C. C.

HAYNE, C. I concur on the ground that while the valuable services received by the deceased constituted sufficient consideration to support the subsequent promise to pay which, I think, the evidence shows was made, yet the terms of such promise seem to me to bring it within the statute of frauds, as being a promise to pay the debt of another.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

75 Cal. 323

PEOPLE v. SNYDER. (No. 20,376.)

(Supreme Court of California. March 21, 1888.)

RAPE—INDICTMENT—PLEADING AND PROOF.

Under Pen. Code Cal. § 261, which defines rape as an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under the following circumstances: With a child of tender years; with a lunatic or insane woman; by intimidation; by the administration of intoxicating or narcotic substances, etc.—it is sufficient if the information charge that the crime was committed by force, violence, and against the will of the prosecuting witness; and it is not necessary to set out the exact circumstances, as described in the subdivisions of the Code, by which the crime was accomplished.

In bank. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

John D. Whaley, for appellant. Geo. A. Johnson, Atty. Gen., for the People.

McFARLAND, J. The information charges the appellant with the crime of rape, and the jury found him guilty. The charging language of the information, after proper averments of time, place, etc., is that the defendant, "with force and arms, in and upon one Louisa Bell, a female over the age of ten years, who was not then and there the wife of the said John H. Snyder, violently and feloniously did make an assault, and her, the said Louisa Bell, then and there, to-wit, on the day and year last aforesaid, feloniously did ravish and carnally know, and accomplish with her an act of sexual intercourse, by force, violence, and against her will and resistance, contrary to the form," etc.; and the main contention of appellant is that there was a fatal variance between the information and the proofs. This contention is that while the information charges the crime to have been committed by force, violence, etc., the proof shows that it was committed (if at all) by means of an intoxicating or narcotic substance administered to the prosecuting witness by the accused; and that under section 261 of the Penal Code an information charging the crime to have been committed by force cannot be supported by proof showing it to have been committed by fraud or artifice.

The common-law definition of rape was "the carnal knowledge of a woman forcibly, and against her will." 4 Bl. Comm. 210. And the indictment was substantially in the form of the information in the case at bar. And, through decisions made from time to time, it gradually came to be the settled law (although there are cases to the contrary) that under such an indictment it was competent and sufficient to prove that the act charged was committed upon a child of tender years, incapable of consent; upon a lunatic or insane woman; by intimidation; when the woman was unconscious of the nature of the act; by the administration of intoxicating or narcotic substances; by false personation of a husband, etc. The criminal law of this state followed the common-law definition of the crime down to the adoption of the Codes. Hitt. Gen. Laws, 1449. Section 261 of the Penal Code commences as follows: "Rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under either of the following circumstances." Then follow six subdivisions which recite substantially the things which, as above briefly indicated, could be proven under the general, common-law indictment. And the position taken by appellant really is that the indictment and the proof must follow, and be confined to, one of the six subdivisions of the section. We think the true construction of section 261 to be that thereby the legislature meant merely to put beyond doubt the rule that on an information for rape the things mentioned in the subdivisions could be proven, and would establish the crime. It is not intended to alter or establish a rule of pleading, or to create six different kinds of crime. Now, as before the adoption of the Code, under an indictment similar to the information in this case, any of the matters mentioned in section 261 may be proved. They are included in the words, "by force and violence, and against her will," and "did feloniously ravish," as fully now as they were then.

2. The court properly allowed evidence of the fact that the injured party made complaint of the injury while it was recent, and the point that evidence should not have been admitted showing that she named the defendant in her complaint has no basis in the record.

3. We cannot say that the evidence did not warrant the verdict.

There are no other points which require special notice. Judgment and order denying new trial affirmed.

We concur: SEARLS, C. J.; PATERSON, J.; MCKINSTRY, J.; SHARPSTEIN, J.; TEMPLE, J.; THORNTON, J.

75 Cal. 258

In re Estate of DORSEY. (No. 12,195.)
(Supreme Court of California. March 20, 1888.)

1. EXECUTORS AND ADMINISTRATORS—SALES UNDER ORDER OF COURT—PRIVATE SALES.

An administrator cannot object to granting the petition of a creditor that the property of a deceased person be sold at public auction to pay the debts of the intestate, on the ground that it could be more advantageously sold at private sale, as Code Civil Proc. Cal. § 1544, provides that sales of the kind in question must be made at public auction, unless in the opinion of the court it would be more beneficial to sell it in whole or in part at private sale.

2. SAME—NOTICE OF SALE.

Where the court on the 3d of March ordered property to be sold at private sale on or before the 9th of the next April, there was sufficient time given under Code Civil Proc. Cal. § 1549, which provides that notice of the sale must be posted and published for two weeks successively next before the day on or after which the sale is to be made, and "the notice must state a day on or after which the sale will be made, and a place where offers or bids will be received. The day last referred to must be at least 15 days from the first publication of notice; and the sale must not be made before that day, but must be made within six months thereafter."

Commissioners' decision. Department 1. Appeal from superior court, Tuolumne county; J. F. ROONEY, Judge.

F. W. Street, for appellant. *F. D. Nichol*, for respondent.

v.17p.no.4—14

BELCHER, C. C. It appears from the record that Caleb Dorsey died at Sonora, in the county of Tuolumne, on the 28th day of March, 1885. In July following, Esther M. Dorsey was duly appointed and qualified as administratrix of his estate. The estate consisted of a small amount of personal property, a dwelling-house and lot in Sonora, several gold mines and interests in mines, and a water-ditch and water-right connected therewith. By an order of the court the dwelling-house and lot were set aside for the use of the administratrix and her family. Claims against the estate were presented and allowed, aggregating more than \$7,800. In October, 1885, an order was made and entered by the court authorizing the administratrix to sell all the mining properties and ditch at private sale, but no bids were received, and no sales effected. On the 25th day of January, 1887, George Winnie—the largest creditor of the estate—presented to the court a petition, which, after setting out the necessary facts, asked that an order be made directing that all the real property of the estate (except the portion thereof set aside for the family of deceased) be sold at public auction to the highest bidder for cash. After due notice, this petition was heard, and on the 3d day of March an order was made, authorizing and directing the administratrix to sell at public auction, and in one parcel or subdivisions, as she should judge most beneficial to the estate, the ditch and all the mines and interests in mines belonging to the estate, except the mine known as the "Lady Washington Mine," or so much thereof as should be necessary. The order further directed that the Lady Washington mine be sold at private sale, "said sale to be made on or before the 9th day of April, 1887." The administratrix was present at the hearing of the petition, and objected to having the property sold at public auction, on the ground that a private sale would be most beneficial to the estate and to the creditors thereof. The appeal is by the administratrix from the order as made, and from the whole thereof.

In support of the appeal it is urged that the court erred in ordering the property to be sold at public auction, when, in the judgment of the administratrix, it could be more beneficially disposed of at private sale. It is said that the court should have accepted and acted on her judgment in the matter. The objection is met and fully answered by the Code. Section 1544, Code Civil Proc., providing for sales of the kind in question, says: "Every such sale must be ordered to be made at public auction, unless, in the opinion of the court, it would benefit the estate to sell the whole or some part of such real estate at private sale. The court may, if the same is asked for in the petition, order or direct such real estate, or any part thereof, to be sold at either public or private sale, as the executor or administrator shall judge to be most beneficial for the estate." Under this provision all sales must be made at public auction, unless, in the opinion of the court, the best interests of the estate would be subserved by a private sale. When, however, a private sale is asked for, the court may act upon the opinion of the executor or administrator, and order such a sale to be made. In this case a private sale was not asked for, and there is nothing in the record to show that the judgment of the court was not properly exercised.

It is also urged that the court erred in requiring the sale of the Lady Washington mine to be made on or before the 9th day of April, 1887. It is said that it would have been impossible for the administratrix to have complied with the order, and section 1549, Code Civil Proc., is cited in support of the contention. That section provides that notice of the sale must be posted and published for two weeks successively next before the day on or after which the sale is to be made. "The notice must state a day on or after which the sale will be made, and a place where offers or bids will be received. The day last referred to must be at least fifteen days from the first publication of notice; and the sale must not be made before that day, but must be made within six months thereafter." As the order was made on the 3d day of March, we

are unable to see why the administratrix could not have complied with it. Suppose, for instance, the notice had been published on the 4th day of March, and the 20th day of the same month had been designated as the day on or after which the sale would be made, there would then have been left 16 days during which offers or bids might have been received. Certainly this might have been, and, so far as we are advised, was a sufficiently long time within which to make the sale.

We find no errors in the record, and the order appealed from should, therefore, be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

75 Cal. 306

PEOPLE v. WILLIAMS. (No. 20,379.)

(*Supreme Court of California. March 20, 1888.*)

1. HOMICIDE—ERRONEOUS INSTRUCTION—ASSUMPTION OF GUILT

The court in an instruction on voluntary drunkenness, as determining the degree of an offense, said: "In this case, if the killing was willful, that is, intentional, deliberate, and premeditated, it is murder in the first degree; otherwise, it may be murder in the second degree, or manslaughter, as the evidence may convince your minds;" but in concluding the instruction added: "I desire to say, in connection with these instructions, that I do not intend to intimate to you, or tell you in any way, whether this defendant is guilty of any crime or not;" and the jury were fully instructed that the prosecution must establish every essential fact beyond a reasonable doubt. *Held*, that the inadvertence in assuming guilt of defendant was fully cured by the context, and the correction of the court.

2. SAME—MANSLAUGHTER—MODIFICATION OF INSTRUCTION.

It is proper for the court to qualify an instruction asked to the effect that unless it was established by the evidence that the killing was unlawful, and with malice aforethought, they must acquit, by adding "of the crime of murder."

In bank. Appeal from superior court, Butte county; L. D. FREER, Judge. The defendant, Williams, was indicted for murder, and, being convicted of manslaughter, appeals.

W. J. Herrin, for appellant. Geo. A. Johnson, Atty. Gen., for the People.

TEMPLE, J. The defendant was tried for murder, and, being convicted of manslaughter, appeals from the judgment, and from an order denying his motion for a new trial. There is no bill of exceptions, however, in the record, and we have before us only the judgment roll.

The first exception urged here is as to the refusal of the court to give an instruction, asked by the defendant, to the effect that, if the killing was done in necessary self-defense, the defendant must be acquitted. This proposition is fully covered by instructions which were given.

It is next objected that the court instructed the jury as follows: "In this case, if the killing was willful, that is, intentional, deliberate, and premeditated, it is murder in the first degree; otherwise, it may be murder in the second degree, or manslaughter, as the evidence may convince your minds." Taken by itself, this instruction is, no doubt, defective, in assuming the guilt of defendant. We may assume, however, that the fact of killing by defendant was admitted. This is an extract from a lengthy instruction on the subject of voluntary drunkenness, and the court was explaining the proposition that, although such intoxication does not excuse crime, yet it may be considered in determining the degree of the offense. Taken with the context, the extract plainly means, "In this case, if a crime has been committed by the defendant while in a state of voluntary intoxication, if the killing was willful," etc. In concluding the instruction upon the subject, the judge added: "I desire to say, in connection with these instructions, that I do not intend to

intimate to you, or to tell you in any way, whether this defendant was guilty of any crime or not. I call attention to this because, as I remember now, that, in giving part of one instruction which I just read to you, I omitted to state that which I should have stated at the time." The jury were very fully instructed as to the burden of proof, and that the prosecution must establish every essential fact beyond a reasonable doubt. We think the inadvertence was fully cured. Not conceding that there was error, in any possible view, in telling the jury that, in determining the weight to be given to the testimony of the witnesses, they should consider the character and appearance of the witnesses, it is enough, for this appeal, to say that we cannot tell that evidence was not before the jury as to the character of each witness called.

The judge very properly qualified the instruction asked to the effect that unless it was established by the evidence that the killing was unlawful, and with malice aforethought, they must acquit, by adding "of the crime of murder." Admitting that the charge contains an instruction upon the subject of insanity, we cannot say, in the absence of a bill of exceptions containing the evidence, that it was not warranted by some issue in the case. There is no such plea as insanity, and we do not know that the issue did not arise at the trial. The judgment and order are affirmed.

We concur: SÉARLS, C. J.; MCKINSTRY, J.; MCFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.; PATERSON, J.

75 Cal. 285

GWINN v. HAMILTON. (No. 12,128.)

(*Supreme Court of California.* March 20, 1888.)

1. APPEAL—FORMER APPEAL—EFFECT OF DECISION.

Where the court, upon a former appeal, held that the complaint stated a cause of action, its sufficiency cannot be again called in question.

2. SAME—REVIEW—SUFFICIENCY OF EVIDENCE.

When the evidence is conflicting, and upon the whole testimony it cannot be said that the court below came to a wrong conclusion upon such evidence, the judgment must be affirmed.

Commissioners' decision. Department 1. Appeal from superior court, Sacramento county; J. B. MCFARLAND, Judge.

For former appeal, see 7 Pac. Rep. 837.

This was an action by Belden R. Gwinn against David Hamilton, the administrator of his father's estate, Harrison Gwinn, deceased, to recover a sum of money for labor and services alleged to have been performed by the son for the father. After the institution of the action Belden R. Gwinn died, and his administrator, John M. Gwinn, was substituted as plaintiff. Judgment for plaintiff, and defendant appeals.

Ball & Craig, W. H. Beatty, and S. C. Denson, for appellant. *Armstrong & Hinkson*, for respondent.

HAYNE, C. Action for services rendered by a son to his father. Judgment was rendered in favor of plaintiff for \$605, and the defendant appeals.

1. It is contended that the complaint does not state a cause of action. But we think that matter was concluded by the decision on the former appeal. Upon the first trial judgment was rendered for plaintiff for \$2,328.87, and the defendant appealed. The judgment was reversed because a great part of the demand was considered to be barred by the statute of limitations. This of course did not involve the sufficiency of the complaint. But the question of the sufficiency of the complaint was the main point discussed, and as we understand the opinion the court decided against the defendant, and held that the complaint stated a cause of action. We readily concede that the rule as to the law of the case does not protect *mere dicta*. But a decision upon a

point which arose in the case, and was decided, is not a *dictum*, although it was not necessary to the disposition of the appeal. *Table Mountain v. Stranahan*, 21 Cal. 551; and compare *Olney v. Sawyer*, 54 Cal. 384, 385; *Camron v. Kenfield*, 57 Cal. 553, 554; *San Francisco v. Water-Works*, 53 Cal. 610. Doubtless the counsel for the plaintiff relied upon the decision, and it would be unjust to suffer the sufficiency of the complaint to be again called in question. If the complaint is held to be sufficient, the finding by reference to it is sufficient. *McEwen v. Johnson*, 7 Cal. 260; *Pralus v. Mining Co.*, 35 Cal. 34, 35; *Carey v. Brown*, 58 Cal. 184; *Moore v. Clear Lake Co.*, 63 Cal. 146, 8 Pac. Rep. 816; *Johnson v. Klein*, 70 Cal. 186, 11 Pac. Rep. 606. Possibly the reference in question would not cover the plea of the statute of limitations. But that point is not raised by counsel, and we do not think that the circumstances are such as to require us to notice it.

2. It is urged that the defendant should have been allowed a credit of \$566.48, which was the price of a crop of grain raised upon the land of a third person. The evidence seems to us to justify the respondent's contention that this crop was put in by the son and one St. Louis for their own benefit, and that this was with the consent of the father. There is some evidence against this view. Thus it was shown that the son used father's team for the work, and that the father paid a man to assist in harvesting the crop. On the other hand, the son evidently made the cropping contract in his own name, and ostensibly for his own benefit. This was the understanding of the owner of the land. For he says: "I judged his father let him have the team to give him a show." And it was proven that on one occasion, when the father was asked whether the cropping contract was not an extension of his business, he said: "I've got nothing to do with it; it is Belden's." And he further said "that his crop was all in, and that Belden could have his team to put in the crop." The subsequent remark about "running the ranch" appears to us to refer to the ranch upon which they lived, and not the place where this crop was put in. Upon the whole testimony we cannot say that the court below came to a wrong conclusion as to this matter. The other matters do not seem to require special notice. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

75 Cal. 298

PEEK v. PEEK. (No. 12,315.)

(Supreme Court of California. March 20, 1888.)

APPEAL—SUBMISSION ON BRIEFS—DELAY IN FILING.

In a cause to be submitted on briefs filed, the appellant failed to file his brief at the time fixed in the order, and the respondent then filed a document containing no argument, but simply asking for judgment on the ground of default. Some time after, without leave of court, or giving any reason for the default, appellant filed his brief. Held, that respondent was not entitled to the judgment requested, but that he was not in default, and could have time to file his brief on the merits.

Commissioners' decision. In bank. Appeal from superior court, San Bernardino county; HENRY M. WILLIS, Judge.

Rowell & Rowell, Harris & Allen, and Wells, Vandyke & Lee, for appellant. *H. C. Rolfe*, for respondent.

HAYNE, C. On October 5th the court ordered that the cause be submitted on briefs to be filed,—the appellant to file his opening brief within 30 days, the respondent to have 30 days to answer, and the appellant 10 days to reply. The appellant neglected to file his opening brief, and on November 26th the

respondent filed a document which contained no argument, but simply called attention to the defendant's default, and asked that the judgment and order be affirmed. About three weeks after this the appellant's counsel, without (so far as the record shows) having obtained any extension of time, either from the court or counsel, and without the permission of the court, and without offering any excuse for their default, placed their brief on file; and in this condition of affairs the case is sent to us for examination.

The rule is that where the appellant neither makes an oral argument nor files any brief, the court will affirm the judgment without an examination of the record. *Hickinbotham v. Monroe*, 28 Cal. 489; *Brewster v. Johnson*, 51 Cal. 222; *Faris v. Lampson*, 14 Pac. Rep. 674; *Scott v. Sowden*, 16 Pac. Rep. 768, (filed February 21, 1888.) The respondent, having waited a reasonable time after the default of appellant, had a right to invoke this rule without submitting an argument on the merits; there being nothing for him to reply to. And although we think it would have been better for him to have submitted an argument upon the merits, or to have ascertained the intention of opposing counsel as to filing of a brief, he is not in default for not doing so. But there being a brief on file for appellant,—although improperly so,—we think it would be harsh to apply the rule invoked by respondent; but the respondent, not being in default, has a right to be heard, and we do not think the cause should be disposed of in the absence of an argument in his behalf. The cause of the waste of time and labor occurring in this case is the neglect of the appellant's counsel. They had no right to disregard the order of this court as to the time of filing briefs. The dispatch of business requires some order in the proceedings; and the learned counsel for the appellant will readily see that if they are at liberty to disregard the orders and rules of the court, every other counsel would be equally at liberty to do so, which would produce an undesirable confusion. The court has always been liberal in relieving against defaults. But it is hardly respectful for the counsel to place their briefs on file after the expiration of the time allowed therefore, without the permission of the court or the consent of opposing counsel. We think that where such a course results in a waste of time, and imposes additional labor on an overburdened court, it should be discouraged, and to that end that the brief of appellant be considered as improperly on file, and that it be allowed to remain only as an argument on the merits, all the technical points as to the admissibility of evidence being taken to be waived, and that the respondent be permitted to file a brief on the merits. In the briefs to be filed we think the attention of counsel should be called to the question whether the contract upon which the defendant relies is not within the statute of frauds; (see Civil Code, § 178, and section 1624, subsec. 3; *Lloyd v. Fulton*, 91 U. S. 480; *Browne, St. Frauds*, § 215;) and, if so, whether there was such a part performance as to take the case out of the statute. See *Dundas v. Dutens*, 1 Ves. Jr. 199.

We therefore advise that the submission of the cause be set aside, with leave to respondent to file a brief within 30 days, the appellant to have 30 days to reply.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the submission of the above cause is set aside, with leave to respondent to file a brief within 30 days, the appellant to have 30 days to reply.

75 Cal. 301

PEOPLE v. GRUNDELL. (No. 20,359.)

(Supreme Court of California. March 20, 1888.)

I. CRIMINAL LAW—CONTINUANCE—CONSENT OF DEFENDANT—RECORD.

Upon a trial for larceny, the recorded affidavit of the committing magistrate failed to set out that all the continuances were with the consent of the defendant,

but the affidavit of the attorney prosecuting so alleged, and was opposed by only the counter-affidavit of the defendant. *Held*, the record does not show such want of consent as to violate Pen. Code Cal. § 861, providing that a postponement cannot be had * * * unless by consent, or on motion of the defendant.

2. SAME—EVIDENCE—REPORTER'S TRANSCRIPT OF TESTIMONY.

Upon a trial for larceny, the admission in evidence of the reporter's transcript of the testimony of a deposing witness is not error, under Pen. Code Cal. § 864, placing the reporter's certified transcript of the testimony of a deposing witness, when properly filed, on the same footing as depositions; and section 1345, providing that depositions may be read in evidence by either party upon the trial, etc.

3. SAME.

The provision of Pen. Code Cal. § 869, stating that a reporter shall, within 10 days after the close of taking a deposition, * * * file with the clerk a certified copy of his notes, transcribed in long-hand, is merely directory, and the deposition is admissible in evidence, if the filing is within a reasonable time.

4. SAME—DEPOSITIONS—DESCRIPTION OF DEPOSING WITNESS.

A deposition which states that the deposing witness is a boy 16 years of age, living with his brother on a place in the mountains, contains a sufficient designation of the deponent's business or profession, under Pen. Code Cal. § 869, which provides that a deposition must state the business or profession of the deponent.

5. SAME—REPORTER'S ORIGINAL NOTES.

A record must show affirmatively that the reporter's "original notes" of a deposition are not on file with the transcript, before it will have violated Pen. Code Cal. § 869, providing that a reporter shall file his "original notes" of a deposition with the clerk, together with the transcript of the same.

6. SAME—WAIVER OF OBJECTIONS.

A defendant, on trial for larceny, having appeared by counsel, and consented that the testimony of a deposing witness be taken down and read in evidence, cannot, upon the trial, object to the reading of such deposition on the ground that it does not conform to all of the provisions of the Penal Code relating to depositions.

7. SAME—EVIDENCE—OF ACCOMPLICE.

The testimony of an accomplice, upon the trial of the principal for stealing a steer, is admissible in evidence; and finding the hide and entrails of the missing animal buried in the principal's back-yard is sufficient corroboration of accomplice testimony to sustain conviction.

PATERSON, J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, Santa Clara county; D. BELDEN, Judge.

M. H. Hyland, for appellant. *Geo. A. Johnson*, Atty. Gen., for respondent.

HAYNE, C. The appellant was convicted of grand larceny, and sentenced to one year in the state prison. Several points are made on the appeal.

1. A motion was made in the superior court to set aside the information, on the ground that the committing magistrate had continued the hearing without an affidavit, or the consent of the defendant, as provided by section 861 of the Penal Code. Without expressing any opinion as to whether this section is merely directory or not, it is sufficient to say that from the record before us it cannot be determined that the continuance was not by consent. The magistrate says in his affidavit that the examination was set by consent for the 30th of March, and was begun on that day; that, when the prosecution rested, the hearing was continued for 10 days, at the request of the defendant; and that before the expiration of that time he was taken sick, and was unable to transact business before May 17th; but he does not state whether the intervening continuance was by consent or not. The assistant district attorney, who had charge of the case, says in his affidavit that "each and all of said continuances were with the knowledge and consent of defendant and each of his counsel." As we construe this, it includes the continuance complained of. The only opposing evidence is the affidavit of the prisoner himself. The affidavit of his then counsel is significantly absent. The court below evidently did not believe the statement of the defendant, and we do not see that it was bound to do so.

2. At the trial, the prosecution read in evidence, against the defendant's objection, the short-hand reporter's transcript of the testimony of one Lewis, given before the committing magistrate, and this is assigned as error. Section 869 of the Penal Code provides for the taking down of such testimony "as a deposition," and that "the transcript of the reporter, appointed as aforesaid, when written out in long-hand writing, and certified as being a correct statement of such testimony and proceedings in the case, shall be *prima facie* a correct statement of such testimony and proceedings." And the section goes on to provide that "the reporter shall, within ten days after the close of such examination, if the defendant be held to answer the charge, transcribe into long-hand writing his said short-hand notes, and certify and file the same with the county clerk of the county or city and county in which the defendant was examined, and shall in all cases file his original notes with said clerk." In the case of *Reid v. Reid*, 14 Pac. Rep. 781, it was held by department 2 that section 273, Code Civil Proc., did not render the unfiled transcript of the reporter admissible as evidence. But that case is not similar to this. In the first place, the transcript in that case was not filed, and stress was laid upon that circumstance in the opinion. In this case it was filed. Such a transcript, when filed by the officer in pursuance of a provision of law, may be regarded as in the nature of an official entry. Code Civil Proc. § 1920. The publicity of such a record is a safeguard against the dangers mentioned in *Reid v. Reid*. Such a document is quite a different thing from the unfiled and unsworn certificate of one who may no longer be an officer, produced at the trial from the pocket of one of the parties. In the second place, the statute is different from that considered in *Reid v. Reid*. Section 869 of the Penal Code places such transcripts upon the footing of *depositions*. And by section 1345 depositions "may be read in evidence by either party at the trial, upon its appearing that the witness is unable to attend by reason of his death, insanity, sickness, or infirmity, or of his continued absence from the state." There is no provision placing reporters' transcripts in civil cases upon the footing of depositions. For these reasons the case of *Reid v. Reid* is not in point. We think it sufficiently appeared that the witness was out of the jurisdiction, and therefore it was proper to read the deposition in evidence. *People v. Oiler*, 66 Cal. 102, 4 Pac. Rep. 1066.

There are, however, several objections taken to the form of the deposition. (a) It is said that it appears that the deposition was not filed within 10 days after the close of the examination, as required by the provision above quoted. But we think that the specification as to time is directory, merely. If the filing be within a reasonable time, it is sufficient; and we are not prepared to say that the time in this case was unreasonable. (b) It is said that the deposition was not admissible, "because it did not show the business or profession of the deponent." But it states that he was a boy of 16 years of age, living with his brother on a place in the Santa Cruz mountains. At that age it is not to be presumed that he had any business or profession, especially as he was living with his brother. Under the circumstances, we think the objection was properly overruled. (c) It is said that the "original notes" of the reporter were not filed with the transcript, as required by the section; but the record does not show that they were not filed. The presumption is in support of the judgment, and it is the duty of the appellant to make an alleged error apparent from the record. It may be that it appeared that the original notes were on file. *Clark v. Sawyer*, 48 Cal. 141, 142. The same may be said as to the want of a certificate and signature, although objections on these latter grounds were not taken at the trial, and are not argued in the briefs. It is to be observed that what is here said relates to the construction of the record, and not to the showing to be made at the trial.

3. The prosecution also read in advance the deposition of one Rost, which was taken before Judge BELDEN in open court, and written down by the re-

porter of the court. Certain objections were taken to the mode of authentication of this deposition, and also that there was no proof that the witness could not be produced at the trial. It appears, however, that the defendant appeared by his counsel in open court, and consented that the "deposition of Ernest Rost, a witness detained in custody to testify, may be taken; that the said testimony of the said witness be taken down by the short-hand reporter of this court, and the same may be by him hereafter written out, and said written notes of the direct and cross examination read in evidence upon the trial of said cause, with the same force and effect as if said witness were himself present and testifying." This was an express consent that this identical deposition should be read in evidence at the trial. There was no condition that it should be shown that the witness could not be produced. The deposition was taken as provided in the stipulation, and is to be governed by it, and not by the provisions as to depositions in the Penal Code. In this view the certificate was unnecessary.

4. It is said that the above-mentioned depositions were not admissible, or sufficient to support the conviction, because the witnesses were accomplices. But the objection that a witness was an accomplice does not go to the admissibility, but only to the effect, of his evidence. In this case, if it be assumed that there was such knowledge on the part of Rost as to make him an accomplice, we think that the other evidence to the effect that the owner missed his steer, and shortly afterwards its hide and some entrails were found buried in defendant's back-yard, is sufficient corroboration of the accomplice. See *People v. Cleveland*, 49 Cal. 577; *People v. Cloonan*, 50 Cal. 449; *People v. Kunz*, 14 Pac. Rep. 836. The court below informed the jury of the rule as to the testimony of an accomplice, in its oral charge, to which no exception was taken.

The other matters do not require special notice. We therefore advise that the judgment and order denying a new trial be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

I dissent: PATERSON, J.

75 Cal. 308

OTTO v. JOURNEYMEN TAILORS' PROTECTIVE & BENEVOLENT UNION OF SAN FRANCISCO. (No. 11,645.)

(Supreme Court of California. March 21, 1888.)

1. BENEVOLENT SOCIETIES—PUNISHMENT OF MEMBERS—RIGHT OF EXPULSION.

Where the only penalty imposed by the constitution and by-laws of an unincorporated tailors' benevolent union against members working for parties against whom a strike has been declared is a fine, the expulsion of a member for such an offense is invalid.

2. SAME—GOOD FAITH.

A member, in good standing, of an unincorporated association having a benevolent fund, in the benefit of which such member is entitled to participate, was expelled from the association on a charge for which the only penalty provided was a fine, and was afterwards reinstated in order that he might be again expelled on a charge of conspiracy to injure and destroy the association, in reality the same offense for which he was first expelled. *Held*, that he is entitled to an order from the court commanding the association to restore him to membership, and to the rights and privileges incident thereto.

3. SAME—INTERFERENCE OF THE COURT.

A member of an unincorporated benevolent association will not be bound by the decision, made in bad faith and maliciously, of the central body of the association, although it is provided in the constitution that any member having a grievance may lay it before such body whose decision shall be final.

Department 1. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

John M. Days, (*John C. Hall*, of counsel,) for appellant. *Rhodes Borden* and *L. M. Hoefler*, (*O. P. Evans*, of counsel,) for respondent.

SEARLS, C. J. This is an appeal from a writ of mandate issued by the superior court, commanding appellant to reinstate the respondent, August Otto, to membership in the society, and to restore him to all the rights, privileges, and immunities of membership therein.

The appellant is, and since 1873 has been, an unincorporated association composed of about 200 persons, tailors by occupation, organized for the purpose of transacting the business of a benevolent association, of improving the condition of its members, and for protection against unjust and arbitrary encroachment of capital. The association has a constitution and by-laws, providing for its government, and has a benevolent fund to which members may, under proper circumstances, become entitled to a certain extent. Plaintiff became a member about October 1, 1883, and continued such in good standing until June 9, 1884, when, as the court finds, he was expelled without any hearing or trial whatever. On May 24, 1884, plaintiff was a regular member, in good standing, of the association and of the benevolent fund branch of the association, and entitled to its pecuniary benefits, when a question arose in reference to the employment of non-members of the association by a firm of tailors, and such proceedings were had that a special meeting of all members of shop meetings was called, at which it was decided by a vote of 89 for and 39 against, to declare a strike against the offending firm, for which plaintiff was laboring. By the constitution and by-laws it is provided that a two-thirds majority of the members shall be necessary to ordering a strike. There were at the time 176 members entitled to vote on the question, of whom two-thirds did not vote, but two-thirds of those present at the meeting did vote in favor of the strike. Plaintiff opposed such strike. He at first expressed a determination to abide by the decision, but finally, upon being offered work by the offending firm, accepted such work, and was therefore expelled from the association, as hereinbefore stated, and all union members were informed thereof, whereby he has since that date, under the rules of the association, been prevented from procuring employment in union shops, which seemed to include most of the better class of shops in the city (San Francisco.) The expulsion was invalid in this: members working for parties against whom a strike is declared are subject to a fine of not less than \$10 nor more than \$100, and no other or further penalty is provided, so far as appears by the constitution and by-laws. On the 17th of July, 1884, the striking members of the union agreed to terminate the strike, and to return to work for the employers of the plaintiff, on the condition that they would discharge the latter, which was done, and the strike thus terminated. On the 13th of October, 1884, the central body of the union rescinded the expulsion of plaintiff, and on the same day of the same month other charges involving conspiracy on the part of plaintiff and others against and to the injury of the society and its members were preferred. The 27th day of October was set for the trial of plaintiff upon the charges, which trial subsequently took place, and plaintiff was found guilty of conspiracy, and expelled from the society. The court below finds as bearing upon this point in substance: *First*. That the expulsion of June 9th was for working for a firm against whom a strike had been ordered. *Second*. That the rescission of October 13th was not made in good faith, and was only for the purpose of expelling him again. *Third*. That the first and second expulsions were for one and the same offense, and was not called "conspiracy" until the charges were drawn by an attorney, and then only that a charge might be formulated which would warrant expulsion, independent of the constitution and by-laws. *Fourth*. That the trial of October 27th was by the

central body, and not by the union as a whole; that this was not fair, was contrary to natural justice; not provided for by the constitution or by-laws, etc. The findings fully sustain the allegations of the petition, and warrant the judgment of the court, provided it is within the province of that tribunal to investigate and question the action of the appellant in expelling plaintiff. Appellant specifies many particulars in which it is claimed the decision of the court is not supported by the evidence. We have examined the testimony and are of opinion that it warrants the findings of the court in all essential particulars. To enumerate the several objections, and specify the evidence in support of the findings excepted to, would extend the decision beyond reasonable limits, without any corresponding benefits to the parties; hence we dismiss this branch of it thus summarily. Courts will interfere for the purpose of protecting property rights of members of unincorporated associations in all proper cases, and, when they take jurisdiction, will follow and enforce, so far as applicable, the rules applying to incorporated bodies of the same character. Respondent, as a member of the association, in good standing, who had paid all his dues and assessments, and who was entitled to participate in the benefit feature of the company, had property rights involved, which, if violated, entitles him to the protection of the courts.

The right of expulsion from associations of this character may be based and upheld upon two grounds: *First*, a violation of such of the established rules of the association as have been subscribed or assented to by the members, and as provide expulsion for such violation; *second*, for such conduct as clearly violates the fundamental objects of the association, and if persisted in and allowed would thwart those objects or bring the association into disrepute. We content ourselves with stating the propositions thus broadly, and, for the purposes of this case, need not refer to the numerous authorities defining and limiting the power. In the matter of expulsion the society acts in a *quasi* judicial character, and, so far as it confines itself to the exercise of the powers vested in it, and in good faith pursues the methods prescribed by its laws, such laws not being in violation of the laws of the land, or any inalienable right of the member, its sentence is conclusive, like that of a judicial tribunal. *Com. v. Society*, 8 Watts & S. 250; *Burt v. Lodge*, 44 Mich. 208; 33 N. W. Rep. 13; *Robinson v. Lodge*, 86 Ill. 598. The courts will, however, decide whether the ground for expulsion is well taken. *Hirs. Frat. & Soc.* 55; *Cotton Exchange v. State*, 54 Ga. 668. It has been held in reference to the expulsion of members from societies of this character, that the courts have no right to interfere with the decisions of the societies, except in the following cases: "*First*. If the decision arrived at was contrary to natural justice, such as the member complained of not having an opportunity to explain misconduct. *Secondly*. If the rules of the club have not been observed. *Thirdly*. If the action of the club was malicious and not *bona fide*." *Hirs. Frat. & Soc.* 56; *Dawkins v. Antrobus*, 44 Law T. 557; *Lambert v. Addison*, 46 Law T. 20.

Article 25 of the appellant's constitution provides as follows: "If any member defrauds this union, he shall be dealt with as the central body may decide." Beyond this no specific provision appears in the constitution or by-laws under which members may be expelled. The contention of appellant is that the power of expulsion is inherent in every society, and that the offense of which plaintiff was found guilty was sufficient ground for expulsion, as matter of law, irrespective of any provision of the constitution or by-laws. We subscribe to that portion of the proposition which asserts the inherent right of expulsion, subject, however, to the limitations hereinbefore expressed. For the purposes of this case we assume, also, without deciding—*First*, that the charges and specifications against plaintiff were sufficient, upon being proven, to warrant his expulsion under the inherent right so to do mentioned; *second*, that the "Central Body,"—that is to say, the board of delegates of shop societies, as contradistinguished from the entire body of members, may

exercise the power of expulsion. Conceding these propositions, however, (so far as the latter is concerned, we doubt if it can be maintained,) the facts as found by the court still remain, that plaintiff was really and in fact found guilty for no other offense than that for which he was expelled in the first instance, viz., for working for parties against whom a strike had been ordered; that the expulsion was not in good faith, was not fair, and was contrary to natural justice; that the charge of "conspiracy to injure and destroy the union," was in substance but a pretext to punish him for an offense only subjecting him to a fine, in a manner wholly different from the imposition of the penalty provided therefor, etc. We think, as before stated, that there was evidence from which the facts as found were fairly deducible. These facts raise the inevitable conclusion, that the trial and conviction of plaintiff was a travesty upon justice, and lacking in the essential elements of fairness, good faith, and candor, which should characterize the action of men in passing upon the rights of their fellow-men.

We are referred to the provision of appellant's constitution which provides that "any member having a grievance, shall have the right to lay his case before the central body, who shall take action thereon, and whose decision shall be final." No doubt when action is properly taken in the manner indicated, it is final, and the courts will not interfere, but when under the guise of remedying the grievance of a member, the central body acts in bad faith, and maliciously makes the subject of the grievance a pretext for oppression and wrong, its action may, however, to that extent, be the subject of review. The judgment is affirmed.

We concur: PATERSON, J., MCKINSTRY, J.

2 Cal. Unrep. 852

LONGNECKER v. HIS CREDITORS. (No. 12,268.)

(Supreme Court of California. March 21, 1888.)

INSOLVENCY—DISCHARGE OF INSOLVENT—DISCRETION OF THE COURT.

The disposition of a motion to set aside a decree of final discharge in insolvency rests largely on the discretion of the *nisi prius* court, and will not be reviewed except in case of an abuse of that discretion.

Department 2. Appeal from superior court, Butte county; LEON D. FREER, Judge.

W. R. Felter, one of the creditors of G. H. Longnecker, an insolvent debtor, filed in the superior court an opposition to the insolvent's discharge, which opposition was demurred to. Felter's attorney confessed the demurrer, and 15 days were allowed in which to amend the opposition, but no amended opposition was filed within the time granted, and a default was entered, and the insolvent discharged. The motion to set aside the default was based upon an alleged verbal understanding between the parties as to the filing of the amended opposition.

Albert M. Johnson, for appellant. W. J. Herrin, for respondent.

PER CURIAM. This is an appeal from an order denying a motion to set aside a decree of final discharge in insolvency. The motion was based upon the inadvertence, surprise, excusable neglect, etc., of the appellant. The disposition of motions of this kind rests largely in the discretion of the *nisi prius* court; and in this case we see no such abuse of discretion as would warrant us in disturbing the ruling of the court below. Order affirmed.

75 Cal. 317

In re WILLIAMSON'S ESTATE. (No. 12,226.)
(*Supreme Court of California.* March 21, 1888.)

WILLS—CONSTRUCTION—AMOUNT OF PROPERTY DEVISED.

Where a will, after declaring that all of testator's property is the common property of himself and wife, recites: "I bequeath to my son * * * all my property, real, personal, or mixed, * * * that is to say, an undivided half interest in said property, leaving the remaining undivided one-half of said community property to my said wife, as the law directs;" and the wife dies before the testator,—her half of the property is not disposed of by the will, and should go to the heirs.

Commissioners' decision. Department 2. Appeal from superior court, Santa Cruz county; F. J. McCANN, Judge.

Appeal by Caroline Judd from a decree of distribution in the matter of the estate of William Williamson, deceased.

A. S. Kittredge, for appellant. Julius Lee, for respondent.

HAYNE, C. This is an appeal from a decree of distribution. The question presented is as to the construction of the will. The will first declares that all of the testator's property is the community property of himself and his wife, Artemesia, who was then living, and that an advancement had been made to his daughter, Caroline Judd, (the appellant here;) and then, after reciting that his son, Robert Samuel Williamson, "by his valuable labor and service, has greatly assisted, and is now greatly assisting, me in making and accumulating my said property," proceeds as follows: "*First.* I give, bequeath, and devise to my said son, Robert Samuel, * * * all the property, real, personal, or mixed, of whatsoever nature or character, or wheresoever the same may be situated, in or to which I now have, or hereafter may acquire, any right, title, or interest; that is to say, an undivided one-half interest in said property, or all of which I have power under the law to make testamentary disposition, leaving the remaining undivided one-half of said community property to my said wife, Artemesia, as the law directs. *Second.* I request and desire that my said wife, in case she survives me, by testamentary disposition or otherwise, distribute her portion or half of said community property equally between our said children, Robert Samuel and Caroline, and any others that may be begotten unto us." The wife died before the testator, and the contest is between the two children as to the share which would have gone to the wife had she lived. The court below decided that the son took the whole of such share, and the daughter appeals.

We think the court erred. The testator first used language which, if not limited by what follows, would undoubtedly have given the whole estate to the son. But he immediately defines the sense in which he used the sweeping language by the following: "That is to say, an undivided one-half interest in said property, or all of which I have power under the law to make testamentary disposition." This shows that, when he spoke of bequeathing "all the property" to the son, he meant all over which he supposed he had power of disposition, which was one-half of the community property. And, as if to clinch the matter, he adds this clause: "Leaving the remaining undivided one-half of said community property to my said wife, Artemesia, as the law directs." Now, if the wife had survived the testator, there would have been no doubt at all as to the intention. It would have been perfectly clear that the testator intended the son to take only one-half of the property. The fact that the wife died before the testator does not seem to us to alter the case. The argument that the words, "all of which I have power under the law to make testamentary disposition," show that it was the testator's intention to give to the son the wife's half of the community property, in case he acquired power of disposition over it by her death, is plausible, but not sound. The phrase is used in opposition to the preceding one, viz., "an undivided one-half interest in said property." And the intention of the testator that the whole property

should not go to the son at the wife's death is shown by his request to the wife: "I request and desire that my said wife, in case she survives me, by testamentary disposition or otherwise, distribute her portion or half of said community property equally between our said children, Robert Samuel and Caroline, and any others that may be begotten to us." It seems to us that the wife's half was not disposed of by the will, and that it should go to the heirs as the law directs. The learned judge of the court below was led into error by attributing too much force to the sweeping words of disposition first quoted.

No other question has been argued by counsel. We therefore advise that the judgment be reversed, and the cause remanded for a decree in accordance with the views above expressed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded for a decree in accordance with the views above expressed.

75 Cal. 319

BAUGHMAN v. REED. (No. 12,141.)

(*Supreme Court of California.* March 21, 1888.)

LANDLORD AND TENANT—RENTING ON SHARES—PARTITION.

Where a tenant under a lease by which he agreed to deliver to the lessor two-fifths of all grain produced on the premises, has raised certain crops of grain which he threatens to convert to his own use, denying the lessor's right to any part, the latter is entitled to a partition, and the appointment of a receiver under Code Civil Proc. Cal. § 564, par. 1, providing that a receiver may be appointed in an action between persons jointly interested in any property, on the application of one whose interest is in danger.

Commissioners' decision. Department 2. Appeal from superior court, Amador county; C. B. ARMSTRONG, Judge.

Action by Adam Baughman, surviving partner, against R. B. Reed, for partition of personal property, appointment of a receiver, and for general relief. Demurrer to complaint sustained; judgment for defendant, and plaintiff appeals. The facts sufficiently appear from the opinion.

Lindley & Spagnoli and *Reddick & Solinsky*, for appellant. *Blanchard & Swisler* and *Eagon & Rust*, for respondent.

BELCHER, C. C. The court below sustained a general demurrer to the complaint, and, plaintiff declining to amend, judgment was entered in favor of the defendant, from which the plaintiff has appealed. The material facts stated in the complaint are as follows: In October, 1882, the plaintiff executed to the defendant a written lease, for the term of five years then next ensuing, of a certain ranch in Amador county, and also of certain farming utensils and stock. The plaintiff was to erect certain improvements on the premises, and to furnish to the defendant the seed needed to put in a crop the first year. The defendant was to till and in all respects cultivate the premises in a husband-like manner, and out of the crop raised the last year was to return to the plaintiff the same number of pounds of seed, and of the same kinds as he received the first year. The defendant was also to deliver to the plaintiff, or his order, "two-fifths of all the crops produced on the said farm and premises aforesaid, of every name and description or kind, to be divided on the place; hay in bale under shelter, grain of all kinds in the granary, apples, peaches, pears, plums, etc., in the fruit-house, grapes in the vineyard after being gathered, and in a reasonable time after such crops shall have been harvested or gathered." The defendant entered under his lease, and continued to occupy and cultivate the premises until the 26th of July, 1886, when this

action was brought. It is further alleged that plaintiff, in October, 1882, furnished to defendant, to be used as seed, 32,469 pounds of barley and 3,700 pounds of wheat; that during the year 1886 defendant had raised on the premises 37 tons of barley of the value of \$1,000, and 45 tons of wheat of the value of \$1,350, and that all of this grain was severed from the ground and in process of being threshed and sacked; that defendant intended and had threatened to and would leave and abandon the premises on completing the harvesting of the crop, and that he denied the right of the plaintiff to any part thereof, and threatened and intended to remove the whole crop, and to dispose of and convert the same to his own use; that defendant is insolvent. The prayer is that 32,469 pounds of the barley, 3,700 pounds of the wheat, and two-fifths of the remainder of the crop be segregated and set apart to the plaintiff, and that a receiver be appointed pending the action, and for general relief.

We fail to see why the complaint does not state facts sufficient to constitute a cause of action. The action was in effect for a partition of personal property, owned by the parties as tenants in common. Now conceding that plaintiff did not own that part of the crop which he claimed in return for the seed furnished in 1882, (*Callender v. McLeod*, 16 Pac. Rep. 194,) still he unquestionably did own, as tenant in common with the defendant, two-fifths of all the wheat and barley raised on the leased premises. *Bernal v. Hovious*, 17 Cal. 542; *Knox v. Marshall*, 19 Cal. 617; *Freem. Co-Tenancy*, § 100. The defendant was in possession of the whole crop and was threatening to sell it and appropriate the proceeds to his own use. In such a case an action for partition was the proper remedy, and the appointment of a receiver was authorized by the Code. *Freem. Co-Tenancy*, §§ 426, 448; *Code Civil Proc.* § 564. It is urged for respondent that the complaint was insufficient, because it failed to allege that plaintiff had performed all the conditions of the lease which were to be performed by him, but we think sufficient facts were stated in this regard. It is further argued that the action was commenced prematurely, because the defendant was to deliver to plaintiff his share of the grain in the granary. But as the defendant denied the plaintiff's right to any part of the crop, and was threatening to appropriate it all to his own use, we do not see why plaintiff was called upon to delay the commencement of an action to determine his rights. The judgment should be reversed, and the cause remanded with directions to overrule the demurrer.

We concur: HAYNE, C., FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed and cause remanded, with directions to overrule the demurrer.

75 Cal. 346

In re STUTTMEISTER'S ESTATE. (No. 12,254.)

(*Supreme Court of California.* March 26, 1888.)

1. EXECUTORS AND ADMINISTRATORS—EXPENSES OF ADMINISTRATION—ATTORNEY'S FEES.

Where the executor was negligent in his duties and some of the heirs employ an attorney to prosecute the matter, and hasten administration, the estate is not bound for the payment of such attorney's fees.

2. SAME—ALLOWANCE OF DEMAND—VOID ORDER.

In such case, on petition of the attorney against the heirs, an order was entered by the probate court, on default, that the attorney's fees be paid out of the estate. *Held*, on petition against the administrator to enforce payment under such order, that the order was void.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

For former report of this case, see 14 Pac. Rep. 35.

Ben. Morgan, for appellant. *E. J. & J. H. Moore*, for respondent.

PATERSON, J. The petitioner herein is an attorney at law. On June 12, 1884, he filed a petition in the probate department of the superior court, asking for an order citing V. R. and W. O. Stuttmeister, Bertha M. Byer, and George C. Hoadley, guardian of the estate of Alice L. Stuttmeister, a minor, to appear and show cause why they should not pay the petitioner their proportion of the sum of \$300 claimed by him as an attorney fee. In his petition he alleged, among other matters, that the executor of the last will of Stuttmeister, deceased, had grossly neglected the duties of his trust, and delayed the settlement of the estate; that the heirs and devisees were unable to learn anything about the affairs of the estate; that two of the heirs, V. R. Stuttmeister and B. M. Byer, being greatly in need of money, retained the petitioner as their attorney to prosecute the matter in their behalf, he consenting to act without a retaining fee; that he was retained by them as their attorney to prosecute their claim for themselves and minor heirs; that Hoadley, as guardian of the estate of the minors, retained him to prosecute, on behalf of the minors, proceedings against the executor, on the same terms and conditions. He further alleged that, in pursuance of his agreement, he had performed services which were worth the sum \$300; that he had presented his claim to the heirs and Hoadley, the guardian, and demanded payment, but all objected to the payment of the same except the guardian, who was willing to pay whatever sum the court might allow. On September 19, 1884, the default of the respondents for failure to answer the petition was entered. On October 8, 1884, the court made an order allowing the petitioner \$300 "for services rendered as attorney for the heirs herein in hastening the administration of the estate," and ordered "that judgment be entered in favor of petitioner for the sum of \$300, * * * to be paid from said estate in due course of administration." No appeal was taken from this order. Thereafter, on May 11, 1887, the petitioner filed another petition in said estate, setting forth the making of said order, and praying that the administrator of said estate be compelled to pay him said sum of \$300. To this petition the administrator filed an answer, and, the matter coming on to be heard, the court granted the prayer of the petition, and ordered the administrator to pay the petitioner forthwith, out of the funds in his hands belonging to said estate, the said sum of \$300, from which order this appeal is taken.

From the foregoing statement, it will be seen that the contract upon which the petitioner relies in support of the orders of the court was a contract between himself and V. R. Stuttmeister and B. M. Byer. The executor was not a party to the agreement, and there was no order appointing the petitioner attorney for minor or absent heirs. The heirs could not by their contract bind the estate. The executor was not made a party to the proceeding which resulted in the first order, and the estate was not represented. The claim was not one which arose in the life-time of the testator, and it was not an expense of administration. The fact that no appeal was taken from the original order is immaterial, because the proceedings, on their face, are void. They show a contract with parties who could not bind the estate, the petition states no facts authorizing the order, and no one representing the estate was a party thereto. In *Stuttmeister v. Superior Court*, 14 Pac. Rep. 35, it was decided, simply, that an appeal having been taken from the order now before us, and a *supersedeas* bond filed, the court had no power to enforce the payment of the money by proceedings for contempt. The order is reversed.

We concur: SEARLS, C. J.; MCKINSTRY, J.

BOOTH *et al.* v. HOSKINS. (No. 12,363.)

(Supreme Court of California. March 20, 1888.)

1. MORTGAGES—WHAT CONSTITUTES—ABSOLUTE DEED.

Plaintiffs conveyed land by a quitclaim deed to defendant, and at the same time borrowed money from defendant, both signing an agreement at the same time to mutually repay and reconvey. *Held*, that although on the face of the deed it was an absolute conveyance, yet it was clearly the intention of the parties to create a mortgage only, and such must it be considered.¹

2. LIMITATION OF ACTIONS—WRITTEN AGREEMENT—ORAL EVIDENCE TO VARY.

Where there is a written agreement in which appears a stated time for the repayment of a loan, the lender will not be allowed to adduce in evidence an oral agreement to alter the terms of, or be substituted for, the written agreement, if made at the time of the loan; nor, if made subsequently, can such an oral agreement create a new or continuing contract so as to prevent the running of the statute of limitations.

3. QUIETING TITLE—MORTGAGED PREMISES—PAYMENT OF MORTGAGE DEBT.

Plaintiffs, owing defendant a mortgage debt, brought action against the latter to quiet title to the property subject to such charge, defendant's cause of action to recover his money being barred by statute. *Held*, that the plaintiffs must be denied any affirmative relief in equity until they had done equity by payment of the debt and interest to defendant.

Commissioners' decision. Department 1.

Appeal from superior court, Placer county; B. F. MYRES, Judge.

Action brought by Edward Booth *et al.*, plaintiffs and appellants, to quiet title to land in Placer county, California, against J. H. Hoskins, respondent and defendant.

Taylor & Holl, for appellants. *J. M. Fulweiler* and *C. A. & E. P. Tuttle*, for respondent.

BELCHÉR, C. C. The plaintiffs commenced this action on the 29th day of July, 1885, to quiet their title to a quarter section of land in Placer county. By his answer the defendant denied that the plaintiffs, or either of them, had owned the land in question since the 13th day of July, 1878, admitted that he claimed to own it, and, by way of cross-complaint, alleged that on the 13th day of July, 1878, the plaintiff, Booth, was the sole owner of the land, and on that day, for and in consideration of the sum of \$408, gold coin, paid to him by defendant, executed and delivered to defendant a good and sufficient deed of the same, and thereby the defendant became, ever since has been, and now is the owner thereof. And the prayer was that the defendant's title be quieted as against the plaintiffs. The plaintiffs answered the cross-complaint, and admitted the execution of the deed as alleged, but averred that it was a quitclaim deed, and was made for and as a mortgage, and was so understood and intended by the parties thereto, to secure the payment of \$408, with interest, thereon at the rate of $1\frac{1}{2}$ per cent. per month, due from Booth to the defendant for money loaned and advanced to him by defendant; and then further averred that all claim and demand which defendant may have had against Booth, on account of the money so loaned and advanced, was, before the commencement of the action, barred by the provisions of sections 337, 339, Code Civil Proc. At the trial the deed referred to, being an ordinary quitclaim deed, was introduced in evidence, and also a paper signed by both parties, which reads as follows: "This agreement, made and entered into this 13th day of July, 1878, by and between Edward Booth, of Placer county, state of California, and J. H. Hoskins, also of said county and state, witnesseth, that whereas, the said party of the first part has entered at the Sacramento land-office (describing the quarter section in controversy;) and whereas, said party of the second part has furnished the said party of the first part \$408, in United

¹See note at end of case.

States gold coin, for the said above-described land; and whereas, to secure the party of the second part, the said Edward Booth has this day deeded to J. H. Hoskins his right, title, and interest in the above-described land: now, therefore, this agreement witnesseth, that if the said Edward Booth shall repay to the said J. H. Hoskins the sum of \$408 within three months from the date of this instrument, with interest at $1\frac{1}{4}$ per cent. per month, then the said J. H. Hoskins shall reconvey to the said Booth the above-described land, and all its appurtenances." The defendant was a witness in his own behalf, and testified "that at the time of the execution and delivery of the said deed, Booth also delivered to him the certificate of purchase, just received from the receiver of the land-office, with the express understanding that the patent was to be delivered to him (Hoskins) when it should be issued by the government; and that although the written instrument recited the promise to pay within three months from the 13th day of July, 1878, yet it was distinctly understood and agreed between him and Booth that he (Hoskins) should receive the patent and hold it as additional security; and that Booth should have a reasonable time, after the issuance of the patent, to pay the \$408 and interest; that he never asked Booth to pay him, or expected Booth to pay him, or that his money was due until after the patent had been issued; that it was not until about the 25th day of July, 1881, when he went to the land-office and found that the patent had been issued during the winter preceding, and that Booth had caused it to be delivered to him by making an affidavit, etc.; that about the last of August, or in the forepart of September, 1881, he saw Booth and asked him about his getting the patent, and the payment of what Booth owed him for the purchase of the land; that Booth admitted that he got the patent, and said he was going to keep it, and that his deed to Hoskins was not good because it was not signed by Booth's wife, and that he did not propose to pay him, Hoskins, until he got ready, if at all; that then was the first time that Booth had ever been asked by him for the money, or had refused to stand by his agreement made at the time of the payment for the land and execution of the deed." The foregoing was all the evidence introduced by either side upon the question as to the purpose and effect of the deed from Booth to defendant, and upon the question as to whether the defendant's cause of action to recover back his money was barred by the statute of limitations or not. The court found that prior to the execution of the deed Booth resided with his family upon the quarter section, and filed a homestead thereon, stating in his declaration of homestead all the facts required by law to be stated therein, and, among others, that the property was then of the value of \$2,500; that at the time of the trial the property was of the value of \$20,000; that the deed "was intended to vest the title to said premises in said Hoskins in trust, and to secure the payment of \$408, with interest at $1\frac{1}{4}$ per cent. per month, loaned by Hoskins to Booth on the day last aforesaid to pay for and secure the title to said land from the government of the United States;" that the amount then due was \$918, no part of which sum had been paid or tendered, and that defendant's right to recover the amount due him was not barred by the provisions of sections 337, 339, Code Civil Proc. And as a conclusion of law the court found "that in fairness the plaintiffs ought not to have any relief in this action until they first pay the defendant his just debt; that, seeking equitable relief, they should show equity on their side; that defendant Hoskins is entitled to a decree foreclosing his said deed as a mortgage, and foreclosing plaintiffs of and from all right, title, and equity of redemption therein, after execution of sheriff's deed therefor according to the law and the practice of the court, and for the sum of \$918, to be paid out of the amount arising from the legal sale of said premises, over and above the sum of \$5,000, exempt as a homestead." Judgment of foreclosure was accordingly entered in favor of the defendant, from which and from an order denying them a new trial the plaintiffs have appealed.

The first question that presents itself for consideration is, what was the character of the defendant's deed? We think it entirely clear that the deed was intended to be and was only a mortgage. The defeasance, executed contemporaneously, shows beyond doubt that it was made to secure the payment of a sum of money loaned by the grantee to the grantor, and payable at a future day, with interest. In such a case a deed absolute is held to be and is treated as a mortgage. *Farmer v. Grose*, 42 Cal. 169; *Montgomery v. Spect*, 55 Cal. 352. The next question is, was the defendant's cause of action to recover back his money barred by the statute of limitations? We think it was. By express provision of the written contract, made at the time of the loan, the money was to be repaid in three months. Under this contract the debt became due, and the statute began to run in October, 1878, and an action was consequently barred after four years from that time. There is nothing to take the case out of the general rule except the testimony of defendant that it was understood and agreed between him and Booth that the latter should have a reasonable time to pay the money after the issuance of his patent. But this agreement was oral, and, if made at the time of the loan, could not change the terms of, or be substituted for, the written contract, and, if made subsequently, could not create a new or continuing contract, so as to take the case out of the operation of the statute. Code Civil Proc. § 360. Besides, if we could accept defendant's theory, we should meet with a new difficulty. Defendant learned, in July, 1881, that the patent had been issued, and in August or September following was informed by Booth "that he did not propose to pay him, Hoskins, until he got ready, if at all," and still he waited for three years and a half after that without attempting to assert his rights. Under such circumstances the delay would seem to have been unreasonable and inexcusable. Now, conceding, what we do not decide, that under our law, as at present framed, a mortgage upon a homestead, executed by the husband, but not by the wife, is void only as to the homestead value, and is good as to the excess, (*Sargent v. Wilson*, 5 Cal. 504; *Moss v. Warner*, 10 Cal. 296; *Mabury v. Ruiz*, 58 Cal. 14,) still, the defendant's right to recover the money due him being barred, he was not entitled to have his mortgage foreclosed. But were the plaintiffs entitled to any relief without first paying the defendant? The whole case shows that Booth justly owed the defendant all the money claimed by him. It was by the use of the money loaned by defendant that Booth acquired the title to his property, now of large value. Common honesty requires a debtor to pay his just debts, if he is able to do so, and the courts, when called upon, always enforce such payments if they can. The fact that a debt is barred by the statute of limitations in no way releases the debtor from his moral obligation to pay it. Moreover, one of the maxims which courts of equity should always act upon is, as suggested by the court below, that he who seeks equity must do equity. In accordance with this maxim, we think the plaintiffs should be denied any affirmative relief until the money justly due to the defendant is paid. The other questions discussed by counsel do not require special notice.

The judgment and order should be reversed and the cause remanded, with directions to the court below to enter a decree upon the findings in accordance with this opinion.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed and the cause remanded, with directions to the court below to enter a decree upon the findings in accordance with the views above expressed.

NOTE.

MORTGAGE—DEED ABSOLUTE. A deed absolute upon its face will be construed as a mortgage in connection with a bond for a reconveyance executed as part of the same transaction, *Cosby v. Buchanan*, (Ala.) 1 South. Rep. 893; *Frey v. Campbell*, (Ky.) 3 S. W. Rep. 368, and note; as it will, also, in connection with any instrument of defeasance, *Id.*; *Gaither v. Clark*, (Md.) 8 Atl. Rep. 740; *Bunker v. Barron*, (Me.) *Id.* 253; *Joint-Stock Ass'n v. Merklin*, (Md.) 5 Atl. Rep. 544; *Morrison v. Markham*, (Ga.) 1 S. E. Rep. 425. Any instrument executed merely as security for a debt will be so treated. *Knapp v. Bailey*, (Me.) 9 Atl. Rep. 122; *Pearson v. Sharp*, (Pa.) *Id.* 38; *Hanlon v. Doherty*, (Ind.) 9 N. E. Rep. 782, and note; and a bill of sale will under such circumstances be held a chattel mortgage, *Id.* note, 786; *Butts v. Privett*, (Kan.) 14 Pac. Rep. 247. It is immaterial that the instrument is executed by a party other than the debtor, *Robinson v. Bank*, (Tenn.) 3 S. W. Rep. 656; *Bank v. Ashmead*, (Fla.) 2 South. Rep. 657; or that the reconveyance is to be made to some third party, *Martin v. Pond*, 30 Fed. Rep. 15.

The facts may be shown by parol evidence. *Knapp v. Bailey*, *supra*; *Pearson v. Sharp*, *supra*; *Darst v. Murphy*, (Ill.) 9 N. E. Rep. 887, and note; *Butts v. Privett*, (Kan.) 14 Pac. Rep. 247; *Bank v. Ashmead*, *supra*.

2 Cal. Unrep. 853

MARKHAM v. FOWLER et al. (No. 11,098.)

(*Supreme Court of California.* March 26, 1888.)

APPEAL—PRACTICE—FILING BRIEFS.

Case to be submitted on briefs will be dismissed for failure to file briefs within time allowed.

Department 1. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Bennett, Wiggington & Creed, for appellant. *J. M. Wood*, for respondents.

PER CURIAM. The above-entitled cause having been ordered submitted on briefs to be filed within 30 days from February 14, 1888, and the time having expired, and no briefs having been filed, it is ordered the judgment appealed from be affirmed.

75 Cal. 356

BURKE v. KOCH. (No. 11,088.)

(*Supreme Court of California.* March 26, 1888.)

1. REPLEVIN—ALTERNATIVE JUDGMENT—WHEN NOT NECESSARY.

Under Code Civil Proc. Cal. § 667, providing that judgments in actions to recover possession of personal property may be for the possession, or value thereof, in case a delivery cannot be had, the court is not bound when it appears, in such an action, that property which belonged to plaintiff was fraudulently disposed of by defendants, to find the character or value of such articles as could be returned, or to render a judgment in the alternative.

2. SAME—EVIDENCE—FRAUD.

In an action of claim and delivery, when it appears that property which belonged to plaintiff was fraudulently assigned by one defendant to the other, both being participants in the fraud, the fact that a consideration passed between them is immaterial to the case.

3. SAME—DAMAGES—CLAIM IN PETITION.

In an action of claim and delivery, it is error for a trial court to allow any damages beyond the amount prayed for in the petition.

Department 1. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Action brought by Alfred I. Burke, as assignee of the estate of Jacob Zech, insolvent, against Jacob D. Koch and Jacob Zech, to set aside an alleged fraudulent assignment, etc. The court decided for plaintiff, and defendant Koch alone appealed. After such appeal he died, and his executors, K. Meussdorffer and A. Grass, were substituted as defendants.

A. C. Ellis, for appellant. *Tilden & Tilden*, for respondent.

PATERSON, J. Conceding that this action is, as claimed by appellant, an action of claim and delivery, it does not follow that the judgment is void or

erroneous because not in the alternative. The court found that the defendants sold and disposed of a large portion of the property sued for, and appropriated the proceeds thereof. Under the findings of the court,—and the findings are supported by the evidence,—the defendants stand as wrong-doers, as fraudulent assignor and fraudulent assignee. The defendant Zech, with the intent to hinder, delay, and defraud his creditors, made the assignment to his brother-in-law, defendant Koch, and the latter, with full knowledge of the fraudulent purpose, accepted the same, to aid Zech in defrauding his creditors. In pursuance of their scheme, a part of the property which should have gone to the possession of the assignee, this plaintiff, was disposed of by the defendants. This fact appearing at the trial, the court was not bound to find the character or value of the articles which could be returned, or to enter a judgment in the alternative. *Whetmore v. Rupe*, 65 Cal. 238, 3 Pac. Rep. 851; *Brown v. Thompson*, 45 Cal. 76.

The fact that Koch paid \$2,200 for the property, if such be the fact, is immaterial; it entitles the defendant Koch to no consideration, either at law or in equity. The defendants were both fraudulent actors. Actual fraud characterized the transaction *ab initio*, and the creditors are not called upon to reimburse Koch for money which was paid him to insure the fraud against detection. *Goodwin v. Hammond*, 13 Cal. 168; *Swinford v. Rogers*, 23 Cal. 234.

The statement shows that "plaintiff offered in evidence, as admissions made by Jacob Koch as to why he took the property, and his knowledge of the circumstances of Mr. Zech, and also showing he was told the value, the testimony of Mr. Koch taken at the trial of the opposition to the discharge of Jacob Zech in insolvency." The evidence was objected to by defendant, as "irrelevant and inadmissible." Objection was overruled, and defendant excepted. The evidence following this offer and ruling appears to be a transcript of the sworn testimony of Koch, but is not shown to be such except by the statement above quoted. The evidence was not irrelevant, if it was in fact a statement made by Koch, and the objection that it was inadmissible was insufficient to test the question of its competency. The ruling is therefore not shown to be erroneous.

The judgment is for \$7,470 and costs. The plaintiff prayed for the sum of \$6,000, the value of the property, and \$500 damages; and the prayer follows the *ad damnum* clause of the complaint, which alleges that plaintiff has been damaged in the sum of \$500 by reason of the detention. In the absence of an amendment to the complaint, therefore, the court could not allow any damages beyond the amount prayed for.

The order denying a new trial is affirmed, and the cause is remanded, with directions to modify the judgment by striking out the figures "\$7,470" and inserting the figures "\$6,500" in lieu thereof. In all other respects the judgment is affirmed.

We concur: SEARLS, C. J.; MCKINSTRY, J.

75 Cal. 332

STOCKTON BLDG. & LOAN ASS'N v. CHALMERS *et al.* (No. 11,828.)

(Supreme Court of California. March 23, 1888.)

1. EXECUTORS AND ADMINISTRATORS—ACTIONS AGAINST—RIGHTS AS INDIVIDUALS.

The wife of a deceased mortgagor was made a party to a foreclosure suit as executrix only. A homestead previously declared by her was set up in defense. The land was sold under a decree giving plaintiff possession. *Held*, that a writ of assistance should not issue against the wife, as, not being a party to the suit in her individual capacity, such homestead exemption could not be properly pleaded in defense.

2. SAME.

Under Code Civil Proc. Cal. §§ 387, 389, prescribing two methods by which new parties may be brought into an action, viz., by intervention and by order of court, one who is before the court as executrix cannot become a party to the action in her individual capacity, except by one of the methods prescribed.

PATERSON, J., dissenting.

In bank. Appeal from superior court, El Dorado county; GEORGE E. WILLIAMS, Judge.

W. L. Dudley and Geo. G. Blanchard, for appellant. *Chas. N. Fox*, for respondents.

SEARLS, C. J. This is an appeal from an order after final judgment, refusing a writ of assistance. Robert Chalmers, in his life-time, executed a mortgage upon certain premises in El Dorado county. Subsequently his wife, Louisa, declared a homestead upon a portion of the same premises. Chalmers departed this life, and an action to foreclose the mortgage was brought against the executor and executrix of his last will, viz., against George Chalmers and Louisa M. Chalmers, as executor and executrix thereof. Louisa Chalmers, the widow, was made a party defendant as executrix, but not in her individual capacity. The executor and executrix set up the fact of the declaration of homestead by the latter, and the court found the existence of the homestead as a fact, and that it was subsequent in time and subject to the lien of the mortgage. A decree was entered in favor of plaintiff under which the property was sold, purchased by plaintiff, and, a sheriff's deed having passed, possession was demanded of Louisa M. Chalmers, (who had before that time intermarried with one Hardie,) pursuant to a clause in the decree requiring possession to be delivered to the purchaser, which was refused, whereupon plaintiff applied for a writ of assistance. The court below denied the writ upon the grounds that Mrs. Chalmers was not individually a party to the foreclosure suit, and was not made such, or concluded by the answer made in her representative capacity, setting up the homestead, or by the decree rendered therein.

It is well settled that a judgment for or against a party in one right cannot affect him when acting in another right. Thus, a plaintiff, suing as administrator of his wife, is not affected by a judgment against himself in her life-time, in an action to which she was not a party. *Blakey v. Newby*, 6 Munf. 64. "A decree against one as administrator, on a bill to compel the delivery of slaves claimed as a gift from the intestate, will not conclude his rights as a creditor, on a bill by him against the former plaintiffs, to set aside the gift conveyance for fraud." Freem. Judgm. § 156, and cases cited. Louisa Chalmers was sued as the executrix of the last will of her deceased husband. As such she could only avail herself of such defenses to the foreclosure suit as would have existed in favor of her testator, had he been living, and a party to the action, and had he been living and a party defendant he could not have concluded by a defense or want thereof his wife's right to the homestead. Such result could only be reached, if by action, in a proceeding to which she was a party. *Revalk v. Kraemer*, 8 Cal. 66; *Same v. Same*, Id. 75; *Van Reynegan v. Revalk*, Id. 76; *Cook v. Klink*, Id. 347; *Stoops v. Woods*, 45 Cal. 439. It is true, a party may be before the court in two or more capacities, and in *Corcoran v. Canal Co.*, 94 U. S. 741, an individual, as trustee for certain bondholders, was brought before the court and a decree rendered against him as such, and it was held he could not relitigate the same matter on the ground that he was himself a bondholder of some of the bonds. If he was such holder, it was said he was bound by the former decree, because, as trustee in the former suit, he was representing himself. That, however, is not this case. Louisa Chalmers, as executrix, represented the estate of her deceased husband, and the decree rendered is binding upon such estate; but her right in the homestead, if taken from the community property of herself and husband, vested

absolutely in her upon the death of the latter, and as executrix she could not represent it. But it is claimed that defendant did, in effect, make herself individually a party to the action by setting up the homestead right when sued as executrix. The Code specifies but two methods by which, after the commencement of an action, new parties may be brought in; one is by an order of the court and the other by complaint of intervention. No such order was made or proceedings had in this case; hence we conclude she was not individually a party to the cause. It may well be that a party who voluntarily files an answer in a cause without an order of court making him a party defendant, and who goes to trial upon the issues made by his answer to the complaint, will be concluded by the judgment rendered on the trial of such issues, and estopped from denying that he was a party to the action. But in the present case we search the decree in vain for any adjudication of defendant's homestead rights. The conclusion reached by the court below was "that Mrs. Chalmers (now Mrs. Hardie) never was a party to this action, and therefore the judgment and decree do not affect her homestead right, and, being in possession under the homestead right, she is rightfully in possession."

We are of opinion this conclusion was warranted by the premises, and the order denying the writ is affirmed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.; TEMPLE, J.; THORNTON, J.; MCKINSTY, J.

PATERSON, J. I dissent. It is true that Louisa M. Chalmers was not, technically speaking, a party defendant in the action, but she voluntarily set up her individual rights in the property, and caused the same to be litigated. Her homestead right was set forth in detail. It was treated as an issue in the case. The trial proceeded upon the theory, by all the parties, that her individual rights were in controversy, and the findings of the court upon that matter were as full as the allegations of the answer. Her individual right was not necessarily, or even properly, in the answer as a part of the defense made by the defendants in their representative capacities. The estate could not in any way be benefited by the determination of the homestead rights of Mrs. Chalmers; on the contrary, if her homestead right had been established, (the court found that plaintiff's mortgage was a lien upon the property described in said declaration of homestead,) the estate would have lost a fund which otherwise would have been devoted to a payment of the debts. She, therefore, in effect and in fact, became a party to the suit in her individual capacity. Her rights were determined, and I think she was bound by the decree rendered in the case. If the name "Louisa M. Chalmers" had been repeated in the title of the cause without the addition of the official designation "executrix," there can be no doubt that judgment would be binding upon her. "A nominal, but not substantial, difference in parties does not effect the estoppel. The general rule that a judgment of a court having jurisdiction of the subject-matter and the parties and the process, and rendered directly upon the point in question, is conclusive between the same parties, is not complied with when the same person, though a party in both suits, is such in different capacities, in the one individually, in the other as administrator. So, if an action is brought by A., as guardian of B., a minor, a judgment against A., as guardian, is in his official capacity, and will not preclude him from maintaining a subsequent action in his own right individually, and *vice versa*; for, in the prior action, A., properly speaking, had not been a party. The real party in interest was the minor, by A., his guardian. The subsequent action in A.'s own name is not then between the same parties. The person may be the same, but in different capacities, and the former action cannot preclude him from maintaining the subsequent action; but where they litigate their individual rights in the same action, the judgment is conclusive. Thus, where

an executrix, who was also the widow of the testator, being sued in the former capacity only, but raising in her defense of the suit the issue of her rights as usufructuary, will be personally concluded by the judgment, and cannot subsequently attack its validity on the ground that she was not cited in her individual capacity." 1 Herm. Estop. § 94.

75 Cal. 349

LOWRIE et al. v. SALZ et al. (No. 12,183.)

(*Supreme Court of California.* March 26, 1888.)

1. PRINCIPAL AND AGENT—REVOCATION BY DEATH—TRUSTS.

L., leaving home, left one M. in charge of his farm, with general instructions to manage same. M. had business transactions with one H., who was indebted to the estate, and who purchased the goods in question, and who deposited them with warehousemen in the name of M., but for the account and risk of —, no person being named. The warehouseman knew H., but not M. H. never handed the receipt to M., but borrowed money from defendants, to whom, upon surrender of the receipt, a new one was issued by the warehouseman. L. was dead at the time of the transaction. *Held*, that M.'s agency was revoked by death of principal, and that the goods were never in the possession of M. so as to create a trust for the benefit of the estate.

2. EVIDENCE—OPINION—ADMISSIBILITY.

In an action for the value of goods deposited, a witness was asked "whom he understood was the depositor." *Held*, such question is objectionable, as requiring the opinion of the witness, and should have been excluded.

Department 1. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

Action of trover and conversion, brought by Mary Lowrie and M. B. Sturges, plaintiffs and appellants, against S. Salz and E. Niehaus, defendants and respondents. Verdict for defendants. Plaintiffs appeal.

T. C. Van Ness, for appellants. *Thos. C. Huxley*, for respondents.

SEARLS, C. J. This is an appeal from a judgment of nonsuit, and from an order denying a new trial. The motion to dismiss the appeal from the judgment must be granted. The judgment was entered January 11, 1886, and the appeal was taken April 26, 1887, more than one year after the entry of such judgment.

The proof of service of notice of appeal was sufficient, under the rule enunciated in *Reed v. Allison*, 61 Cal. 461, and the motion to dismiss is denied as to the appeal from the order denying a new trial.

One of the grounds specified in the notice of motion for new trial is "insufficiency of the evidence to justify the decision and judgment." The statement fails to specify any particular in which the evidence is insufficient; and hence to that extent, under section 659, Code Civil Proc., the statement must be disregarded. There was evidence tending to show that one John Lowrie was a ranch-owner in Alameda county, and was engaged in the business of farming and fruit-growing. In the summer of 1883 he departed from this state for Alaska, leaving in charge as general superintendent and manager of his lands one John Munson, who was authorized to carry on the business, sell the product of the ranch, etc. John Lowrie was lost at sea on or about October, 1883, but his death was not known here until July, 1884. In the mean time Munson had conducted the farming business. James Hogan, who was engaged in the business of purchasing and packing fruit at Centerville, Alameda county, had purchased fruit from the Lowrie ranch through Munson; and on or about August 23, 1884, was indebted therefor to the extent of about \$1,500. It would seem that Hogan had agreed to pay some money on the fruit, from time to time, to pay for picking, and the residue of the purchase price when he (Hogan) sold the fruit. In August, 1884, Hogan deposited in the warehouse of Mortimer & Wamsley, at Niles, in Alameda county, five loads of canned fruit, amounting to 300 cases, and directed the ware-

houseman to give him a receipt as if deposited by Munson. A receipt was accordingly given in the following words and figures:

"NILES, August 23, 1884.

"Received in Niles Warehouse from Jno. Munson the following cases of canned goods on storage, for account and risk of ———. (Not transferable or negotiable;) Three hundred and sixty (360) cases canned goods. Storage charges one cent. per month, or for any fractional part of a month.

"MORTIMER & WAMSLEY, Proprietors."

The receipt should have been for 300 cases, but by mistake was made 360. The warehouseman knew Hogan, did not know Munson, and supposed the deposit was in the name of the latter to avoid danger of legal proceedings by the creditors of the former. Hogan had previously informed Munson that he should deposit fruit in this warehouse, (indeed, he had already deposited some,) "and when he had got enough in there to secure me [Munson,] he would give me the warehouse receipt, and that was all the talk we had about it. * * * I never asked him for the receipt, and he never gave it to me." Hogan never gave the receipt to Munson, but borrowed money on it from defendants, to whom, upon the surrender of this receipt, a new one was given by the warehouseman. Defendants afterwards received the amount due them from Jones & Co., to whom they assigned their security, and the fruit was sold by the latter for \$1,200. Plaintiffs are the executors of the last will of Lowrie, and, as such, sue for the value of the fruit; and their right to recover was the question involved in the nonsuit.

1. The agency of Munson ceased with the death of his principal. From that time forward he could not bind the estate of the latter by contracts in the name of his former principal, for the reason that a dead man cannot have an agent, in the ordinary acceptance of the term.

2. If Munson, assuming to be the agent of Lowrie, received property or benefits accruing by reason of such assumed or supposed agency, and which property belonged to the estate of one for whom he assumed to act, he could be treated as a trustee, and would be liable as such.

3. The goods were deposited by Hogan in the name of Munson as depositor, it is true, but not for him or for his account, but for account and risk of ———; that is, of some person not named. The receipt was given to Hogan, who had delivered the goods, and was never delivered to Munson. Had this receipt been filled out so as to show that the deposit was for the account and benefit of Munson, it would have been evidence of his right to the property; but in the form in which it was issued it failed in this particular. Had Hogan filled the blank by the insertion of the name of any given person, as we think he might lawfully have done, it would, upon delivery to such person, have entitled him, upon return of the receipt, to the possession of the goods. What he did do was to return the receipt, and procure another in the name of and for account of defendants. As the first receipt and deposit did not entitle Munson to possession, or give him constructive possession, of the property, he could not, without delivery of the receipt to him, have recovered the property, and the representatives of Lowrie, whom we may suppose he was assuming to represent, were in no better condition. The case of *Honig v. Bank*, 15 Pac. Rep. 58, relied upon by appellants, is not in point. There the money was deposited by Peyser in the name of, and for the account of Honig, and the certificate of deposit issued by the bank read as follows: "N. Honig has deposited in this bank two hundred and fifty dollars in gold coin, payable to self or order on the return of this certificate, properly indorsed," etc.; and this court held the bank liable in having paid the certificate without the indorsement of Honig. Had the receipt in this case specified Munson as the person for whose account the deposit was made, the analogy would have been complete, and, so far as like rules apply to the two cases, they would have been parallel. Had the Honig certificate failed to name any person to whom it

was payable, we may safely assume the decision would have been different. It would then have been payable to bearer upon return and surrender of the certificate. So, here, the goods were subject to delivery upon the return of the receipt. The receipt was not negotiable, and that fact was impressed upon its face, substantially as provided by section 8 of the act of March 1, 1878, relating to warehouse receipts, etc., (St. 1877-78, p. 949.)

The exceptions founded upon the rulings of the court touching the testimony of the witness Wamsley, who was recalled by plaintiff pending the motion for non-suit, are not, we think, either important or tenable. It was first sought to be shown, by the witness, for whom he delivered the receipt in question. Upon objection, the court held that plaintiff might show all that was said between him and the boy (Hogan's boy) fully. This was all that was proper. No occult theory of the witness on the subject, no mental reservation or intention of his, not expressed, could alter the rights of the parties. The witness was then asked whom he understood to be the depositor of the fruit, and the court permitted the question, and the witness replied: "Do you mean the owner?" And the court said: "Depositor. You know what that means, don't you?" And the witness answered: "The man that put it in there." The court thereupon asked the witness if he understood the meaning of the term, and received for response: "Well, I understand the use of the word 'depositor' to mean the owner of the fruit." To which the court responded: "You can answer it in that light if you see fit. But that is not necessarily the construction of the word. The man who delivered the fruit there is the depositor, as a matter of law. Now, with that view of it, answer the question." *Answer.* "Why, Hogan was the man that delivered the fruit." The witness certainly gave his own views upon the subject, and later answered as to the fact in the view presented by the court. The question as put was objectionable, so far as it called for the opinion of the witness, rather than for the facts upon which his understanding was based; and, had the court sustained defendants' objection, there would have been no error in the ruling, and there was no error in the explanations and inquiries of the court and witness.

Taking the case as a whole, we think the testimony failed in establishing a predicate for recovery, and that the nonsuit was properly granted, and the motion for a new trial was properly denied. The appeal from the judgment is dismissed, because not taken within one year from the entry of such judgment, and the order denying a new trial is affirmed.

We concur: MCKINSTRY, J.; PATERSON, J.

2 Cal. Unrep. 853

Ex parte McDONALD. (No. 20,405.)

(*Supreme Court of California.* March 26, 1888.)

EXECUTION—SUPPLEMENTARY PROCEEDINGS—CONTEMPT—HABEAS CORPUS.

Where, in proceedings supplementary to execution, defendant pleads a previous discharge in insolvency, and refuses to answer questions as to her property, and is committed for contempt, her remedy is by appeal, and not by *habeas corpus*.¹

In bank. Petition for writ of *habeas corpus*.

Petitioner, Maggie McDonald, was intrusted by another with several thousand dollars to purchase mining stock for her. Petitioner received the money to invest on account of such person, and so agreed to invest same. On demand for delivery of the stock, the petitioner refused, and afterwards sold the stock for which judgment was given against her. Execution issued, and court ordered petitioner to answer certain questions as to her property, which

¹See note at end of case.

she refused, pleading a discharge in insolvency previously given her, and she was committed for contempt. Petitioner sued out this writ.

Geo. W. Tyler, for petitioner. *Chas. F. Hanlon*, in opposition.

PER CURIAM. The petitioner, being restrained of her liberty, sues out a writ of *habeas corpus*, praying to be discharged, upon the ground that the judgment under which the proceedings were had which resulted in her imprisonment for contempt had been discharged by subsequent proceedings under the insolvent laws of this state. The superior court had jurisdiction to hear and determine this question, and, it would appear, did determine it adversely to the petitioner. If wrong in so doing, it is but error, and petitioner's remedy, if any, is by appeal. The application is denied, and petitioner remanded to the custody of the sheriff of the city and county of San Francisco.

NOTE.

HABEAS CORPUS—WHEN LIES. *Habeas corpus* will not lie to correct errors of a court having jurisdiction of the subject-matter and the person charged, *Zelle v. McHenry*, (Iowa,) 2 N. W. Rep. 264; nor to retry issues of fact, or to review the proceedings of a legal trial; that can only be properly done by writ of error on appeal, *Ex parte Lemkuhi*, (Cal.) 13 Pac. Rep. 148. But an appellate court may make use of the writ as one means of exercising its supervisory power. In *re Hamilton*, (Mich.) 16 N. W. Rep. 327. The acts of an officer *de facto* not being void, the right of the justice issuing the commitment to hold his office cannot be inquired into on *habeas corpus*. *Ex parte Johnson*, (Neb.) 19 N. W. Rep. 594. *Habeas corpus* is not the proper remedy to procure the discharge of a person arrested in a civil action on an affidavit which merely alleges, in the language of the statute, that defendant fraudulently contracted the debt sued on, without alleging the facts tending to show fraud; such defect in the affidavit rendering the proceedings voidable only, and not absolutely void. *Barton v. Sanders*, (Or.) 16 Pac. Rep. 921. Where one held in custody under the judgment of a court institutes *habeas corpus* proceedings, he must show that the judgment is not merely irregular or erroneous, but absolutely void. *Rolfs v. Shallcross*, (Kan.) 1 Pac. Rep. 523; In *re Turner*, (Cal.) 16 Pac. Rep. 898. In such case the petitioner for the writ assails collaterally the judgment under which he is imprisoned, and, to entitle himself to a discharge from such imprisonment, he must show the judgment, either by his petition or by his proof on the hearing, to be an absolute nullity. *Willis v. Bayles*, (Ind.) 5 N. E. Rep. 9. Respecting the grounds upon which a judgment may be collaterally attacked, see *McCarter v. Neil*, (Ark.) 6 S. W. Rep. 731, and note.

75 Cal. 325

FISHER *et al.* v. SLATTERY. (No. 12,185.)

(*Supreme Court of California.* March 22, 1888.)

1. EJECTMENT—WHEN LIES—LANDLORD AND TENANT.

A lessee, under a written lease for a year, renewable at his option, and prohibiting him from letting or subletting without the written consent of the lessors, after six months' possession, sold his business, and permitted the purchaser to go into possession of the premises leased, retaining, however, the right to keep certain personal property there, and himself paying the rent. At the end of the year, without having sublet the premises, or assigned the lease, he surrendered the premises to the lessors who had refused to accept rent from the purchaser. *Held*, such findings, in an action of ejectment, entitle the lessors to judgment for possession.

2. SAME—INADVERTENT FINDING.

A finding in an action of ejectment that plaintiff was in possession at the commencement of the action, being evidently a mere inadvertence, as the pleadings admitted, and the other findings indicated that defendant was then in possession, will not defeat a judgment.

Commissioners' decision. Department 2. Appeal from superior court, Yuba county; PHILLIP W. KEYSER, Judge.

Action of ejectment by Phillip and Anna M. Fisher against P. C. Slattery. Judgment for plaintiffs, and defendant appeals.

J. H. Craddock, for appellant. *E. A. Davis*, for respondents.

FOOTE, C. This is an action in ejectment. One of the plaintiffs, Anna M. Fisher, obtained a judgment in the court below for the possession of the premises sued for, etc. From that this appeal is prosecuted upon the judgment roll. The appellant urges that the findings are conflicting and contradictory;

that they do not sustain or justify the judgment; and that the judgment is against law. It appears that Anna M. Fisher was on the 26th day of October, 1885, the owner of the premises sued for, that upon that day she, jointly with her husband, who had no interest in them, leased the premises to one Sullivan by a written lease for one year, commencing on said date, it being agreed therein that Sullivan might, at his option, continue the lease until the 26th day of October, 1888. The lease also contained a clause to the effect that Sullivan was prohibited from letting or underletting the premises without the written consent of the lessors. Sullivan thereupon entered into possession of the premises, but about the 1st of May, 1886, he sold a butcher business, of which he was the proprietor, in Yuba City and Marysville, to the defendant; also certain personal property in the former place. A deed to the latter was executed and delivered by Sullivan to Slattery, acknowledged and recorded. Slattery entered into its possession at once; also the shop, fixtures, meat, etc., therein included. Upon the same day, with Sullivan's consent, the former also entered into possession of the premises sued for in this action, together with the shop, meat, and fixtures therein contained, Sullivan retaining the right to keep therein certain goods not sold to Slattery, until it should be found convenient to remove them. A bill of sale of the personalty was also given to Slattery by Sullivan. The court further finds that Sullivan did not sublet the premises, nor assign his lease of them to Slattery.

We see nothing in this which renders the findings contradictory. It is true that Sullivan allowed Slattery to go into possession of the premises in Marysville, leased from Mrs. Fisher and her husband, but the former retained the right to keep certain property there, and himself paid the rent to the lessors for two months, and when Slattery applied to be allowed to pay the rent to them it was refused, and his tenancy was repudiated. Sullivan, the lessee, paid the rent up to the end of the first year's tenancy, and then, on the 26th of October, 1886, handed over his lease to the attorney for the plaintiffs, and stated that he did not desire to occupy the premises any longer, and his tenancy was at an end, and Mrs. Fisher was entitled to the possession of her property as against Slattery, who was as to her a mere trespasser. Mrs. Fisher never acknowledged Slattery as her tenant, refused to do so when he applied for recognition and offered to pay rent, and never received any rent except from Sullivan. There is nothing which indicates any acquiescence on her part, with any letting, subletting, or assignment of the lease by Sullivan to Slattery. She seems to have looked to Sullivan, and Sullivan only, as her tenant, and not in any way to have waived her right not to have the premises sublet without her written consent. There is no indication from these facts that any subletting by the written consent of the lessors was given, or that any parol assignment of the lease was made. The appellant claims further that the court has found that Mrs. Fisher was actually in possession of the premises she sued for when her action was brought, and that therefore he could not have been in the wrongful possession thereof at that time. Ordinarily a finding in an action of ejectment that the plaintiff was in possession at the commencement of the action would be fatal to a judgment for the plaintiff. But in this case it was admitted by the pleadings that the defendant was in possession at the commencement of the action. The finding that plaintiff was in possession at the commencement of the action was evidently a mere inadvertence. The pleadings and the other findings indicate that defendant was in possession, and claimed a right to the possession.

We perceive no prejudicial error in the record; and advise that the judgment be affirmed.

I concur: HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

75 Cal. 342

SIMPSON v. APPELGATE. (No. 12,040.)

(Supreme Court of California. March 24, 1888.)

1. VENDOR AND VENDEE—PAROL CONTRACT—RESCISSION—WHEN ABSOLUTE.

Plaintiff, being in possession of certain public land, contracted by parol to sell it to defendant, who paid for it, took possession, and improved it. Afterwards, the contract having been rescinded in order to enable plaintiff, under the pre-emption laws, to make final proof, and defendant to act as witness for him, a patent was obtained to this with other land, and plaintiff then agreed by parol to convey it to the defendant. *Held*, the rescission enabling plaintiff to make final proof must be taken as effectual, and defendant has no equitable title.

2. SAME—TENANT AT WILL.

Defendant in ejectment, although tenant at will, as vendee in possession, after rescission of the contract of sale, waives his right as tenant to notice to quit by a denial of plaintiff's right in his answer.

Commissioners' decision. Department 1. Appeal from superior court, Placer county; J. M. WALLING, Judge.

Action of ejectment by James E. Simpson against George W. Applegate. Judgment was rendered for plaintiff and defendant appeals.

Hale & Craig, for appellant. *C. A. & F. P. Tuttle*, for respondent.

HAYNE, C. Ejectment. The plaintiff claims under a United States patent. The defendant set up an equitable defense, and prayed for a conveyance from plaintiff of the legal title. The court below gave judgment for the plaintiff, and the defendant appeals. The case comes up on the judgment roll.

Certain points are made by the respondent as to the construction of the findings, but for the purposes of this opinion we shall assume that the finding that the plaintiff was "the owner" of the premises at the commencement of the action is a conclusion of law, within the rule laid down in *Levins v. Roegner*, 71 Cal. 273, 12 Pac. Rep. 161, 343.

The facts as disclosed by the findings are as follows: The appellant and respondent were respectively in possession of adjoining pieces of public land. In 1862, the respondent made a parol agreement to sell to the appellant the tract in controversy for \$75. This sum was paid, and the appellant took possession of the property, and improved the same; thus bringing himself fairly within the rule as to specific performance of partially executed parol agreements for the conveyance of real property. But no deed was made. Afterwards the respondent applied for a patent from the United States for a tract which included the premises in controversy. This was with the knowledge and acquiescence of appellant, who drew up the declaratory statement, at respondent's request. What then occurred is stated by the findings as follows: "Thereafter, and within the time allowed by the pre-emption laws to make final proof and payment, plaintiff applied to defendant to go with him to said land-office as a witness for him, to make proof of his right to his said land. The defendant then explained to plaintiff that he could not become such witness while there existed any contract or agreement between them for a conveyance by plaintiff to defendant, or to any one else, of any part of the land so to be pre-empted; and, further, that the plaintiff himself could not take the oath prescribed by law while any such contract or agreement existed; and that before defendant could become such witness, or plaintiff himself could take such prescribed oath, it was indispensable that all existing contracts and agreements in respect to a conveyance of any part of the land should be canceled and rescinded; and it was then and thereupon agreed between them that all said contracts and agreements then or theretofore existing between them should be, and then were, canceled and rescinded, and said defendant then became such witness." A patent was accordingly issued to the plaintiff. It is further found that "after the making of said final proof

and payment for said land, and after the issuance of said patent, there were conversations between plaintiff and defendant as to a conveyance of said land by said plaintiff to said defendant; and therein defendant requested plaintiff to convey the same to him, and plaintiff verbally consented and agreed so to do, for the sum of \$1.25 per acre, the defendant's proportion of the expense of procuring the patent." The plaintiff, however, subsequently changed his mind, and brought the present action to remove the defendant from possession.

The finding that the parties rescinded their contract in order to qualify the defendant to become a witness on the application for the patent must be taken to mean an effectual rescission. There is nothing in the record to show that they did not intend it to be such; and, if the record had shown that such was not their intention, it cannot for a moment be supposed that any court would countenance such a trick upon the officers of the land department, or such trifling with the obligations of an oath. The contract was therefore entirely rescinded and gone; and for the purposes of this branch of the case this left the parties as if no contract had ever existed. The subsequent "conversations" amounted to nothing. If we assume that there was a consideration for any subsequent agreement, such agreement was not valid, because it was not in writing, and there was no subsequent part performance. The appellant appears to have relied entirely upon the honor of the respondent, and, if he has been disappointed in such reliance, he is without a remedy.

It is argued for appellant, however, that, if his equitable defense fails, he is a tenant at will, and that, since he has received no notice to quit, the action must fail. The court below found that he was "not the tenant at will of the plaintiff." We are inclined to think, however, that this must, in view of the other facts found, be considered to be a mere conclusion of law, and that he must be held to be a tenant at will, because he was a vendee in possession after the rescission of the contract to sell. *Frisbie v. Price*, 27 Cal. 253. But, if we assume this to be so, it does not help the appellant, because the answer denies the right of the plaintiff; and it is found that the defendant, in 1882, executed a conveyance of the premises to one Seaver, and about a year afterwards received a reconveyance from him, and "at all times claimed to be the owner of said demanded premises, except during the time that Seaver held the deed from defendant." These things constituted such a disclaimer of the relationship as dispensed with notice. Taylor, in his work on Landlord and Tenant, after stating the general rule as to denials by the tenant of the landlord's right, says: "But if the tenancy is from year to year, or at will, the law is otherwise; for these tenancies are always determinable by notice, and, as notice would be waived by a denial of the relation of landlord and tenant, the tenancy is in fact forfeited." 8th Ed. § 522. And this is the law in California. *Smith v. Ogg Shaw*, 16 Cal. 88; *Dodge v. Walley*, 22 Cal. 225; *Bolton v. Landers*, 27 Cal. 104.

We do not think the findings, when properly construed, are contradictory. It may be remarked with reference to the transcript that it is not the practice in this state to change the title of a case when it is appealed. There is no propriety here in making the defendant in the court below appear as the plaintiff on appeal. Such a course, being against usage, has a tendency to produce confusion, both on appeal and in the court below.

We advise that the judgment be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

75 Cal. 293

LEVISTON v. RYAN *et al.* (No. 9,271.)

(Supreme Court of California. March 20, 1888.)

1. PUBLIC LANDS—PATENTS—VALIDITY—BURDEN OF PROOF.

A patent, under which plaintiff claims in ejectment, is *prima facie* valid; and, if its validity can be attacked at all, the burden of proof is upon the defendant.

2. SAME—PROVINCE OF THE COURT.

In ejectment, where there is some evidence to establish the validity of a patent under which plaintiff claims title, the court should not declare such patent invalid on the ground that there is not sufficient evidence to determine the question of its validity.

3. SAME—LAND SUBJECT TO ENTRY.

Where, in ejectment, plaintiff claimed under a patent, the selection having been made under Act Cong. March 3, 1871, (16 St. 581,) providing that a selection may be made from land subject to pre-emption under any laws of the United States, with certain specified exceptions, the defendant, in order to defeat the patent, if he can attack its validity at all, must show that the land was not subject to acquisition in any mode allowed by any law.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

Action of ejectment, brought by plaintiff, William Leviston, against William Ryan and others, to secure possession of certain lands situate in the city and county of San Francisco. The superior court found for defendant, and plaintiff appeals.

Wm. & Geo. Leviston, for appellant. Tobin & Tobin and Thos. F. Barry, for respondents.

HAYNE, C. Ejectment. The plaintiff claims through a patent from the state of California, issued under the act of 1862 and amendatory acts in relation to agricultural colleges. The defense is that the patent is void. The court below gave judgment for the defendant, and the plaintiff appeals. Two points are made by the defendant in support of the judgment.

1. It is said that the tract in controversy is part of the four leagues confirmed in the city and county of San Francisco as successor of the pueblo. If this were true, there could be no doubt but that the plaintiff's patent is void; but there is nothing in the findings or the evidence to show that it is true. The finding is that "it is impossible to determine whether or not the lands in controversy are within the limits of the lands so confirmed to the city and county of San Francisco." It may be remarked, in this connection, that we see nothing impossible in the determination of the question. There is no question of fact which is material to the decision of a cause,—that is to say, which the law requires to be decided,—which cannot be settled by proof or presumption. The machinery of a court must be supposed to be equal to any demand which the law permits to be made upon it. The law does not require impossibilities. In the present instance the description in the decree of confirmation is clear, and it was a mere question of applying it to the ground. If sufficient evidence to satisfy the mind of the court was not produced by the parties, it should have found the fact against the party on whom was the burden of proof, (*Speegle v. Leese*, 51 Cal. 415,) and the burden in this case was upon the defendant. It was not required to make an official survey, but simply to decide as between the parties before it, whether the tract in controversy was within the description contained in the decree of confirmation. The facts which the court did find showed a valid patent, and, this being the case, the supposed impossibility of finding further facts showing it to be invalid was no reason for holding it to be so. In the absence of a showing that the land was part of the four leagues, we must conclude that the patent is valid, unless there be some other ground upon which it can be attacked.

2. The defendant contends that such other ground is furnished by the fact that the land was, at the date of the selection, within the limits of an incorpo-

rated city. It is alleged in the complaint, and not denied by the answer, that the land "is situate in the city and county of San Francisco." This averment, of course, speaks only from the time of the commencement of the action. But we know as a matter of law that the act establishing the corporate limits has not been changed since the date of the selection, and the land has certainly not moved since then; so that it must be taken as an established fact that the land was within the limits of the city and county of San Francisco at the date of its selection. This does not necessarily mean that it was a part of the four leagues. It is well known that the corporate limits extend somewhat beyond the four leagues; so that the tract might be "in the city and county of San Francisco," without being a part of the four leagues. And the respondent's argument upon this point is based upon the assumption that such is the case. The argument is that the statute of the United States provides that "lands included within the limits of any incorporated town, or selected as the site of a city or town," shall not be subject to pre-emption. Rev. St. § 2258, reproduced from act of 1841. But pre-emption is not the only mode in which public lands may be acquired. For example, the prohibition against pre-emption of lands within the limits of a city or town does not prevent the issuance of a patent for public mineral land within such limits. *Steel v. Smelting Works*, 106 U. S. 447, 1 Sup. Ct. Rep. 389. And upon the same principal we suppose that, if the land be public land, the prohibition against pre-emption does not prevent its acquisition in any other mode that may be applicable, (see *Doll v. Meador*, 16 Cal. 322,) unless the acts under which the proceedings were had contain something to the contrary. It is obvious, therefore, that it is necessary to examine the acts under which the proceedings were had. The original act was passed on July 2, 1862. It provided that "there be granted" to the several states a certain quantity of land for the purpose of providing colleges for the benefit of agriculture and the mechanic arts. The provision in relation to the lands to be selected as part of the grant was as follows: "Whenever there are public lands in a state subject to sale at private entry at \$1.25 per acre, the quantity to which said state shall be entitled shall be selected from such lands within the limits of such state." 12 St. U. S. p. 503, § 2. This act also contains a proviso that "no mineral lands shall be selected or purchased under the provisions of this act." On June 8, 1868, an amendatory act was passed, whereby it was provided that the selection could be made "from any lands within said state subject to pre-emption and sale," with the same proviso as to mineral lands, and a further proviso excepting lands already subject to rightful claims. 15 U. S. St. p. 68, § 4. On March 3, 1871, another amendatory act was passed, whereby it was provided that the selection could be made "from any lands within said state subject to pre-emption settlement, entry, sale, or location under any laws of the United States," with the same proviso as to mineral lands and lands subject to rightful claims. 16 St. U. S. 581. The selection was in 1872, and was therefore under the last-mentioned act. It is obvious that its provisions on the subject are different from those of the prior acts. As we construe it, the selection is not confined to lands which are subject to pre-emption, but may be made from public lands which are subject to acquisition in any mode, except mineral lands and lands subject to rightful claims; or, in the language of the statute, from any land which is subject to "settlement, entry, sale or location under any laws of the United States," with the exceptions mentioned. The language of the statute being express that the selection may be made from public lands subject to acquisition in any mode, (with specified exceptions,) we do not see how it can be construed to mean that the selection must be made from land subject to acquisition in one particular mode. This being the proper construction of the statute, it is not sufficient for the respondent to show that the land was not subject to pre-emption. He must go further, and show that the land was not subject to acquisition as public land in any mode. In other words, he must

show that the land was not of such character as to bring it within any law of the United States providing for the acquisition of public land. To apply this principle, he must show that the land was not timber land, desert land, or land of any special character which would subject it to acquisition under any law of the United States. The court cannot take judicial notice of the character of the land. In all the cases which we have seen in which patents have been held to be invalid, the defendant has proved by evidence the facts showing such invalidity. Whether a patent is conclusive or not, it is at least *prima facie* valid; and if a defendant in ejectment can attack it at all, the burden is on him to show the invalidity. *Minter v. Crommelin*, 18 How. 88; *Collins v. Barlett*, 44 Cal. 381. The findings in this case set out the patent in full, and do not show that the land was of such a character as not to be subject to selection. They, therefore, do not support the judgment. The question, therefore, as to the conclusiveness of the patent,—which is the main one argued,—does not arise upon the record. We do not suppose it probable that the land was of such a special character as to bring it within any special mode of acquisition, and if the parties can stipulate that such is the fact, and agree to resubmit the cause, we suppose it would be proper (following the precedent of *Soto v. Kroder*, 19 Cal. 94, 95) to take up the case again, and determine what seems to be the main question involved; the controversy being undoubtedly genuine. In the present condition of the record, however, the judgment cannot stand. We therefore advise that the judgment be reversed, and the cause remanded for a new trial, with leave to the parties to file a stipulation, and proceed as above mentioned.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for a new trial, with leave to the parties to file a stipulation, and proceed as above mentioned.

75 Cal. 443

SWAMP-LAND RECLAMATION DIST. NO. 407 v. WILCOX. (No. 11,782.)

(Supreme Court of California. March 29, 1888.)

1. PUBLIC LANDS—SWAMP LANDS—ASSESSMENT—ALTERATION OF ORDER OF BOARD OF SUPERVISORS.

In an action to enforce payment of a swamp-land assessment, an entry in the record of the board of supervisors appointing the assessors, which is conceded to have been altered without authority by one who was, at the time of the entry, but not at the time of the alteration, clerk of the board, is admissible in evidence, where it appears that the record as altered conforms to the original entry book from which it was made, and the party making the alteration testifies that it was done to amend a clerical error. Reversing 14 Pac. Rep. 843.

2. SAME—ASSESSMENT LISTS—DESCRIPTION.

Under Pol. Code Cal. § 3461, requiring certain assessment lists to contain "a description by legal subdivisions, swamp-land surveys, or natural boundaries, of each tract assessed," a description naming the adjoining proprietors on their respective boundaries is sufficient. Following 14 Pac. Rep. 843.

3. SAME—EXPENSES AND BENEFITS—DUTY OF COMMISSIONERS—PRESUMPTION.

Under Pol. Code Cal. § 3456, providing that assessments for swamp-land improvements shall be in proportion to the whole expense and to the resulting benefit, and section 3461, requiring the assessment list to contain, among other things, "the amount of the charge assessed against each tract," where a list conforms to the requirements of the latter section, it will be presumed that the assessment was made in compliance with the former, there being no evidence to the contrary. Following 14 Pac. Rep. 843.

4. SAME—AMOUNT OF ASSESSMENT—OMISSION OF DOLLAR-MARK.

In an action to enforce payment of a swamp-land assessment, it appeared that, in the assessment list, there was no dollar-mark before the figures opposite defendant's name, under the heading "Amount of Charges Assessed," but such mark preceded the figures in the same column in other places. *Held*, that the figures must be construed to represent dollars. Following 14 Pac. Rep. 843.

5. SAME—OATH OF COMMISSIONERS.

The commissioners of swamp-land assessments were verbally sworn before viewing the land, but it did not appear that they subscribed their oath and filed it in the county clerk's office, as required of all "officers" by Pol. Code Cal. §§ 904, 909. *Held* that, even if the commissioners were "officers" within the meaning of those sections, a failure of strict compliance with their requirements would not avoid official acts fully performed. Following 14 Pac. Rep. 843.

In bank. Appeal from superior court, Sacramento county; T. B. McFARLAND, Judge.

Action by swamp-land reclamation district No. 407 against William Wilcox, to enforce payment of a swamp-land assessment. Judgment for plaintiff, and defendant appeals. For former opinion in this case on appeal in department 1, see 14 Pac. Rep. 843.

Freeman, Johnson & Bates, Armstrong & Hinkson, and W. H. Beatty, for appellant. *A. P. Catlin*, for respondent.

SHARPSTEIN, J. This appeal is from a judgment entered in favor of plaintiff and from an order denying the defendant's motion for a new trial in an action to enforce payment of a swamp-land assessment. After alleging that it is a corporation organized for the purpose of reclaiming certain swamp land, and that in the month of March, 1882, it became necessary to construct in said district, levees, embankments, ditches, drains, and other reclamation work, the plaintiff alleges that in order to provide for such reclamation works, and the maintenance, protection, and repair thereof, the board of trustees of said swamp-land reclamation district No. 407 employed Jim C. Pierson, a competent engineer, to survey, plan, locate, and estimate the costs of the works necessary for such reclamation, and of the maintenance, protection, and repair thereof. That thereafter the said Pierson did plan, locate, and survey said works, and estimated the cost thereof, and made a report in writing thereof to the said board of trustees, which report was approved and adopted by the said board, and was afterwards, on or about the —— day of August, 1882, by the said board, presented to the board of supervisors of Sacramento county, together with an estimate, made by said board of trustees, of the amount necessary for the incidental expenses of superintendence, repair, and other expenses. That said report was received by the said board of supervisors, and filed with the clerk thereof on the 25th day of August, 1882. From said report it appeared that the aforesaid works of reclamation, together with the incidental expenses of superintendence, repairs, etc., would cost the sum of \$78,000. That thereupon, on the day last mentioned, the said board of supervisors approved the said report, and adopted an order appointing three disinterested persons, residents of said county, commissioners to assess the charge upon the said land, of which order the following is a copy: "Ordered that J. M. Upham, James Stephenson, and John Miller, three competent and disinterested persons, and residents of Sacramento county, be and are hereby, appointed commissioners, who must, in the manner provided by law, view the lands of said district, and assess thereupon the proper assessments and charge for the reclamation of said lands, to-wit, the sum of \$78,000, in the manner and at the cost surveyed, planned, and estimated by J. C. Pierson, engineer of said district, and by the board of trustees of said district, as exhibited by the report of said trustees filed this day with the clerk of this board." These allegations were denied by the defendant, and the plaintiff, for the purpose of proving them, offered in evidence the entry in the record of the board of supervisors of the county of Sacramento, being page 558 of the Minute Book K of the records caused to be kept by the board of supervisors, in which the clerk of the board was required to record all orders and decisions made by the board, and the daily proceedings had at all regular and special meetings, and when offered in evidence the entry therein read as follows, to-wit:

"OFFICE OF THE BOARD OF SUPERVISORS, Friday, August 25, 1882.

"Swamp-Land District No. 407.

"The report of the trustees of Swamp-Land District No. 407 was received, and following reports adopted: Ordered that J. M. Upham, J. M. Stephenson, and John Miller, three competent and disinterested persons and residents of Sacramento county, be, and are hereby, appointed commissioners, who must, in the manner provided by law, view the land of said district, and assess thereupon the proper assessment, and charge for the reclamation of said land, to-wit, the sum of \$78,000, in the manner and at the cost surveyed, placed, and estimated by J. C. Pierson, engineer of said district, and by the board of trustees of said district, as exhibited by the report of said trustees filed this day with the clerk of this board."

The attorneys for defendant objected to said entry as evidence on the ground that it appeared to have been altered and changed since it was made, and that it was an order appointing commissioners to view and assess a charge on lands in swamp-land district No. 341, and not upon land in swamp-land district No. 407. Thereupon the plaintiffs admitted that on the 17th day of June, 1885, the day before the trial, Thomas H. Berkey changed the figures designating the number of the district from 341 to 407. It was then shown that said Thomas H. Berkey was the county clerk of Sacramento on the 25th of August, 1882, but that his term of office had expired at the time he changed said records as above stated; that the record of the proceedings of the board of supervisors of the 25th day of August, 1882, of which said page 558 of Minute Book K was a part, was signed by P. R. Berkey, the president of the board of supervisors, but not signed by Thomas H. Berkey, who was county clerk, and, by virtue of his office, clerk of the board of supervisors of said county at the time said entry was made, nor was said record signed by any of his deputies. And it appears that said change was made by said Thomas H. Berkey without the direction or permission of said board of supervisors. Said Thomas H. Berkey, at the time he made the said alteration, was a deputy of the clerk of the county of Sacramento, and as such was acting clerk of the board of supervisors when sitting as a board of equalization. The board of supervisors was not in session when the alteration was made. Berkey testified that he made it as soon as his attention was first called to what appeared to him, by a comparison of the records and examination of different pages of said book K, to be a clerical error made by John H. Parnell, deceased, who, in August, 1882, was deputy of witness, and acting clerk of the board of supervisors. A book was introduced in evidence, described by the witness "as the book of original entry," in which the clerk first entered the minutes of the proceedings of the board of supervisors, from which the Minute Book K was made up. In that book, under date of August 25, 1882, appeared an entry of which the following is a copy: "The Board of Swamp-Lands Commissioners No. 407. Report of Trustees filed and ordered adopted. See order." The bill of exceptions states that, "the testimony of the witness Berkey and inspection of the papers, among which was the original report of the trustees of swamp-land district No. 407, tended to show that the order was made upon the report of the trustees of the swamp-land reclamation district No. 407, and that the figures "341" was merely a clerical error of said Parnell in making up the minutes or records in said Book K." The testimony of said Berkey was duly objected to by defendant, on the grounds that a record cannot be altered, changed, or contradicted by parol, and his testimony was only an opinion, conclusion, or inference from circumstances, and was irrelevant, immaterial, incompetent, and so the admission in evidence of the said rough minute book, because the entry therein was indefinite, and the same was not a record, and was irrelevant and incompetent. The court overruled both objections, and admitted the testimony of said Berkey and said book in evidence, to which rulings, and each of them, the defendant then and there excepted. The plaintiff then offered

said entry in evidence again, to which the defendant then and there objected on the grounds: (1) That said order was irrelevant, immaterial, and incompetent; (2) that said record has been changed since this action was commenced, in a material respect, under the direction and with the knowledge of the attorneys for the plaintiff; (3) that the order made by the board of supervisors, as it appeared and was in fact before changed by said Berkey, was an order appointing commissioners to view and assess a charge upon the lands in swamp-land district No. 341, and not an order appointing commissioners to assess a charge upon the land in swamp-land district No. 407. The court overruled the objection and admitted said entry, so changed, in evidence. The defendant excepted.

We discover no error in that. The evidence tended to prove that the board of supervisors approved the report of the board of trustees, and appointed commissioners to view and assess the land of reclamation swamp-land district No. 407. The entry made in book K was *prima facie* evidence of the facts stated therein. Code Civil Proc. § 1920. But it was not conclusive of those facts. Proof of its having been altered might affect the credit and weight to be given to it, but did not render it inadmissible. *Wayland v. Ware*, 104 Mass. 46; *Sprague v. Bailly*, 19 Pick. 436. If the evidence proved that the entry in the official book, as it appeared when offered in evidence, contained the order made by the board, the circumstance of its having been altered after it was originally entered did not render it inadmissible. In *Sprague v. Bailly*, *supra*, it became necessary for the defendant to prove that he had taken the oath required to be taken by a collector of taxes. The records of the town were produced at the trial, and contained an entry of his having taken the oath of office as "treasurer." The defendant moved that the town clerk should be permitted to amend his record. This was objected to by the plaintiff. The objection was overruled, and the clerk amended by striking out the word "treasurer" and inserting the words "collector of taxes, according to the best of my knowledge and belief." On appeal to the supreme court the counsel for plaintiff insisted that this was error. SHAW, C. J., said: "Upon this point the court are of opinion that there was competent evidence to go to the jury to find whether the defendant was sworn as collector or not. The entry in the book is a memorandum, not a record, and may be left to the jury with other evidence upon the fact." In the case now before us it was necessary for the court to find whether the order introduced in evidence related to district No. 407, or to district No. 341. Evidence tending to prove that that related to either, was, in our opinion, admissible. The original entry of the clerk was *prima facie* evidence that the order was entered, as it passed, but not conclusive. The alteration did not prove or disprove that the original entry was erroneous. The validity of the assessment depended on the order made by the board, not upon the order entered by the clerk in his book. The entry of the order was *prima facie* evidence that it had been duly made as entered. But this might be contradicted and overcome by other evidence. Code Civil Proc. § 1833. We think it was clearly shown that the original entry of the order was erroneous, and that the order made by the board is correctly expressed in the amended entry. It was upon this point that the judgment and order of the court below was reversed by department 1 of this court, and upon this point the case was ordered to be heard in bank. Upon the other exceptions we are satisfied with the views expressed in the opinion filed by the department, which are as follows: "The defendant also objected to the assessment list, offered in evidence by the plaintiff, upon several grounds, and his objections were overruled. One ground of objection was that the land was not properly described. The Code required the list to contain 'a description by legal subdivisions, swamp-land surveys, or natural boundaries of each tract assessed,' and 'the number of acres in each tract.' The land assessed to the defendant was described as a portion of two swamp-land surveys, 'bounded

on the north by the lands of Mrs. R. F. Davis, on the east by the lands of L. C. Rube, on the south by the lands of the Pacific Mutual Life Insurance Company, and on the west by Old river, number of acres, 100.' This should be held, we think, to be a sufficient description, as otherwise it would seem impossible to describe the land so as to comply with the statute. Evidently it could not have been described by legal subdivisions, nor, being a portion of two surveys, by swamp-land surveys. If, then, the words 'natural boundaries' are to be construed as excluding all artificial boundaries, or boundaries made by man, it must follow that no sufficient description of the land could be made. We do not think such a result was intended or should be declared. In our opinion any description which clearly identifies and marks out the land is sufficient. Another ground of objection was that it did not appear, from the face of the assessment list, or from any other evidence, that the assessment or charge was made in proportion to the whole expense, and to the benefits which would result from the works of reclamation, nor that the charge was estimated in gold and silver coin of the United States, nor in any kind of money. Section 3456 of the Political Code requires the commissioners to 'view and assess upon the lands situated within the district a charge proportionate to the whole expense, and to the benefits which will result from such works, and estimate it in gold and silver coin of the United States.' And section 3461 provides what the list must contain, as follows: 'The list must contain, (1) A description by legal subdivisions, swamp-land surveys, or natural boundaries of each tract assessed. (2) The number of acres in each tract. (3) The names of the owners of each tract, if known; and if unknown, that fact. (4) The amount of the charge assessed against each tract.' The list returned was signed by the supposed commissioners, and complied with the requirements of section 3461, and there is nothing to show that the assessment was not made in full compliance with section 3456. The commissioners were not required to report that in making the assessment they had complied with the requirements of section 3456; and if they had done so, their certificate to that effect would not have been even *prima facie* evidence of the fact. *People v. Hagar*, 49 Cal. 232. They were, however, charged with an official duty, and, in the absence of all evidence to the contrary, must be presumed to have regularly performed that duty. Section 1963, subd. 15, Code Civil Proc. It is true that there was no dollar-mark before the figures '4,764.45' placed opposite the name of the defendant under the heading of 'Amount of Charges Assessed;' but the record shows that this was only one of a number of assessments contained in the list, and that 'in a number of cases there was a dollar-mark (\$) preceding the figures in columns headed with the words "Amount of Charges Assessed," and in a number of instances, as in this, the dollar-mark did not appear.' It is not shown when, or in how many places, the dollar-mark did appear, but if it was prefixed to some of the items in the column, then all the figures standing in the same column and in the same relation to other similar items must be construed to be dollars, without a repetition of the mark before each item. *People v. Mining Co.*, 33 Cal. 171. Still another ground of objection was that it did not appear that Upham, Stephenson, and Miller took, subscribed, and filed their oath of office in the office of the county clerk before they assessed the land and made the assessment list. It did appear that they were sworn verbally by a justice of the peace before they went out to view the land. It is not necessary to decide whether or not they were such officers as sections 904 and 909 of the Political Code refer to; for, if they were, their official acts, after being fully performed, were not rendered void by the fact that they had failed to comply strictly with the requirements of those sections."

Judgment and order affirmed.

We concur: SEARLS, C. J.; MCFARLAND, J.; TEMPLE, J.; PATERSON, J.; THORNTON, J.

SWAMP-LAND RECLAMATION DIST. NO. 407 v. RUBLE. (No. 11,783.)

(Supreme Court of California. March 29, 1888.)

In bank. Appeal from superior court, Sacramento county; T. B. McFARLAND, Judge. For former appeal in this case, see 14 Pac. Rep. 846.
W. H. Beatty, Freeman, Johnson & Bates, and *Armstrong & Hinkson*, for appellant. *A. P. Catlin*, for respondent.

PER CURIAM. This case does not differ in any material respects from that of *Reclamation Dist. v. Wilcox*, ante, 241, (No. 11,782.) filed this day. Upon the authority of that case, the judgment and order are affirmed.

75 Cal. 464

MITCHELL v. AMADOR C. & M. CO. (No. 12,387.)

(Supreme Court of California. March 30, 1888.)

1. MORTGAGES—DESCRIPTION OF PROPERTY—IMPROVEMENTS.

Plaintiff obtained a decree of foreclosure, and a deed for a canal and water-right, of which defendant was a *pendente lite* purchaser. Defendant after purchasing, and before the decree, constructed a new canal to take the place of the old one. Held, in an action to try title, that plaintiff has no right to the new canal, as simply an improvement, where the description of the property in the mortgages, *lis pendens*, decree of foreclosure, and deeds embraced only the old canal and appurtenances.

2. SAME—SUBSEQUENT PURCHASER—WASTE.

Where plaintiff obtained a decree of foreclosure and deed for property of which defendant was a *pendente lite* purchaser, he may recover actual damages for waste committed by defendant while in possession of the property, in an action to try title, and for rents, issues, and profits.

3. ESTOPPEL—IN PAIS—EVIDENCE TO REBUT PRESUMPTION.

In an action for possession of a canal, which plaintiff claims as simply an improvement upon a canal for which he has obtained a decree of foreclosure and deed, where plaintiff is permitted to show, as matter of estoppel, declarations of officers of the defendant corporation to the effect that they regard the new canal as subject to plaintiff's mortgage, evidence on the part of defendant tending to show that plaintiff did not so regard it, and did not rely upon such declarations, is admissible.

In bank. Appeal from superior court, Amador county; C. V. GOTTSCHALK, Judge.

Action to try title, and for other relief, brought by Thomas Mitchell against Amador Canal & Mining Company. Judgment for plaintiff, and defendant appeals.

M. A. Wheaton and *A. C. Adams*, for appellant. *Tilden & Tilden*, (*Lindley & Spagnoli*, of counsel,) for appellee.

PATERSON, J. A full statement of the facts found by the court is filed herewith. This is an action to determine the title to, and recover possession of, a canal of great value, "formerly known as the 'Butte Ditch,' or canal, afterwards called the 'Amador Canal,' as the same is now held and used by the defendant, together with all of the franchises and water-rights belonging thereto, and all the appurtenances and rights connected therewith;" also to recover the rents, issues, and profits, and damages, amounting to the sum of \$1,000,000. Plaintiff claims title to the property under a decree of foreclosure entered October 4, 1873, and a sheriff's deed given in pursuance of a sale thereunder, dated June 6, 1884. The foreclosure suit was commenced on April 6, 1870, and a *lis pendens* was filed the same day. The mortgages upon which the decree was based were executed and delivered to plaintiff by Stickles and others, who then owned the property, in August and September, 1868. Respondent claims that the new line of ditch was constructed to take the place of the old ditch, under the rights, privileges, and franchises acquired from the mortgagors for the purpose of using those rights, privileges, and franchises to better advantage, and that the property as it now exists is but an improvement upon the old ditch, and as such subject to the mortgages. Appellant

claims that the property affected by the decree of foreclosure is not the property for the recovery of which judgment against appellant has been rendered in this case; that it is not the Butte Ditch extended or improved, but another and different aqueduct, called the "Amador Canal," and that a comparison of the descriptions in the decree of foreclosure and in the judgment herein makes this apparent.

In the mortgages, *lis pendens*, decree of foreclosure, and sheriff's deed the property is described as follows:

"That certain ditch commonly called the 'Butte Ditch.'"

"Commencing at the Old Pine-Log crossing on the North fork of the Mokelumne river."

"Conveying water thence to Slab Town, Butte City, and other localities in Amador county; also to the vicinity of Jackson, Scottsville, and other points in said Amador county."

"Together with all the appurtenances, flumes, aqueducts, branch ditches, reservoirs, pipes, and cabins connected with, or in any manner belonging to, the ditch property above mentioned, with the right to take water from the north fork of the Mokelumne river."

In this case the court found that plaintiff was the owner of and entitled to the possession of the following described property:

"All that certain property now known as and called the 'Amador Canal,' with all its appurtenances as the same is now used, together with the water-rights and franchise thereunto belonging, which is more particularly described as follows:

"All the canal and works known as the 'Amador Canal,' situated in the county of Amador, commencing at the north side of the North fork of the Mokelumne river, at a point where said canal taps and takes the waters of said North fork of the Mokelumne river, about two hundred rods above the point which is known as 'Pine-Log Crossing.'

"And thence running in a westerly direction down the north side of said stream about eighteen miles, more or less, to a tunnel, and to the placer mines in the vicinity of Slab Town.

"From thence through a tunnel, in a general north-westerly direction, following the sinuosities and meanderings of said canal, twenty-two miles, more or less, to a point on Tanner's ranch, in the town of Sutter, Amador county, and in the vicinity of the Amador mine.

"Together with all the flumes, ditches and branch ditches, iron-pipe, aqueducts, buildings, cabins, reservoirs, dams, and tunnels belonging to said works, or in any nature connected therewith, and including the branch ditches extending to Jackson and Plymouth, and also all franchises, rights of way, and all water-rights, and all locations for the taking of water, with the right to the waters of said north fork of the Mokelumne river, and all hereditaments, and appurtenances in any way belonging to said property."

There is nothing in the language of these two decrees to indicate that the property described is the same in each. The names of the ditches, the courses,

and the *termini* are different, and the branches, extensions, and franchises named in the decree herein are manifestly not included in the language used in the decree of foreclosure. Furthermore, it is true, as a matter of fact, that the Butte ditch and the Amador canal are not, and never were, physically identical at any point between their *termini*. The learned judge of the court below did not base his conclusion as to the legal identity of the two ditches upon any assumption of identity in fact, but upon the propositions that the Sutter Canal Company and the Amador Canal Company, in their constructions of the new ditch and its branches, always considered them subject to Mitchell's mortgages; that the property was treated as the same ditch, though under a different name; and that the new ditch was built for the purpose of using to better advantage the water-rights and franchises of the old Butte ditch,—was constructed to take its place. In a written opinion, the court thus clearly states the fact in this regard, and defines the issue of law upon which, in its opinion, the case turned: "As soon as the Sutter Canal & Mining Company came into possession of the Butte-Ditch property, July 16, 1870, it commenced the construction of a new ditch of larger capacity than the old Butte ditch on the same general line, but higher up the hill, and of a lesser grade; the new ditch having a grade of eight feet to the mile, whereas the grade of the Butte ditch was thirteen feet four inches. In digging the new ditch, the old Butte ditch, being lower down the hill, was filled up, the flumes were broken down, and the lumber of which they were built was used by the Sutter Canal & Mining Company to build cabins for their workmen, blacksmith shops, etc. The new ditch was built principally in the ground excavated; the old ditch consisted chiefly of flumes. In blasting out the new ditch, the rocks rolled down the hill, and broke down the flumes of the old ditch. In fact, no attention was paid to the old ditch. At a place called 'Bald Rock,' the new canal connected with the old Butte ditch, and for a distance of two miles below Bald Rock the new ditch was right over the Butte ditch. In 1872, the Sutter Canal & Mining Company became insolvent, and such proceedings were had that its property was sold, by order of the United States district court, to the Amador Canal & Mining Company, free and clear of all liens and incumbrances, except from a mortgage lien claimed by Thomas Mitchell on certain franchises of said bankrupt. The Amador Canal & Mining Company completed the ditch commenced by the Sutter Canal & Mining Company, in the prosecution of which it pursued the same course as its predecessors, filling up the old Butte ditch, breaking down the flumes, treating it, in fact, as of no value at all. In 1868, subsequently to the execution of the two mortgages to the plaintiff, the Butte Ditch Company extended their ditch by means of an iron pipe some thirteen hundred feet long, with a carrying capacity of fifteen hundred inches of water, to a place on the Mokelumne river about two hundred rods above Pine-Log crossing. * * * Considerable has been said about the subsequently acquired title, but there is no question in this case of any future acquired title, neither by the mortgagors nor by their grantees. It is future acquired property, not future acquired title to the property mortgaged, which is the issue in this case. * * * Plaintiff's contention is that his mortgages on the Butte-Ditch property, franchises, and water-rights covered the property of the defendant; not because the mortgagors, or their grantees and successors in interest, have acquired any better title to the property mortgaged subsequently to the execution of the mortgage, nor yet on the ground that the Amador canal should be considered as an appurtenance to the Butte ditch, but because the new canal was constructed to take the place of the old Butte ditch, and for the purpose of using to better advantage the water-rights, privileges, and franchises belonging to the last-mentioned ditch; in fact, because, as plaintiff contends, the Amador canal is an improvement of the mortgaged property, and goes to feed the mortgages. * * * It was the intention of the Sutter Canal & Mining Company to use, by means of

the canal it was constructing, the water-right and franchises purchased by Bowman of the Butte Ditch Company. It was for this purpose it commenced the building of the new canal. The Amador Canal & Mining Company, after its purchase of the property, completed the work inaugurated by the Sutter Canal & Mining Company, and extended the ditch from Bald Rock up to the place on the north fork of the Mokelumne river, about two hundred rods above Old Pine-Log crossing, the same place to which the Butte Ditching Company removed their water-right location in 1870, claiming 5,000 inches of water. At this place the Amador canal tapped the river, and took out the water, and at the same place it has taken out and used the water ever since. Bowman went into possession of the Butte ditch and water-right under the title acquired from the Butte Ditch Company. The Sutter Canal & Mining Company commenced the construction of the new canal for the purpose of using such water-right. The Amador Canal Company, upon the completion of the canal, did use such water-right, and has used it ever since. If the water-right and franchises of the Butte Ditch company had not been purchased by Bowman, no new canal could have been constructed; because neither Bowman nor the Sutter Canal & Mining Company or this defendant ever took up, located, or acquired any water-right other than that of the Butte Ditch Company. * * * Counsel for defendant says the new canal is about thirty miles in length, and from the tunnel extends in an entirely new direction to the Tanner reservoir, near Sutter creek; that no part of this new canal had ever been owned by the mortgagors,—no part of it covered by the description, or terms, or language of the mortgage. All this is true, but, as I said before, the new canal would not and could not have been constructed without having first obtained the water-right of the Butte Ditch Company, (the mortgagors,) and it was built for the purpose of using such water-right. * * * Although the Amador canal is not, strictly speaking, the old Butte ditch, extended and enlarged, as alleged in plaintiff's complaint, and is in fact a new ditch, it was built for the purpose of using to better advantage the water-rights and franchises of the old Butte ditch; it was constructed to take its place,—in lieu of it,—and is in law subject to plaintiff's mortgages."

The findings of fact and conclusions of law are in consonance with the opinion of the court. At the trial, evidence was admitted, over the objection of the defendants, upon the questions whether the officers of the Sutter Canal & Mining Company, or of this defendant corporation, ever claimed that the ditch they were constructing was separate property, and not subject to the mortgage, and for what purpose the plaintiff lent the money. Evidence was admitted, also, of declarations made by the officers of the corporation, at the time the new ditch was being constructed, to the effect that the new ditch "was improving the property all the time, and helping the security, and that it was for this reason that proceedings in the foreclosure suit were delayed." This evidence was allowed on behalf of the plaintiff as matter of estoppel; and we are unable to perceive, in view of the evidence thus admitted, upon what theory evidence offered by the defendant tending to show that no reliance was placed by the plaintiff upon such declarations, and that he did not in fact consider the property as subject to the mortgage, was excluded. Thus, plaintiff's objection was sustained to defendant's offer to prove by Joseph Naphaly that "while he (Naphaly) was assignee, Mr. Mitchell stated that his mortgage did not cover anything of the bankrupt estate except the Butte ditch and the water-right connected with it; that it did not cover any portion of the new ditch; * * * and that Mr. Mitchell repeatedly, in conversation at Mr. Naphaly's office, (private conversation, as well as in testimony in the United States district court,) stated that his mortgage only covered the Butte-Ditch property, and for that reason requested these parties to stipulate that he might withdraw, upon the ground that they really had no interest in objecting to the withdrawal of his claim from the United States district court in the bank-

ruptcy proceedings." Defendant offered to show that plaintiff, Mitchell, had called Judge Thompson as a witness in the bankruptcy proceedings to prove by him that the mortgage only covered the Butte ditch and water-right of the bankrupt estate, that the Butte ditch and water-right were at that time of no value, and that it would cost more to put the Butte ditch in repair than it would be worth after it was repaired; but the offer was excluded. If it was material and proper for plaintiff to prove that he believed the property was subject to the mortgage, it would seem to be proper and just to allow the defendant to show that he never believed any such thing. But we cannot see how any such evidence can be material in this case. The mortgage has been foreclosed. It has become merged in the decree. The decree has been executed. The sheriff's deed has passed to the plaintiff. The action which culminated in that decree was commenced for the purpose of subjecting the property liable therefor to the satisfaction of plaintiff's claim,—the \$6,000 and interest; the issue therein raised the question what property was thus liable; and the determination of that issue by the findings and judgment therein conclusively settled the rights of the plaintiff and defendant herein as to the ditches, reservoirs, and franchises which could be taken, and which were to be sold in satisfaction of plaintiff's mortgage. The plaintiff had his day in court upon that issue. He offered his proof. The court determined the matter, and described the property as we find it in the decree. With that determination plaintiff was satisfied, for he took no appeal. If the description of the property in that decree was insufficient or uncertain, it seems to us it was the duty of the plaintiff to ask the court in that case to make it sufficient and certain. The court followed the description contained in the mortgage. If there were any equities entitling the plaintiff to property not included in the language of the mortgage, or if there were matters of estoppel *in pais*, extending the rights of the plaintiff to other ditches and franchises than those named in the mortgage, those matters ought to have been pleaded and proved in that action. *Marshall v. Water Co.*, 5 Pac. Rep. 101. It is important in such cases that the pleadings, the mortgage, and the decree should be certain as to the property affected; otherwise, purchasers *pendente lite* would be at the mercy of the mortgagor and mortgagee. The security offered by mortgages would be destroyed. The decree would determine nothing as to the property pledged, and would be the commencement of endless litigation, instead of a final determination of the rights of the parties interested. The policy of the law with regard to mortgages requires that they give definite information, not only as to the debt secured, but as to the property mortgaged. The rule of law which declares that to be certain which can be made certain is not applicable in a case like this. If there is any uncertainty as to the property described in the mortgage, and which is subject to the mortgage, it should be made certain in the pleadings and the proof, so that the decree may leave nothing in doubt. The information which the law requires to be given to creditors and purchasers by the mortgage and the foreclosure proceedings is that certainty as to the location and description which will enable one to know where the property is, and to distinguish it from other property of the same character which may be adjacent to it. *Herman v. Deming*, 44 Conn. 125.

We cannot see how the inquiry in this case, considered as an action of ejectment or to quiet title, can properly extend any further than to determine the identity of the property named in the decree of foreclosure. The defendant and the Sutter Canal Company, it must be remembered, were purchasers *pendente lite*. They were not made parties to the suit, and, of course, were bound by the decree against their grantors only to the extent of the property described in the complaint, decree, and the *lis pendens*. These, as we have seen, described the property exactly as it was described in the mortgage. Nothing is said in the complaint, *lis pendens*, or decree about any new water-right acquired after the execution of the mortgage. It matters not whether

the water-right is appurtenant to the ditch, or the ditch appurtenant to the water-right. If there was any other ditch than that commonly known as the "Butte Ditch," commencing at Pine-Log crossing, etc., it ought to have been described so that the sheriff and creditors might know that it passed by the decree; and, if there was a new or additional water-right of 5,000 inches, it could not be appurtenant to the Butte ditch, which already had the right to all it could carry,—about 750 inches.

Respondent claims that the Butte Ditch Company had the right to all the water of the stream; that the new works were simply intended as a new and improved method of enjoying the rights and franchises held by that company; and that "this case is not to be determined by simply referring to the descriptive language in the various instruments; but all of the facts and circumstances are to be considered, as well as the declarations and acts of the parties in their dealings with the property, illustrating their object and intention. The assertion that there are two descriptions does not determine whether one was built to use to better advantage the franchises and rights of the other; nor does such assertion determine whether the present property is, in law, an improvement of the property mortgaged." It is true, the court found "that said Butte Canal & Ditch Company was the owner of said water, water-rights, privileges, and franchises, and the right to construct canals and ditches to convey the waters of said stream;" but, if this is a finding that the Butte Ditch Company was entitled to all the waters of the north fork of the Mokelumne river, it is a finding which is not supported by the evidence. We have searched the record in vain for evidence of such fact. In the articles of incorporation it is stated that the object of the Butte Ditch Company is to take the waters of the north fork of the Mokelumne river; but, in the absence of proof of an actual appropriation and diversion, this evidence is not sufficient to show that the Butte Ditch Company enjoyed the franchise to the extent claimed for it. The right mortgaged was the right to take water from said stream, no mention being made of the quantity. Conceding that this language used in the mortgage is broad enough to cover all subsequently acquired franchises, without the necessity of an averment in the complaint in foreclosure of such additional right, we do not perceive any advantage to the plaintiff. In January, 1870, a notice was posted at a point 200 rods above Pine-Log crossing stating that the owners of the Butte Canal & Ditching Company had removed their location, or point of tapping the north fork of the Mokelumne river, to that point, and "appropriated of the waters of the north fork of the Mokelumne river, at this point, 5,000 cubic inches;" and that they were going on with due diligence to construct a canal of sufficient capacity to carry and distribute said amount of water. The company, however, never succeeded in tapping the river at that or any other point, so as to secure the benefit of this notice. The company became insolvent long before they reached that point, and their failure to proceed operated as a forfeiture of their right. The mere act of commencing a ditch, with the intention of appropriating the water, of itself gives no right to the water of a stream. The right depends upon the effectual prosecution of the work. The completion of the ditch and the diversion of the water are necessary elements of title; and the abandonment of the purpose is not so much a matter in avoidance of a title as it is matter showing that no title was ever obtained. The parties prosecuting the work must have the ability to complete the work within a reasonable time, and pecuniary inability to complete the work within a reasonable time cannot be urged as an excuse for not prosecuting the work. *Kimball v. Gearhart*, 12 Cal. 28. "Appropriation, use, and non-use are the tests of the right." *Davis v. Gale*, 32 Cal. 32. The right to the water does not exist when the notice is given, and it may never vest. "The most that is *in esse* is a right to acquire by reasonable diligence a future right to the water." *Canal Co. v. Kidd*, 37 Cal. 316. The right to 5,000 inches of water did not exist at the time the mortgage was

executed; and if such right was acquired, being an additional right,—a franchise, a new property,—it was not covered by the mortgage, because not in existence at the time the mortgage was executed. If the Sutter Canal & Mining Company forfeited its right to 5,000 inches by a failure to prosecute the work, no additional water-right passed to the defendant here by the assignment in bankruptcy; and defendant's right to the additional quantity of water, if any, must depend upon its own appropriation and diversion. It is unnecessary for us to inquire, in this case, whether the defendant has ever properly acquired a right to 5,000 or more inches of water. The question before us here is, how much water—what property—the plaintiff is entitled to under the description given in the decree of foreclosure. It is proper to say, however, that the defendant offered in evidence the recordation in the proper book of a notice of location of 10,000 inches of water of the Mokelumne river at the point where this ditch connects with the river. This offer was excluded, but there is evidence of an actual appropriation by defendant; and in view of the diversion, and the long and uninterrupted use, of the waters at that point by the defendant, it will be presumed for the purposes of this case, in the absence of proof to the contrary, that a notice was properly posted.

In determining whether the property now known as the "Amador Canal," and its appurtenances is an improvement of the original Butte ditch, and incident to it, or such an addition as may be said to have been contemplated by the parties to the mortgage, and constituting a basis for a decree subjecting it to the payment of the debt secured by the mortgages of 1868, it is important to bear in mind the events which have produced the changes in the character of the property, and the order in which they occurred. At the time the mortgages were given (August and September, 1868) the Butte ditch was about nineteen miles and a half in length, and extended from Pine-Log crossing to Slab Town, just as it is described in the mortgage, *lis pendens*, complaint, and decree. Immediately after the Butte Ditch Company received the money from the plaintiff, and gave mortgages therefor, the ditch was extended by means of a pipe 1,200 or 1,300 feet above Pine-Log crossing. This pipe carried 1,500 inches, which was double the capacity of the Butte ditch. On January 26, 1870, a notice was posted on behalf of the Butte Ditch Company claiming 5,000 inches of water at the point where the new ditch heads. In July, 1870, work was begun upon the first extension, but several miles north-west of the tunnel. This work was done by the Sutter Canal & Mining Company. The company worked towards the tunnel, leaving spaces for flumes. July 15th the property was conveyed to Bowman, and on July 16th Bowman sold to the Sutter Canal & Mining Company. It was the intention of the company, when it commenced the new construction, to build the ditch to the tunnel, excavate the tunnel, and from there construct the ditch to the point where the new ditch now heads, whenever the company could make sufficient money to enable it to complete the same. It was thought that, when a connection was made with the old ditch above the tunnel, the company could, by turning the water of the old ditch into the new ditch, and by turning the water down to Sutter creek, make sufficient money to complete the ditch to the point where the notice for 5,000 inches of water had been posted. At that time, the company, therefore, knew that it had not sufficient funds to finish the work in a reasonable time, so as to comply with the law applicable to the appropriation of water. The company struggled along with the work, however, completing the greater portion of the ditch to the tunnel, and excavating the tunnel, and built the new ditch along the river, above the old ditch, until it reached the lower end of Bald Rock. Here the lower end of the flume, which constituted a portion of the old ditch, was elevated so that the water from it ran into the new ditch they had built to that point. The water from the old ditch ran into the new ditch for two weeks after the connection thus made, but it never reached further than two miles below the point of connec-

tion in the new ditch, while the Sutter Canal & Mining Company held it. At this point the company failed, and was soon adjudged a bankrupt. The work stopped in the fall of 1871, at which time the water was turned out of the ditch, and abandoned until the Amador Canal & Mining Company turned it in again. The Sutter Canal & Mining Company was adjudged a bankrupt in March 1872. On October 4, 1873, the decree of foreclosure was entered in the suit referred to; on the 11th of October, 1873, the deed from Napthaly, assignee in bankruptcy, was delivered to the defendant corporation; and on October 14th, the defendant began work on the ditch at the point where the connection had been made with the old ditch at the lower end of Bald Rock. At this point a flume 80 feet higher than the old flume was placed around Bald Rock to the upper end thereof, and the ditch was constructed to the point where it now heads, and completed in the fall of 1874. Since the completion of the ditch in 1874 many miles of branch ditches have been built in different places, carrying the water in directions and to points different and far from those reached by the Butte Ditch Company.

How, therefore, can it be said that the property as it now stands is an improvement of the property as originally mortgaged by the Butte Ditch Company, or is an incident to it, or is such an addition as may be said to have been contemplated by the parties to the mortgage, or that the new ditch was built for the purpose of using to better advantage the water-rights and franchises of the old Butte ditch, or was constructed to take its place? It may have been the intention of the Sutter Canal & Mining Company to use, by means of the canal it was constructing, the water-right and franchise purchased by Bowman of the Butte Ditch Company, but in its failure to prosecute the work, as we have seen, it never acquired any greater franchise than that which was held by the Butte Ditch Company when it executed the mortgages to this plaintiff. It is said: "If the water-right and franchises of the Butte Ditch Company had not been purchased by Bowman, no new canal could have been constructed, because neither Bowman nor the Sutter Canal & Mining Company or this defendant ever took up, located, or acquired any water-right other than that of the Butte Ditch Company;" but there is nothing in the transcript to warrant the statement. A new canal could have been constructed without regard to the franchises held by the Butte Ditch Company, or by Bowman, or by the Sutter Canal Company; and it is not probable that a ditch of such capacity would be built for the purpose of using the water-right of the Butte ditch only,—about 750 inches. The inability and failure of the Sutter Canal & Mining Company to prosecute the work of construction left the franchise of the Butte Ditch Company no greater than it was at the time the mortgage was executed. The quantity of water to which the company was entitled is somewhat uncertain, and we do not mean to express any opinion upon that matter.

There can be no doubt that the Sutter Canal & Mining Company lost its right to the additional 5,000 inches claimed by it. The provisions of the Code are conclusive. Section 1416 of the Civil Code provides that, "within sixty days after the notice is posted, the claimant must commence the excavation or construction of the works in which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by snow or rain." Section 1417 provides that "by 'completion' is meant conducting the waters to the place of intended use." Section 1420 provides that "persons who have heretofore claimed the right to water, and who have not constructed works in which to divert it, and who have not diverted nor applied it to some useful purpose, must after this title takes effect, and within twenty days thereafter, proceed as in this title provided, or their right ceases." See also, cases cited under said sections in Deering's Annotated Civil Code. At the time of the entry of the decree of foreclosure, October 4, 1873, no part of the ditch as it now exists was constructed

between the lower end of Bald Rock and the river. Work was not commenced upon that portion of the ditch until 10 days after the entry of that decree. There was at the time of the entry of that decree a continuous line of ditch from Slab Town and the tunnel to the point on the river where the iron pipe had been laid, twelve or thirteen hundred feet above Pine-Log crossing. We cannot perceive how any ditch or ditches which were constructed subsequently can be claimed by the plaintiff under the decree. With respect to after-acquired property, it is only when the parties by their contract intend to create a positive lien or charge upon the property, that the lien attaches as a charge upon the particular property, or where it is an improvement or extension; or where it is expected to be the fruit of an undertaking already commenced, or a thing which, in the ordinary course of events, will exist at a future time, and which may be said, reasonably, to have been contemplated by the parties to the contract. *Seymour v. Railroad Co.*, 25 Barb. 305; *Barnard v. Eaton*, 2 Cush. 302; 1 Jones, Mortg. § 153. A man cannot grant a thing which he has not. The thing granted or pledged must have an actual or potential existence. There must be something *in presenti* of which the thing *in futuro* is to be the product, or necessary for its use, or incident to it. If it were otherwise, all property might be fettered with long-made and unknown mortgages, and the purchase thereof be made extremely hazardous.

In this state "a mortgage can be created, renewed, or extended only by writing executed with the formalities required in the case of a grant of real property." There is no mention made in the mortgage of any water-right to be thereafter acquired; nor is there any language indicating any intention that the mortgage should cover after-acquired property of the character in controversy. The property is described in the mortgage with certainty. It was, at the time of the execution of the mortgage, well known, and there is now no dispute as to what property was at that time in existence. The Amador Canal Company received from the assignee a conveyance which in terms described the property as it then existed. The complaint necessarily alleged, in view of the theory of the plaintiff, that the property in controversy "was, and is in fact, the Butte-Ditch property hereinbefore referred to, although the same had been altered, extended, and improved; and all the franchises, water-rights, and rights of way thereby conveyed to said Amador Canal & Mining Company were the franchises, water-rights, and rights of way formerly owned by said Butte Ditch Company, * * * and that said company continued the work of altering and improving said property, * * * and all the said improvements were made for the purpose of employing to better advantage those water-rights covered by said mortgages, and the said property is and was subject to said mortgages of this plaintiff." But the findings of the court and the evidence show, we think, that the property in controversy is not the old Butte ditch, altered, extended, and improved; and that the Amador canal should not be considered as an appurtenance to the Butte Ditch. It is a singular fact that although the name of the ditch was changed after the purchase by the Sutter Canal & Mining Company, and again after the purchase by this company, yet no mention of these changes was made in the descriptions given in the foreclosure proceedings. In the complaint, *lis pendens*, decree, and deed it is described as "that certain ditch commonly known as and called the 'Butte Ditch,'" etc. Its place of commencement is fixed, and places to which it carries water are named. There is nothing indicating an intention to cover any ditches thereafter to be constructed; the language being, "Together with all the appurtenances, flumes, aqueducts, branch ditches, reservoirs, pipes, and cabins connected with, or in any manner belonging to, the ditch property above mentioned, with the right to take water from the north fork of the Mokelumne river." The new ditch was not projected at the time the mortgage was executed, and there is nothing to show that it was at that time ever contemplated.

In *Ellison v. Water Co.* the court considered a mortgage which, by its terms, covered, not only the works completed at the time of the execution of the instrument, but also all work then in progress, and thereafter to be constructed, by the company for conducting and distributing water; and yet Mr. Justice FIELD, in delivering the opinion of the court, said: "This broad language cannot, however, we apprehend, give a lien upon ditches for the construction of which no steps had been taken by a survey and location of lines, and which rested merely in contemplation. Some specific right of way, capable of identification from a previous survey or location, would seem to be necessary to constitute such property as is capable of mortgage or transfer, so as to pass subsequently constructed works thereon." 12 Cal. 554. Although this portion of the opinion appears to be *dictum*, it is nevertheless in accord with the weight of authority, and establishes a safe and certain rule for the protection of mortgagor, mortgagee, and creditor. While there is no evidence that there are in this case any creditors of the present owners of the property, there is no safe principle applicable which does not contemplate the rights of third persons who are bound only by the record. And in railroad cases, where the *termini* of the road are given in the mortgage, and authority is thereafter given to extend the road, such extension is not subject to the mortgage, unless the language of the instrument clearly and expressly includes such extensions. *Randolph v. Railroad Co.*, 28 N. J. Eq. 49; *Chapman v. Railroad Co.*, 26 W. Va. 310.

It is claimed that *Mining Co. v. Moses*, 58 Cal. 168, is a case directly in point and conclusive herein. In that case the principal property mortgaged was an extensive set of mining claims known as the "Kelly & Co. Claims." There was mortgaged, in connection with said claims, all the ditches, reservoirs, etc., used for working said claims. The ditches owned by the defendant in that case were used exclusively for the purpose of conveying the waters of Gansner creek and intermediate streams upon said claims. It clearly appears from the facts in that case that all of the works constructed by Gurnee, and all of the water-rights which he acquired, if any, were acquired solely for the purpose of being used in connection with the mines, which were the principal property mortgaged, and as such, were appurtenant to the mines. In his (Gurnee's) deed to the Hungarian Hill Gold Mining Company, he particularly described each parcel of the property, and provided that the whole thereof was subject to the mortgage which he had executed to the defendants, and that plaintiff should fully discharge and pay the same. In 1875, the plaintiff in that case, for convenience in working the claims, moved one of the water-pipes to the Hersey claim, for the purpose of working up the channel to the Kelly & Co. claims, and of working said claims to better advantage. In the foreclosure proceedings the Hungarian Hill Gold Mining Company was a defendant, and duly served with summons. A decree was entered in favor of the plaintiff, Moses, foreclosing said mortgage, and directed the sale of the "said Kelly & Co. mining claims, and all water-ditches, including the Salt Creek ditch, with all the water, water-rights, and privileges belonging to the said water-ditches, and each of them, and all reservoirs used, had, and belonging to said mining claims." In that case Gurnee was the mortgagor, and the owner of all the property in dispute, although the new ditch and reservoir were built by him after he executed the mortgage. The new ditch was clearly appurtenant to the principal property mortgaged. Both Gurnee and the Hungarian Hill Gold Mining Company were made parties to the foreclosure suit. The language employed in the mortgage to describe the property in that case was comprehensive, and, in view of the use made of the water, can be construed fairly to include the new property. It described the mining claims, and "also, all the water-ditches leading water onto said claims, including the ditch from Salt creek, with all the water, water-rights, and privileges belonging to said water-ditches; also all mining tools, implements, tunnels, cuts,

flumes, and reservoirs used, had, and belonging to said claims, and every part and portion thereof; together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining." In this case there is no evidence of an agreement on the part of the defendant to pay the mortgages on the mortgaged property. The mortgagors never owned any portion of the property which is here in dispute, and described as the "Amador Canal." The mortgage was given upon the Butte ditch, which was not appurtenant to any other property mortgaged, except to the water-right of Pine-Log crossing. The water here is not used, or intended for use, at any particular place, or for any particular purpose, but is intended for sale to other parties. In this case no part of the property in dispute existed when the foreclosure suit was commenced, and neither the Sutter Canal & Mining Company nor the Amador Canal & Mining Company was a party to the suit. As stated by the respondent in his brief, in *Mining Co. v. Moses*, the property there in controversy "was clearly but an enlargement of a ditch and water-right, conceded as belonging to the estate mortgaged, or as an improvement thereon. The mortgagor, in making it, looked to the redemption of the property, and made the expenditure for his own benefit. He knew that he could save himself from loss by paying the debt for which the property was mortgaged. With this in view, he conveyed the whole property to plaintiff; expressly providing in the deed that plaintiff took the same subject to such lien, and that it should pay and discharge the mortgage."

In *Quirk v. Falk*, 47 Cal. 453, the court did not say that the water-ditch, and the water-right thereto appertaining, could not be appurtenant to a mining claim; but simply said that the plaintiff had failed to prove that the larger portion of the water was used in working those claims, and had failed to prove that the water-ditch, and water-right thereto appertaining, became appurtenant to the monitor claims. In *Wood v. Whelen*, 93 Ill. 153, cited by the respondent, the new gas-pipe works were held to be simply additions, fixtures, and therefore appurtenants to the property mortgaged. It was there said: "The granting clause of the mortgage is very comprehensive, and was, no doubt, intended to, as it does, include everything appertaining to the gas-works." A large number of cases has been cited by the respondent, but we deem it unnecessary, in view of what has been said herein, to review them at length. They are nearly all cases of mortgages upon railroad property. In some of the cases cited, the court held that the mortgage, by its terms, covered after-acquired property; in others, that after-acquired property passed as an incident to the franchise, as an accession to the subject of the mortgage, because essential to the exercise of the franchise, and incident to it. In *Sparks v. Hess*, 15 Cal. 186, it was held, in effect, that the structure—the bridge—was the superior thing, and that the land on either side passed as appurtenant to it. The property conveyed was "a certain bridge located, situated, and lying on the south fork of the Yuba river, etc., known as 'Spark's Bridge,' across the south fork of said river; together with the toll-houses, stables, and also the right and privilege of said Sparks in and to the dug road there made on each side of said bridge; together with all the privileges and appurtenances appertaining and in anywise belonging to said bridge." Where the structure is the principal thing conveyed, under such circumstances as appeared in that case, it will carry with it the title of the grantor in the land upon which it stands, or with which it is connected.

2. The court found that in the action of the Amador Canal & Mining Company against Mitchell the question was litigated as to whether the property acquired from the assignee by the Amador Canal & Mining Company was subject to the said mortgage; and that, after hearing and trial thereof, it was finally determined in favor of this plaintiff. This, we think, is an erroneous construction of the judgment in that case. The plaintiff there did not seek to have construed the decree of foreclosure, nor to determine the scope or

effect thereof. The action was brought to set aside the decree of foreclosure on the ground of fraud. The title to the Amador Canal was not there litigated. The court determined that there was no fraud; and that the Amador Canal & Mining Company, being a purchaser *pendente lite*, was bound by the decree of foreclosure, though not made a party to the suit. The question raised here, namely, what property is included in the descriptions given in the complaint, *lis pendens*, decree, and sheriff's deed, was not considered. *Mining Co. v. Mitchell*, 59 Cal. 168.

3. There can be no doubt, we think, that the acts of the defendant in destroying the old ditch and flume from Bald Rock towards the river, and in converting the lumber to its own use, were unlawful, and rendered the company liable in an action for damages. It is a question, however, whether such damages can be recovered in this action. It is difficult to determine from the issues herein whether the action can be considered anything beyond one in ejectment, and for rents, issues, and profits. There is, however, an allegation in the complaint that, "in the performance of said work, the said ditch or canal [Butte ditch] as originally constructed has been to a large extent filled up and destroyed," etc. There is also an allegation "that, by reason of the premises and the facts hereinbefore alleged, the plaintiff has been damaged by the defendant in the sum of \$500,000;" and there is a prayer for the recovery from defendant of the sum of \$500,000 damages. There is also a prayer for the appointment of a receiver, for the possession of the canal and water-rights, and for such other and further relief in the premises as shall be just and equitable. There was no demurrer to the complaint, but defendant answered, denying specifically the allegations of the complaint; and the trial seems to have proceeded upon the theory that it is an action to recover the land, and the rents, issues, and profits thereof. The defendant was not bound to use, improve, or repair the property; but it was the duty of the defendant, when it went into the possession of the property under the deed from Nathaly, as assignee, at least, not to destroy it. It had the right of redemption and actual possession. The defendant was in one sense a bailiff for the plaintiff with respect to such property, and as such during the time it held possession was bound to do no act that would injure it. The defendant destroyed it and must now be held responsible for the waste. We think that the plaintiff may recover in this action the damages occasioned to him by the acts of the defendant, notwithstanding the fact that he has heretofore claimed other relief. The remedy for waste is ordinarily at law, but, where it is for the purpose of preserving the security of a mortgage, equity will interpose, by injunction, to prevent future waste, and in the same action an accounting will be decreed, and compensation given for past waste. For this purpose, "the remedy by bill in equity is so much more easy, expeditious, and complete that it is now almost invariably resorted to." 2 Story, Eq. Jur. § 917; 1 Story, Eq. Jur. §§ 515-518. Both before and after a decree of foreclosure, chancery will interpose to prevent any injury to the inheritance which depreciates the mortgage security; and the court will not "turn the plaintiff round to an action at law," but will require an accounting for waste committed by the one in possession. 1 Hil. Real Prop. 375-377; *Sarles v. Sarles*, 3 Sandf. Ch. 601. In this respect "the court of chancery does not now treat questions of destructive damage to property exactly as it did forty or fifty years back; its protection being more largely afforded than it then generally was." Add. Torts, 252.

The right of the plaintiff to take water from the north fork of the Mokelumne river still exists to the extent that the Butte ditch owned the same at the time the mortgage was executed; but plaintiff will be entitled to recover the actual damage sustained by reason of the negligent and wrongful acts of the defendant. From the lower end of Bald Rock towards the river the Butte ditch was destroyed, and the flume and pipes were appropriated by the de-

fendant, and plaintiff prevented from using his water-right. The measure of damages, therefore, must be the value of property destroyed, and compensation for the loss of the use of his water-right for such period as would have been necessary to enable the plaintiff to reconstruct his ditch after the same was destroyed from the point where it tapped the river to the lower end of Bald Rock. If the new ditch between these points is constructed upon a line which renders it necessary for plaintiff to build his ditch upon another more difficult and more expensive line than that upon which the old ditch was built, plaintiff will be entitled to additional damages to the extent of the difference in cost of construction upon the old line and the cost of construction upon the most feasible line remaining.

Judgment and order reversed, and cause remanded for a new trial, with leave to the parties to amend their pleadings, if they shall be so advised.

We concur: SEARLS, C. J.; MCFARLAND, J.; SHARPSTEIN, J.

75 Cal. 360

DOANE v. HOUGHTON. (No. 9,732.)

(Supreme Court of California. March 26, 1888.)

1. PLEADING—AMENDMENT—STRIKING OUT NAMES OF DEFENDANTS NOT SERVED.

An action was dismissed, on trial, as to certain defendants, and the court directed the complaint to be amended by simply striking out of the caption the names of said defendants. *Held* no error, there being no showing that the defendants dismissed were ever served.

2. MUNICIPAL CORPORATIONS—STREET ASSESSMENTS—ACTION TO ENFORCE LIEN.

In an action to enforce a street-assessment lien, the work ordered by the board was curbing and sidewalking. The notice, bids, and contract mentioned corners, but it did not appear whether the corners were part of the sidewalk or parts of a crossing. *Held*, that it would not be presumed that any part of a crossing was included in the assessment.

3. SAME—PLEADING.

Under act Cal. April 1, 1872, relating to the enforcement of liens for street assessment, a complaint in an action to enforce such lien need not set out any of the proceedings prior to the issuance of the assessment, want of jurisdiction to order the work being a matter of defense.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Taylor & Haight, for appellant. *J. M. Wood*, for respondent.

PATERSON, J. This action is to enforce the lien of a street assessment. Defendant appealed from the judgment. At the trial, on motion of plaintiff, the action was dismissed as to certain defendants, and the complaint, by direction of the court, was amended by striking out of the caption thereof the names of said defendants, without filing an amended complaint.

1. This method of amending a pleading cannot be commended. It is irregular, and such mutilations are not only slovenly, but dangerous. These defendants, however, were not prejudiced by the action of the court. Upon the evidence, the court found that the property was owned by the remaining defendants only. We think the court committed no error in allowing the amendment. Sections 469, 470, Code Civil Proc. Even if the order had not been made, the judgment on the findings could not have been against the other defendants, whether served or not. There is nothing to show that the defendants dismissed from the case were ever served. The authorities cited, therefore,—*Clarke v. Porter*, 53 Cal. 410, and *Millikin v. Houghton*, 4 Pac. Rep. 914,—do not apply. Furthermore, there is no bill of exceptions, and the judgment does not show that there was any objection made by appellant.

2. The work ordered by the board was for curbing and sidewalking Second street, from Folsom to Harrison. The notice, bids, award, and contract mentioned the corners; but it does not appear whether the corners mentioned were a part of the sidewalk, *i. e.*, a part of the work ordered, or whether they were portions of a crossing. They were between the points named, and no mention is made in the assessment of anything except curbs and sidewalks. We cannot say from the judgment roll that any part of a crossing is included in the assessment.

3. Section 13 of the act of April 1, 1872, under which this work was done, provides that "the complaint need not show any of the proceedings prior to the issuance of the assessment, diagram, and certificate; but it shall be held legally sufficient if it shows the title of the court in which the action is brought by the parties, plaintiff and defendant, the date of the issuance of the assessment, the date of the recording thereof, the book and page where recorded, a general statement of the work done, a description of the lot or lots sought to be charged with the assessments, the amount assessed thereon, that the same remains unpaid, and the proper prayer for relief." Want of jurisdiction to order the work is one of the defenses allowed by the act. St. 1871-72, p. 816. We think the complaint states sufficient facts. The judgment is affirmed.

We concur: MCKINSTRY, J.; TEMPLE, J.

75 Cal. 371

QUAN CHICK v. COFFEY. (No. 12,486.)

(Supreme Court of California. March 27, 1883.)

CERTIORARI—WHEN LIES—OFFICER IN CUSTODY OF RECORD.

Under Code Civil Proc. Cal. § 1070, providing that the writ of *certiorari* must be directed to the tribunal, officer, or person having the custody of the record or proceeding to be certified, the action of a magistrate in issuing a search-warrant cannot be reviewed on *certiorari* directed to him, after he has returned all papers and proceedings had before him to the proper superior court.

In bank. Application for writ of review.

This is an application by Quan Chick for a writ of *certiorari* to review the action of Hon. J. V. Coffey, judge of the superior court, acting as a magistrate, in issuing a search-warrant on which certain proceedings were afterwards had.

H. H. Lowenthal, for applicant. Matt. I. Sullivan, for respondent.

McFARLAND, J. On September 23, 1887, the respondent, Hon. J. V. Coffey, who was a superior judge, acting as a magistrate, issued a certain search-warrant, and certain proceedings were afterwards had thereon. The warrant was issued upon the affidavit of a complainant, made upon information and belief. It is contended that no witnesses were examined, and no depositions were taken which "set forth the facts tending to establish the grounds of the application, or probable cause for believing that they exist," as required by sections 1526, 1527, Pen. Code. It is also contended that for this reason (as well as for other reasons not necessary to be here stated) the respondent exceeded his authority and jurisdiction in issuing said writ; and it is sought, in this proceeding, to review his action through a writ of *certiorari*. It appears, however, that long before the date of the filing of the petition for this writ, which was January 12, 1888, the respondent, in pursuance of sections 1536, 1541, *et seq.*, Pen. Code, had returned to the proper superior court all the papers and proceedings filed with or had before him in the matter of said search-warrant; that no proceeding in said matter is now pending before him; and that he has no possession of any paper or record therein. Section 1070, Code Civil Proc., provides that the writ of *certiorari* must be directed to the tribunal, officer, or person "having the custody of the record or proceeding to be certified." It is evident, therefore, that the acts of respondent here sought to be reviewed cannot be reached by this writ. Proceeding dismissed.

We concur: SEARLS, C. J.; THORNTON, J.; TEMPLE, J.; SHARPSTEIN, J.

75 Cal. 364

PARKE *et al.* v. FRANK. (No. 9,959.)

(Supreme Court of California. March 27, 1888.)

1. PRINCIPAL AND AGENT—AGREEMENT NOT TO REVOKE FOR REASONABLE TIME—EFFECT.

Where a principal, for a valuable consideration, agrees with his agent not to revoke the agency for a reasonable time, and from the nature of the contract a rea-

reasonable time can be ascertained, the agency is not within Civil Code Cal. § 2356, providing that, unless the power of an agent is coupled with an interest in the subject of the agency, it is terminated by revocation.

2. SAME—REVOCATION—INSTRUCTIONS.

In an action for damages arising from the revocation of a contract of agency, where the evidence shows no definite term of agency, but does show an agreement by the principal not to revoke, the refusal of the court to charge that if the jury believe, from the evidence, that no definite time was agreed upon between plaintiffs and defendant for the contract to endure, then said contract could be terminated by either party at any time, is not error.

3. SAME—BREACH OF AGREEMENT NOT TO REVOKE—DAMAGES.

In an action for damages caused by an alleged breach of a contract of agency, the plaintiff failed to prove with reasonable certainty the amount of damage sustained, but left such damages to be fixed entirely by the jury. *Held* sufficient ground for a new trial.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Action by Lyman C. Parke and Benjamin T. Lacy, against A. H. Frank, doing business as A. H. Frank & Co., to recover for damages arising out of a breach of a contract of agency. Judgment for plaintiffs, and defendant appeals.

Charles P. Eells, for appellant. *H. C. Newhall* and *E. N. Deuprey*, for respondents.

McKINSTRY, J. The main contention of the appellant in the court below was that the contract of agency, not being for any definite term, was revocable at the will of the principal. Appellant claims that the rulings of the superior court alleged to be erroneous are exemplified by the portion of its charge to the jury which reads: "No period of time was mentioned. * * * Where employment is proved, and no time is specified, the law presumes it shall last and endure for a reasonable time. What would be a reasonable time is a question for you to determine;" and by the refusal of the court, on request of defendant, to charge: "If the jury believe, from the evidence, that no definite time was agreed upon between plaintiffs and defendant for the contract of agency to endure, then said contract could be terminated by either party thereto, at his option, at any time." The Civil Code provides: "Unless the power of an agent is coupled with an interest in the subject of the agency, it is terminated, as to every person having notice thereof, by its revocation by the principal." Section 2356. The interest which can protect a power after the death of the person who creates it must be an interest in the thing itself, and not an interest in that which is produced by the exercise of the power. *Hunt v. Rousmanier*, 8 Wheat. 174. It may be conceded that, by the section of the Civil Code, a revocation by the principal terminates the agency in every case where his death terminates it, and that the plaintiffs herein had no such interest in the subject of the agency as rendered the agency irrevocable. Nevertheless, if, for a valuable consideration, the defendant agreed not to revoke the agency for a reasonable time, and in view of the circumstances and nature of the contract a reasonable time could be ascertained, he had no legal right to revoke it during such time. "Although a letter of attorney depends, from its nature, on the will of the person making it, and may, in general, be recalled at his will, yet if he binds himself for a consideration, in terms, or by the nature of his contract, not to change his will, the law will not permit him to change it." *Hunt v. Rousmanier*, 8 Wheat. 203. In such case, if he fails to comply with his contract, he becomes liable to the agent as such. Even if, however, it should be conceded that, under the Code, the principal retains the right to revoke a power, at his option, in every case where the agent is not vested with an interest in the subject of the agency, this would not render illegal a collateral agreement whereby the principal should agree, for a con-

sideration, not to exercise the power for a definite period, or for a reasonable time ascertainable. In case of such an agreement, if the agency is revoked by the principal, and the agent is thereby deprived of authority further to act as such, the principal is liable in damages by reason of the breach of his promise not to recall the agency. Whether, therefore, it be considered that the defendant violated his contract by refusing to make consignments to the plaintiffs, or violated it by revoking the agency, he would be liable upon proper pleading. And in each case the rule of damages would be the same, that is, the plaintiffs would be entitled to recover the direct or approximate damages sustained by reason of defendant's depriving them of the benefits of the agency.

The court below did not err in refusing to give the instruction asked by defendant, because that instruction ignores all evidence tending to show that the defendant agreed not to revoke the agency. But the instruction given, while abstractly correct, suggests that, independent of any express promise or implied promise arising out of the nature of the contract, the defendant had no legal right to put an end to the agency until the expiration of a "reasonable time."

There should be a new trial of the issue as to damages. It seems not infrequently to be lost sight of in the trial courts that, in actions upon contracts, the amount of damages caused by an alleged breach is to be proved as a fact. It is impossible to ascertain from the statement for new trial upon what facts, taken as proved, the jury based their verdict for \$4,843.90, or why the verdict was reduced by the court to \$3,100 rather than to any other sum. We find no evidence which will sustain a judgment for either amount. This is not an action for a tort; the amount of the recovery was not to be left, upon general principles, to the "sound discretion" or "dispassionate judgment" of the jury. It is an action to recover the actual and proximate damages caused to plaintiff by a failure of defendant to perform his contract. Where there is a legal measure of damages the jury must determine the amount as a fact; otherwise the law which so measures the damages would be of no avail. 1 *Suth. Dam.* 2. It is often said to be a paramount principle that the person injured shall receive compensation commensurate with his injury, and no more. By reason of the breach of his contract, if he did break it, the defendant here became liable for the full amount of damages which resulted "naturally" (that is, in usual course of things) and proximately from the breach. These were to be proved with reasonable certainty. The particulars of damages were so far capable of ascertainment, and upon the plaintiffs was imposed the obligation of proving them. The matter should not have been left to the conjectures of jurymen. The number of shipments, or quantity of machinery to be sent, was not fixed by the parties, and the plaintiffs very properly made no effort to establish the profits they might have made, during any definite period, had defendant complied with his contract. From the nature of the case, such damages must have been purely speculative. But there is nothing in the record to indicate but that they could have proved, with reasonable certainty, what necessary expenses they were induced to incur, by reason of defendant's promise, for the purpose of carrying out their contract with him, as distinct from their contracts, if any, with the R. W. Gardner & Lehigh Valley E. W. Company; or what special damages pleaded, if any, they sustained by reason of loss of profits upon orders of defendant for machinery which the latter refused to fill, in case the evidence showed such machinery had been ordered from them by responsible third parties, or would have been sold had it been received in due course. The plaintiffs were not entitled to recover the difference between the manufacturer's prices for machines and the enhanced prices paid by them for the purchase of machines from other persons in the east. These were independent transactions, which were not the direct consequence of the breach of the defendant's agreement, and cannot, as matter of law, be said to have been contemplated by him.

On the whole case, we think the interests of justice demand a new trial. Judgment and order reversed, and cause remanded for new trial.

We concur: SEARLES, C. J.; PATERSON, J.

75 Cal. 411

PEOPLE v. COLLINS. (No. 20,378.)

(*Supreme Court of California.* March 28, 1888.)

1. CRIMINAL LAW—CONTINUANCE—ENGAGEMENTS OF COUNSEL.

A motion for continuance on the ground that counsel had been prevented from making due preparation for trial by a prior engagement is addressed to the discretion of the court, and will not be reviewed except for abuse.

2. SAME—WITNESS—IMPEACHMENT—HARMLESS ERROR.

Defendant having been called as witness, error in admitting testimony impeaching him will be disregarded where it does not prejudice his case.

In bank. Appeal from superior court, city and county of San Francisco; W. C. VAN FLEET, Judge.

Appeal by defendant from a judgment and order refusing a new trial.

John D. Whaley, for appellant. *Atty. Gen. Geo. A. Johnson*, for the People.

SHARPSTEIN, J. We are urged by appellant's counsel to reverse the judgment and order denying defendant's motion for a new trial, on two grounds, neither of which, in our opinion, is tenable.

1. The defendant's motion for a continuance on the ground that his counsel had been unable, in consequence of another and prior engagement, to make due preparation for the trial of defendant's case, was one which addressed itself to the sound discretion of the court below, and ought not to be interfered with unless we could see clearly that there had been an abuse of discretion, which is not in this case apparent to us.

2. Defendant was examined as a witness in his own behalf; and for the purpose of impeaching him the prosecution called one Adams as a witness, and, after he had testified to having known the defendant about four years, the prosecuting attorney asked him if he knew the defendant's general reputation for truth, honesty, and integrity in the community in which he lives. The witness answered: "I don't know, as I never heard." The witness was then asked by said counsel to say whether he knew it or not. He answered: "I do not." Some other questions elicited from him the statement that he did not know where the defendant lived, and therefore could not state what his reputation was where he lived. The district attorney then asked the witness this question: "Do you know his reputation for honesty and integrity in this community of San Francisco?" The question was objected to, and the court overruled the objection. The witness answered in the affirmative; and to the question, "What is it?" answered, "Bad." This question is not in the approved form, and the court should have sustained the objection to it. But the error, in our opinion, did not prejudice the defendant's case, and therefore must be disregarded. The other witnesses to whom the questions were put in proper form testified that defendant's reputation was bad in the community where he lived. In view of the character of the other evidence in the case, we think the evidence as to the defendant's reputation superfluous.

Judgment and order are affirmed.

We concur: SEARLES, C. J.; MCFARLAND, J.; PATERSON, J.

75 Cal. 383

PEOPLE v. MYER. (No. 20,383.)

(Supreme Court of California. March 28, 1888.)

1. LARCENY—WHAT CONSTITUTES—ASPORTATION.

Evidence that defendant was found in possession of an overcoat taken from a dummy, but still fastened to it by a chain through the sleeves, the dummy being on the sidewalk, and tied to the building by a string, as there was no asportation, does not show larceny under Pen. Code Cal. § 484, defining larceny to be the felonious stealing, taking, or carrying away the personal property of another.

2. CRIMINAL LAW—DEFENDANT AS WITNESS—CROSS-EXAMINATION.

Pen. Code Cal. § 1323, provides that defendant in a criminal action cannot be compelled to be a witness against himself; but, if he offer himself as witness, may be cross-examined as to all matters about which he was examined in chief. Defendant testified in chief merely that he had been drinking, and, as he was walking along, fell over something, and the first thing he knew somebody grabbed him. Questions, on cross-examination, if he had ever gone under an *alias*, or had ever been convicted of felony, *held* permissible. McFARLAND and PATERSON, JJ., dissenting.

In bank. Appeal from superior court, city and county of San Francisco;

D. J. MURPHY, Judge.

On information against defendant, Frank Myer, for stealing an overcoat, defendant was convicted, and appeals.

John D'Arcy, for appellant. *Atty. Gen. Geo. A. Johnson*, for the People.

SHARPSTEIN, J. The defendant was tried on an information in which it was charged that he willfully, unlawfully, and feloniously stole, took, and carried away one overcoat of the value of \$20, the personal property of Harris Joseph and Lewis Joseph. On the trial Lewis Joseph testified as follows: "I had, as usual, placed and buttoned an overcoat upon a dummy which stood on the sidewalk outside of my store. I was inside the store, and heard the chain of the dummy rattle, and on coming outside found defendant with said coat unbuttoned from the dummy, and under his arm, the same being entirely removed from the dummy, and about two feet therefrom and from the place where it had been originally placed on the dummy by me; and the accused was in the act of walking off with said coat when grabbed by me, he being prevented from taking it away because said coat was chained to the dummy by a chain which ran through the coat-sleeve, and the dummy was tied to the building by a string." This was the only evidence introduced to prove the charge of larceny. The jury, on this evidence, returned a verdict of guilty of petit larceny as charged; and the defendant, having pleaded guilty of prior convictions of other petit larcenies, was sentenced to imprisonment in the state prison for the term of two years. He moved for a new trial, which was denied, and from that order and the judgment this appeal is taken.

Appellant insists that the verdict is contrary to the evidence, which, it is claimed, does not prove that the defendant carried away the coat which he is charged with having stolen, but proves that he did not. "Larceny," as defined in the Penal Code of this state, "is the felonious stealing, taking, carrying, leading, or driving away the personal property of another." This is substantially the common law definition, under which it was held that it must be shown that the goods were severed from the possession or custody of the owner, and in the possession of the thief, though it be but for a moment. Thus where goods were tied by a string, the other end of which was fastened to the counter, and the thief took the goods and carried them towards the door as far as the string would permit, and was then stopped, this was held not to be a severance from the owner's possession, and consequently no felony. 3 Greenl. Ev. § 155. "In the language of the old definition of larceny," says Bishop, "the goods taken must be carried away. But they need not be retained in the possession of the thief, neither need they be removed from the owner's premises. The doctrine is that any removal, however slight, of the entire article, which is not attached either to the soil or to anything not re-

moved, is sufficient; while nothings short of this will do." 2 Bish. Crim. Law, 794. The attorney general admits that this is the doctrine of the English cases. In *State v. Jones*, 65 N. C. 395, the court says: "There must be an asportation of the article alleged to be stolen, to complete the crime of larceny. The question as to what constitutes a sufficient asportation has given rise to many nice distinctions in the courts of England, and the rules there established have been generally observed by the courts of this country." *People v. Williams*, 35 Cal. 671, was not so clearly within the rule as this case is; but the court said that it did not feel at liberty to depart from a rule so long and so firmly established by numerous decisions. Tested by that rule, the evidence in this case was clearly insufficient to justify the verdict, and the defendant is entitled to a new trial on that ground.

There is another alleged error which we deem it our duty to pass on, particularly as the case must be remanded for a new trial. The defendant testified, in his own behalf, that he had been drinking, and as he was walking along fell over something, and the first thing he knew somebody grabbed him. This was all he testified to on his examination in chief. On cross-examination he was asked what was his true name. He replied, "Frank Myer." He was then asked, against his counsel's objections, the following questions: "Did you ever go by the name of Frank Miller? Did you ever go by the name of Frank Smith? Did you ever go by the name of Otto Meyer? Have you ever been convicted of a felony in this city and county?" These questions were all answered in the affirmative, and had a tendency to throw discredit on defendant's testimony. "A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but, if he offer himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief." Pen. Code, § 1323. In *People v. Chin Mook Sow*, 51 Cal. 597, the defendant, on cross-examination, was asked if he had not previously been convicted of a certain felony. He answered that he had not, and the district attorney was permitted, against the objection of defendant's counsel, to introduce in evidence a record of such prior conviction. The ruling of the lower court was sustained by this court, and we think the case directly in point here. There are expressions to be found in the opinions of courts for which we entertain the highest respect which seem to militate against this view of the matter, but none in which the precise question here presented was involved. Judgment and order reversed.

We concur: SEARLS, C. J.; MCKINSTRY, J.; THORNTON, J.

McFARLAND, J. I concur in the judgment; but I dissent from the latter part of the opinion of the court, which holds that certain questions were properly allowed to be asked defendant on his cross-examination. The limit of cross-examination of ordinary witnesses is not marked with any great accuracy or distinctness. Questions are frequently allowed which strictly do not refer to the matters about which the witnesses testified in chief. Great latitude is given trial courts in passing upon the admissibility of such questions; and their discretion is rarely interfered with by appellate courts. Now, if the legislature had intended to put a defendant in a criminal case, testifying for himself, upon the same footing as other witnesses, it could easily have signified that intention in one of two ways: *First*, by saying nothing about it; or, *second*, by saying, affirmatively, that he should be subject to cross-examination as other witnesses. But the language of section 1323, Pen. Code, is that he may be cross-examined "as to all matters about which he was examined in chief." Therefore either no signification at all must be given to this language,—which would be to violate a cardinal rule of construction,—or else it must be held to be a limitation of the general practice on cross-exam-

ination, and the establishment of definite boundaries within which the cross-examination of a defendant must be confined. And that the latter is the true construction seems to me to be most obvious and clear. I cannot understand how the language can be held to mean anything else. It must be remembered that the privilege given a defendant in a criminal case to testify for himself is by no means an unmixed blessing. There are cases where an innocent defendant could do himself no good, and might do himself harm, by going on the witness-stand. But his refusal to do so will be construed to his injury by the average jurymen, in spite of any instruction the court may give on the subject. And, then, if he does testify, his temptation to commit perjury will be considered so great that he will rarely be credited with telling the truth. But if he cannot go upon the stand for the mere purpose of stating a fact which will explain some suspicious circumstance, without being forced, upon cross-examination, to lay bare the whole history of his life, he had better keep away from it, unless, indeed, instead of having a human character, he is a miraculous bundle of virtues, with no vice, and with nothing which men call a vice. And, no doubt, these and similar considerations induced the legislature to throw around him the slight protection, at least, which is contained in the section of the Code under consideration. I do not understand that in *People v. Chin Mook Sow*, 51 Cal. 597, anything more was intended to be decided than that, when a defendant is a witness, he may be impeached, by independent evidence, of his bad reputation for truth, etc., or of his conviction of a felony, as provided in section 2051, Code Civil Proc. But other provisions inconsistent with section 1323, Pen. Code, should be construed as not including those who have the dual character of witness and defendant. I think that the objection to each of the questions asked of defendant on cross-examination should have been sustained.

I concur: PATERSON, J.

75 Cal. 376

BARNEY v. VIGOUREAUX *et al.* (No. 9,892.)

(Supreme Court of California. March 28, 1883.)

1. WRITS—SERVICE BY PERSON OTHER THAN OFFICER—AFFIDAVIT—SUFFICIENCY.

Under Code Civil Proc. Cal. § 410, providing that affidavit of service of summons by any person other than the sheriff must allege that such person was over 18 years of age, where such affidavit does not allege that affiant was over 18 years of age at the time of such service, judgment by default cannot be sustained thereon.

2. EXECUTION—RELIEF AGAINST WRONGFUL SEIZURE—VACATING JUDGMENT.

Where the property of a person not party to the action is taken and sold under an execution issued in such action, such person has no remedy by motion to vacate the judgment.

Department 1. Appeal from superior court, city and county of San Francisco; I. C. CARY, Judge.

Judgment against A. W. Vigoureux, defendant and appellant, on action by A. S. Barney to recover debt on promissory note. Affidavit of service did not allege that affiant was over 18 years of age at time of service.

I. N. Thorne, for appellant. W. H. Allen, for respondent.

McKINSTRY, J. The summons was not served on the defendant A. W. Vigoureux. *Maynard v. MacCrellish*, 57 Cal. 355; *Howard v. Galloway*, 60 Cal. 10; *Weil v. Bent*, Id. 603; *Doerfler v. Schmidt*, 64 Cal. 265; *Lyons v. Cunningham*, 66 Cal. 43, 4 Pac. Rep. 938. Nor did A. W. Vigoureux appear in the action before or after the judgment. The superior court had no jurisdiction to enter the judgment against him.

W. A. Vigoureux, calling himself "one of the defendants" in the action, gave notice of a motion to vacate the judgment, quash executions issued thereon, etc. The notice was accompanied by an affidavit made and subscribed.

scribed W. A. Vigoureux, wherein the affiant swore that he was one of the persons named as defendant in the action *B. A. Barney v. A. W. Vigoureux et al.*; and that the summons in that action was on the 30th September, 1878, returned and filed, "with an affidavit of a pretended service thereof on the affiant;" that a judgment was entered "in favor of plaintiff, and against this affiant;" that an execution was issued on the judgment, under which the sheriff had sold "all the right, title, and interest of this affiant, defendant as aforesaid," in certain described land and premises, of which the affiant is owner and in possession. The affidavit proceeds to state facts showing that the affiant was not served at all, and to aver that he had no notice or knowledge of the action, or that a judgment had been entered against him, until after the sale of certain personal property of his, under an execution running to Santa Clara county. However persistent the effort of W. A. Vigoureux to make himself by affidavit a defendant in the judgment, he did not succeed in the attempt. A. W. Vigoureux has appealed from the order of the superior court denying the motion of W. A. Vigoureux. He can hardly complain that, under a judgment against him, the sheriff has levied upon and sold property of W. A. Vigoureux. Had W. A. Vigoureux been served with summons, the judgment would perhaps have bound him, notwithstanding a misnomer, if there was one, in the absence of a plea in abatement. But there was no service upon any defendant in the action other than Banks, and no judgment was entered against W. A. Vigoureux. Nevertheless, as the complaint was not answered by A. W. Vigoureux, nor by any person served as A. W. Vigoureux, the affidavit or proof of service was a necessary part of the judgment roll. Code Civil Proc. § 670. Thus it appears on the face of the judgment roll that the court never acquired jurisdiction of the person of the defendant Vigoureux. On this fact being called to the attention of the court below in any manner, the judgment should have been vacated; but, under the circumstances, no costs should be allowed appellant, who took no steps to set aside the judgment in the court below, but acquiesced in the making of his debt out of the property of another person. The foregoing assumes that A. W. and W. A. Vigoureux are two men, and not the same man, because such is the fact, so far as appears from the judgment roll.

The order appealed from is reversed, and the court below is directed to enter an order vacating and setting aside the judgment, and the proceeding taken under it, without costs to the appellant, either in this court or in the superior court.

We concur: SEARLS, C. J.; PATERSON, J.

75 Cal. 379

In re ROMERO'S ESTATE. (No. 12,366.)

(Supreme Court of California. March 28, 1888.)

HOMESTEAD—WHO ENTITLED—ADOPTED CHILDREN.

On an application to set apart a homestead it appeared that petitioner was the child of a woman who was divorced from her husband. It did not appear that at the time of his birth his mother had separated from her husband, and was living with deceased, nor was there any evidence of his adoption by the latter. *Held*, that the petitioner must be taken to be the child of the lawful husband, and therefore not entitled to the order claimed.

Commissioners' decision. Department 2. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

Edwardo Romero presented a petition asking to have a homestead set apart for himself and Carrie Romero, alleging themselves to be the minor children of Ramon Romero. Petition refused. Petitioner appeals.

N. A. Dorn and *W. M. R. Parker*, for appellants. *R. M. F. Soto* and *Hermann & Soto*, for respondents.

BELCHER, C. C. This is an appeal from an order refusing to set apart a homestead. Edwardo Romero presented a petition to the court below, asking to have a homestead set apart for the use of himself and his sister, Carrie Romero, who were alleged to be the minor children of Ramon Romero, deceased. A brother and sister of the deceased objected to the homestead being set apart, and, as the ground of their objection, alleged that the said Edwardo and Carrie were not the children of deceased; that he was never married, and that he left surviving him at the time of his death no child or children, either legitimate or illegitimate. At the hearing it was shown for the petitioner that Ramon Romero died intestate, in the county of Monterey, on the 18th day of May, 1884, and that administration on his estate was afterwards taken out, and an inventory was returned, showing personal property belonging to the estate of the value of \$381, and real property of the value of \$700. A declaration of homestead made by the deceased was then introduced in evidence. The declaration was dated April 30, 1881, and was properly acknowledged and filed for record on the same day. In it the claimant declared "that I am the head of a family, consisting of myself and my two minor children, Edwardo and Carolina, and I do now, at the time of making this declaration, actually reside with my said family on the land and premises hereinafter described." The petitioner was then sworn as a witness, and testified as follows: "I knew Ramon Romero in his life-time; he was my father. Myself and my sister, Carrie Romero, lived with him all the time, up to the time of his death, on the land described in the petition. We lived there for the last ten years. We were living on said land on the 30th day of April, 1881, and for a long time before. We have lived on said land ever since the death of my father, and live there still. I am twenty years of age, and my sister is sixteen years of age. At the time my father made his declaration of homestead, in 1881, myself and my sister were living with my father on the said land, and there were no other children living with him. My mother is still living with us on the same land. Her name is Maria de Los Angeles Botiller." For the contestants a witness was called who testified that he had lived in the town of Monterey for about 25 years, and had been well acquainted with Ramon Romero, who had also lived in the town the greatest portion of that time; that he never knew or heard that Romero was married; that he knew the mother of Edwardo Romero, and her name was usually called Maria de Los Angeles Botiller. The judgment roll in a case commenced by Maria de Los Angeles Botiller against José Joaquin Botiller, in the district court of Monterey county, was then introduced and read in evidence. The complaint was filed on the 6th day of November, 1872, and alleged that the parties were married in 1855, and were still husband and wife, and asked for a divorce on the ground of desertion. The summons was personally served on the defendant on the 12th day of the same month. The court found, among other things, that plaintiff had "in all respects conducted herself towards the defendant as became a kind, affectionate, and faithful wife." The decree was entered March 20, 1873, and granted the plaintiff the divorce prayed for. The foregoing are all the facts appearing in the record, and upon them the Court denied the petition. If the petitioner and his sister were the minor children of the decedent, they were entitled to have the homestead set apart for their use. Code Civil Proc. § 1465. But if they were not his children in fact, or by adoption, they were not entitled to have the homestead set apart. Whether they were his children or not, was then the single issue to be determined. The evidence shows that the youngest of them was born more than 16 years prior to the time of the hearing, which was on the 28th of February, 1887. They were the children of Maria de Los Angeles Botiller, who, at the times of their birth, was the lawful wife of José Joaquin Botiller. They are presumed, therefore, to be legitimate and the issue of their mother's husband. Civil Code, §§ 193-195. There was no evidence showing that they had been

adopted by their alleged father in the manner prescribed by law, (Civil Code, §§ 221-230,) and in the absence of such proof no presumption that they had been adopted can be indulged. No written findings were filed, but the court must have found all the material facts against the appellants, and there are no specifications of errors or particulars wherein the evidence was insufficient to justify the decision. The decision is presumed to be right, and the order must be affirmed unless error is affirmatively shown by the record. We find no error in the record, and therefore advise that the order be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

McFARLAND, J. I concur in the judgment, because it does not appear (although it was probably the fact) that at the time of the birth of the children their mother had separated from her husband, and was living with the deceased. Had this fact appeared, it would, with the other evidence, have been sufficient to overcome the presumption, (not conclusive,) based upon the marriage, that they were the children of Botiller. It seems to be a hardship to take this little home away from these children, for whom the deceased intended it, and give it to mere collateral kin; but I see no way to avoid it. If the court below had given judgment the other way, even upon the meager evidence offered, I should not have felt like disturbing it. If they are the children of the deceased, they were publicly recognized as provided in section 230, Civil Code, and no other adoption was necessary.

75 Cal. 407

PEOPLE v. BENTLEY. (No. 20,364.)

(Supreme Court of California. March 28, 1888.)

1. HOMICIDE—ASSAULT WITH INTENT TO KILL—EVIDENCE—RES GESTÆ.

On a trial for assault to commit murder, evidence as to acts and declarations of a third party, tending to show a conspiracy between him and defendant to commit the crime, is admissible as part of the *res gestæ*.¹

2. SAME—CONVICTION FOR LESSER OFFENSE.

Under an information charging assault to commit murder, defendant may be convicted of assault with a deadly weapon.

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

W. A. Gray and Oregon Sanders, for appellant. Geo. A. Johnson, Atty. Gen., for the People.

SEARLS, C. J. The defendant was convicted of an assault with a deadly weapon, upon an information charging him with an assault to commit murder. The evidence at the trial tended to show that the prosecuting witness, Moore, and one Baker were, on the evening of May 3, 1887, at Tulare, and were desirous of going to Broder's ranch, which was in the direction of, but not on, the direct road leading from Tulare to Visalia. One Ward was speaking of going to Visalia, and Moore contracted with him to take him (Moore) and Baker to the ranch in his (Ward's) buggy. On reaching a point on the road towards Visalia, where the road to the ranch diverged, Ward made some objections to going to the ranch, affecting to believe that it was further than had been represented; the outcome of which was that the parties agreed to go to Visalia direct. On the way, and after passing the forks of the road, Ward stopped at the house of a Mrs. Bentley, where, leaving Moore and Baker in

¹ Upon the general subject of the *res gestæ*, and when declarations are a part thereof, see *Dismukes v. State*, (Ala.) 3 South. Rep. 671, and note.

the buggy, he entered, and stayed some 10 minutes. The defendant and one Ridgeway, arrested with him, were stopping at this house, which was really not on the most direct road to Visalia. All these things occurred in the night. After leaving the Bentley house, Ward turned from the Visalia road, and drove off for perhaps 150 yards, changed his course, and affected to be lost; turned back towards the Visalia road; drove a short distance, when his passengers got out of the buggy, he told them to go up to some trees, and he would "drive on to see," and would be back in a minute. He did not return, and was not again seen that night. Moore and Baker walked to the trees, about 150 yards distant, where they met two men, who commanded them to hold up their hands, turn their backs, and give up their money. The robbers had pistols, and threatened to shoot if resisted. Moore succeeded in getting a knife out, resisted the man who had him more particularly in charge, cut him, knocked him down, and seems to have been in a fair way to conquer, when his antagonist called upon his companion, who came to the rescue, struck Moore with a pistol over the head, and rendered him senseless. Two shots were fired by the would-be robbers; one by the assailant of Moore, which struck the latter, and the other by Baker's assailant. The assault occurred about 2 o'clock A. M. Moore recognized Ridgeway, whom he cut, and swore that in size and general appearance the other man resembled defendant. Ridgeway and defendant were arrested the next morning at the Bentley house, the former wounded by cuts. Their pistols were found each with a shot discharged, and that of defendant bloody and broken. The assault was made within a quarter of a mile of the Bentley house, which latter place seems to be about one mile from Visalia. Bentley and Ridgeway were seen together at Visalia as late as 9 P. M. on the night of the assault, and were usually seen together. Ward was a frequent visitor at the Bentley house. The foregoing statement contains so much of the testimony as is essential to an understanding of the legal propositions involved in the case.

It is objected here, as it was at the trial, that the declarations, acts, and knowledge of Ward were not admissible in evidence, for the reason that no proper predicate had been established by showing the existence of a conspiracy, between him (defendant) and Ridgeway. A conspiracy, like most other facts, may be proved by circumstantial evidence; indeed, it is not often that the direct facts of a common design, which is the essence of a conspiracy, can be proven otherwise than by the establishment of independent facts, bearing more or less remotely upon the main, central object, and tending to convince the mind, reasonably and logically, of the existence of the conspiracy. In the language of Greenleaf: "If it be proved that the defendants pursued by their acts the same object, often by the same means,—one performing one part, and another another part of the same, so as to complete it,—with a view to the attainment of the same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object." 3 Greenl. Ev., § 93; *U. S. v. Doyle*, 6 Sawy. 612, 5 Fed. Rep. 680. The evidence to which the defendant's counsel objects under this head was almost exclusively directed to the establishment of the fact of a conspiracy by the inferential or circumstantial method, and beyond such result had no tendency to convict the defendant. The details of the agreement with Ward, and their travels towards Visalia, were well enough to an understanding of the surroundings of the main facts, and as showing the minor facts which led up to and illustrated the former, and thus constituted a part of the *res gestæ*. They were not, however, acts which would or could militate against the defendant, except to show the probability of an understanding between him and Ridgeway, on the one hand, and Ward, on the other, that the latter should afford an opportunity, and the former should embrace it by attempting to rob Moore and Baker. These acts did not prove, or attempt to prove, the attempted robbery. That was proven by other and direct evidence as to the fact, and identity of Ridge-

way, and by circumstances tending to show defendant as one of the perpetrators. The acts complained of tended to establish the conspiracy, and were therefore admissible.

There was no error in the withdrawal from the jury of the instruction given inadvertently to the effect that they must find the defendant guilty of an assault with an intent to commit murder, or acquit him. Under the information, the defendant could be found guilty of an assault to commit murder, an assault with a deadly weapon, or acquitted. The court had already, and in other parts of his charge, instructed the jury fully as to the necessity of being convinced of the guilt of the defendant beyond a reasonable doubt; had explained to them the meaning of a reasonable doubt; and had covered everything involved in the instruction withdrawn, except as to the various forms of verdict which they were authorized, under the information, to render. We need not stop to discuss the propriety of the instruction given by the court below upon the question of an assault to commit murder, for the reason that, if conceded to be erroneous, (which we do not decide,) the defendant, who was convicted of the lesser offense of an assault with a deadly weapon, could not have been injured thereby.

The judgment and order appealed from are affirmed.

We concur: MCKINSTY, J.; TEMPLE, J.; MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.; THORNTON, J.

75 Cal. 329

In re GIBSON'S ESTATE. (No. 11,796.)

(*Supreme Court of California.* March 23, 1888.)

WILLS—CONSTRUCTION—DESCRIPTION OF LEGATEE.

The residuary clause of a will was as follows: "I devise the remainder of my estate to the Old Ladies' Home, at present near Rincon Hill, at St. Mary's Hospital." It was shown that a corporation named the "Sisters of Mercy" conducted an establishment generally known as "St. Mary's Hospital," of which one department was called the "Old Ladies' Home," and that there was no other Old Ladies' Home in the vicinity of Rincon Hill. *Held*, that testatrix meant to make such corporation her residuary legatee, and that the bequest was valid. TEMPLE, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

W. S. Goodfellow, for appellants. John M. Burnett and James Gartlan, for respondents.

PATERSON, J. The will of the testator contained the following residuary clause: "I give and devise the remainder of my estate, after the above legacies have been paid, to the Old Ladies' Home, at present near Rincon Hill, at St. Mary's Hospital." The evidence, against the introduction of which there was no objection, shows that the establishment conducted by the corporation respondent was generally known as "St. Mary's Hospital," and that one department thereof is called the "Old Ladies' Home," and is devoted to the care and protection of old ladies. The Old Ladies' Home was originally in the same building with the hospital, but was recently removed into another building, erected by the corporation on the same lot, about 50 feet from the hospital. The expenses of the Old Ladies' Home have always been paid by the corporation, and it is under its control. There is no other Old Ladies' Home in the vicinity of Rincon Hill. The name of the corporation is the "Sisters of Mercy." It is claimed by the appellant that there is no legatee competent to take, and, no trust having been created, the bequest to the Old Ladies' Home fails.

Our Code provides that "the misnomer of a corporation in any written instrument does not invalidate the instrument, if it can be reasonably ascertained from it what corporation is intended." So long as the testator suffi-

ciently indicates the institution intended, the bequest is good; and if from the will itself, or evidence *abunde*, the object of the testator's bounty can be ascertained, a misnomer of a legatee or devisee, whether a natural person or a corporation, will not invalidate the provision. *Lefevre v. Lefevre*, 59 N. Y. 434. It was held in a case quite similar to this that a charitable gift to a hospital should be sustained notwithstanding the misnomer of the corporation, and that it would take and hold the gift on the trust named by the donor. *Lanning v. Sisters of St. Francis*, 35 N. J. Eq. 392. The court found "that the testatrix meant and intended by her said will, and especially by the twelfth article thereof, to make said corporation, called the 'Sisters of Mercy,' her residuary legatee, intending thereby especially to benefit the department thereof which provides for the care, protection, and comfort of old ladies; and the testatrix knew that the only conduit of her charity was the corporation called the 'Sisters of Mercy.'" We think these findings of the court are justified by the evidence. Judgment affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; MCKINSTRY, J.

I dissent: TEMPLE, J.

75 Cal. 337

FRICK v. SINON. (No. 9,868.)

(Supreme Court of California. March 24, 1888.)

1. LIMITATION OF ACTIONS—RUNNING OF THE STATUTE—TENANTS IN COMMON.

Plaintiff's predecessor was in actual, exclusive, adverse possession, under color of title, of certain land the fee of which was in three persons as tenants in common. Before such adverse possession ripened into absolute title under the statute of limitations, one of the co-tenants brought suit in ejectment for the land against plaintiff's predecessor, the complaint alleging that said co-tenant was sole owner thereof. While the action was pending, said co-tenant, for a valuable consideration, executed to the defendant therein a deed of the whole of the premises in dispute, and dismissed the action. *Held*, that the reception of this deed did not make the grantee therein a tenant in common with the two co-tenants of the grantor; and plaintiff's predecessor, having held actual, exclusive, adverse possession of said land for five years after the reception of said deed, acquired a complete title thereto, under the California act of limitations of 1863.¹

2. SAME—OFFER OF COMPROMISE—ESTOPPEL.

An offer to buy out a hostile claim, after one has acquired title by adverse possession, will not estop the party making such offer from asserting his title so acquired.

3. SAME—ADVERSE POSSESSION—EVIDENCE.

In an action to quiet title, where plaintiff claims under one who acquired title by adverse possession, it is not error to admit evidence of the payment of street assessments and insurance premiums on the property. Although not admissible to prove the fact of possession, such evidence tends to show that the actual possessor claimed the whole title.

Department 1. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Action to quiet title, brought by Fredericke Frick against William Sinon. Judgment was rendered for plaintiff. Defendant appeals.

Wm. Pierson, for appellant. *J. Foulds*, for respondent.

MCKINSTRY, J. An action to quiet title, commenced October 29, 1883. The court below adjudged, in effect, that the plaintiff had acquired the legal title to the land described in the complaint by an adverse possession continued for the statutory period. Appellant contends, it appears from the evidence, that the plaintiff and defendant were at the commencement of the suit, and at the trial, tenants in common of the premises. There was evidence that

¹ As to what constitutes adverse possession, see *McLaughlin v. Del Re*, (Cal.) 16 Pac. Rep. 881, and note. As to what constitutes color of title, see *Hickman v. Link*, (Mo.) 7 S. W. Rep. 12, and note.

the predecessor in interest of the plaintiff had the actual, exclusive, and adverse possession, under color of title, of the whole of the land in controversy, from the year 1862 up to the 17th day of April, 1868, at least. Such possession, however, unless it continued to April 21, 1868,—five years from the approval of the act of limitations of 1863,—did not bar the right of possession of defendant's grantors. On the 17th day of April, 1868, W. H. Campbell, J. B. Crockett, and Gwyn Page were the owners in fee-simple, as tenants in common, of the land the title whereof is here in dispute. On that day Campbell commenced an action of ejectment against the predecessor of the plaintiff for the recovery of the possession of the land, averring in his complaint that he was the sole owner thereof. The defendant in the ejectment, by answer, denied the title of the plaintiff therein. While the ejectment was pending, and on the 6th day of March, 1869, Campbell, for a valuable consideration, executed and delivered to the defendant therein a deed "of the whole of the premises" described in the complaint therein and herein. The action of ejectment was thereupon dismissed.

It is contended by appellant that the reception of the deed by plaintiff's predecessor made him a tenant in common with defendant's grantors, Crockett and Page. Had Campbell been in the sole possession of the premises, and had he delivered the possession of the whole to the plaintiff's predecessor, the entry by the predecessor would have been in the assertion of an exclusive right in severalty, and equivalent to an express declaration on the part of the grantee that he entered, "claiming the whole to himself." It would have been such a disseizin as would have set the statute of limitations in motion in his favor. *Bath v. Valdez*, 11 Pac. Rep. 727. The grantee in the deed was in the adverse possession of the whole of the land prior to the execution and delivery of the deed. Crockett and Page could not say, nor can their successors say, that they had no knowledge of the deed, and, in the same breath, that the deed made the grantee a tenant in common with them. Taking notice of the deed, the subsequent possession of plaintiff's predecessor was, to their knowledge, referable to the deed, and was a possession with a claim of the whole title. The continued possession under the deed was as much a disseizin as would have been an entry under it. The mere commencement of the action of ejectment by Campbell, subsequently dismissed, did not deprive the plaintiff's predecessor of the benefit of his adverse possession begun in 1862, and which was continued for a period of five years,—a period completed before the deed was executed by Campbell. Even if the taking of the deed was any evidence tending to prove that the possession, begun in 1862, was not previously adverse, yet the taking of the deed, and possession under it, was a denial of any right in Crockett and Page from the date of its delivery and acceptance. It follows that plaintiff's predecessor did not become a tenant in common with Crockett and Page by receiving the deed from Campbell.

There is ample evidence that plaintiff's predecessor was in the actual, exclusive, and adverse possession of the land in controversy, claiming title to the whole thereof under the deed aforesaid, for five years next succeeding the 6th day of March, 1869. The defendant testified that, say, in November, 1876, (more than seven years after the execution and delivery of the Campbell deed,) he suggested to plaintiff's predecessor that they together should buy "the outstanding one-fifth" of the property; to which the latter responded he could not afford it,—had no money. Also that, shortly before the commencement of this action, (more than 14 years after the Campbell deed,) the agents of the plaintiff asked defendant what he would take for his interest in the property; that he replied "\$600;" and that the agents thereupon declared they would not give him \$60 for it. It was for the court below to determine the credibility of the witness. An offer to buy out a hostile claim in 1876 or 1883 could not invalidate the title of plaintiff or her predecessor. *Furlong v. Cooney*, 14 Pac. Rep. 12. Here is no question of estoppel. Having acquired

the title by adverse possession, plaintiff, while she remained in possession, could be divested of such title only by conveyance in writing. And even if it should be conceded that the declaration was made by plaintiff's predecessor in 1876, as testified to, and that it constituted some evidence tending to show that, during the five years of possession immediately following the Campbell deed, the occupant had not intended to hold adversely, it was but evidence, and very slight evidence; and the court below was justified in holding it did not overcome the effect of the clearly established, open, notorious, and exclusive possession of the land under the deed purporting to grant the entire title.

Nothing was decided in *Carpentier v. Mendenhall*, 28 Cal. 484, which is in conflict with the views above expressed. There, the adverse possession of the defendants commenced in 1858. A special verdict found that the defendants "became tenants in common" with the plaintiff in 1860. The supreme court said that, when the defendants became tenants in common with the plaintiff, their possession lost its hostile character. In *Miller v. Myers*, 46 Cal. 535, the appellant did not complain of the judgment letting the plaintiff into the possession as tenant in common, but for a judgment for mesne profits, claiming there was no ouster of the plaintiff prior to the commencement of the action.

The court below did not err in admitting evidence of the payment by plaintiff and her predecessor of street assessments and insurance premiums. Although, perhaps, not admissible as evidence of the fact of possession, they tended in some degree to show that the claim of the actual possessor was to the whole title. Judgment and order affirmed.

We concur: SEARLS, C. J.; PATERSON, J.

75 Cal. 373

BATCHELDER v. BRICKELL et al. (No. 11,185.)

(Supreme Court of California. March 28, 1888.)

MORTGAGES—DECREE OF FORECLOSURE—MODIFIED DECREE—EFFECT.

A decree of foreclosure was defective only in providing for a personal judgment against one of the defendants. A modified decree, prepared and entered as of the date of the original decree, as directed by an order of the supreme court, was in the language of the original decree except that the word "defendants" was changed to "defendant," and the name of the defendant, wrongfully included in the personal judgment, was omitted from the clause providing for such judgment. Held, that the original decree, or a sale made thereunder, was not vacated or set aside by the modified decree, the manifest intention of the court being to correct the error, and not to constitute a new decree.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

Quint & Newman and *Fox & Kellogg*, for appellant. *E. J. & J. H. Moore* and *A. N. Drown*, for respondents.

TEMPLE, J. This is an action of ejectment, and the only question is whether defendants succeeded in showing title under certain foreclosure proceedings in which Brickell, the principal defendant here, the others being his tenants, was plaintiff, and this plaintiff and her husband were defendants. In that case a decree was duly entered and a sale of the mortgaged premises had, at which Brickell, the plaintiff in that action, became the purchaser. After the sale the case was appealed to this court by the defendants in that suit, but no stay-bond was given, and, pending that appeal, the sheriff's deed was executed and Brickell entered into possession under it. The decision on the appeal in the foreclosure case is reported in 62 Cal. 623. The conclusion of the court is as follows: "It follows from the above that the court below erred in rendering a personal judgment against Mrs. Batchelder on the note of June 1, 1874, and the interest on it, and the decree will be modified in that

regard. In other respects the judgment is correct, and is affirmed. Counsel for respondent will prepare a decree, modified in accordance with the views herein expressed, and present it, on notice, to the chief justice of this court." There was no personal judgment against Mrs. Batchelder, and, so far as we can ascertain, no such point was made on the appeal. The decree, however, contained the usual provision for docketing judgment for any deficiency, and did direct such judgment to be docketed against Mrs. Batchelder. Of course it is this provision which is referred to as a personal judgment against Mrs. Batchelder, and the intent that the decree shall stand except as to that provision is quite plain. The direction to respondent's counsel to prepare a decree modified in accordance with the views expressed, meant simply to write out the decree as modified, more plainly to indicate to the court below the modification intended. Under the circumstances it cannot be justly claimed that it was intended to vacate the decree or set it aside. A contrary intent is expressly stated: "The decree will be modified in that regard. In other respects the judgment is correct, and is affirmed." It was not directed that the modified decree should be submitted to the court for approval, and apparently it was not. This supports the idea that it was not intended to constitute a new decree. The chief justice approved the form of the decree as modified, and it was transmitted to the lower court and there entered, and no steps whatever were ever taken by any one to have the decree as there entered corrected and made to conform to the judgment of this court, if, in fact, it was not in conformity with the judgment here. That decree, entered as modified, after briefly reciting the conclusion of this court, states: "Now, therefore, in accordance with said judgment and order of the supreme court, on motion of E. J. & J. H. Moore, counsel for plaintiff, and on due notice thereof to counsel for defendants, it is ordered and adjudged the decree of the former district court of the Twenty-Third judicial district of this state, of date November 25, 1878, be modified as of that date so to read and stand modified in the words and figures following, which the court below is ordered to enter as of the date of the judgment above mentioned, to-wit." Then follows the original decree in *totidem verbis*, except that the word "defendants" is changed to "defendant," and the name of Mrs. Batchelder is omitted from the clause providing for docketing judgment for the deficiency. We think the decree was not vacated or set aside or the sale rendered void by the judgment of this court. The record does not seem to justify the point that the San Francisco property was sold for more than the decree ordered.

Judgment and order denying plaintiff's motion for a new trial affirmed.

We concur: MCKINSTRY, J.; PATERSON, J.

BATCHELDER v. BRICKELL *et al.* (No. 9,770.)

(Supreme Court of California. March 28, 1888.)

Department 1. Appeal from superior court of the city and county of San Francisco: J. V. COFFEY, Judge. See *Batchelder v. Brickell*, *ante*, 441.

PER CURIAM. On the authority of *Batchelder v. Brickell*, *ante*, 441, No. 11,185, this day filed, the judgment is affirmed.

75 Cal 434

CUMMINGS v. CUMMINGS *et al.* (No. 11,881.)

(Supreme Court of California. March 29, 1888.)

1. DIVORCE—DECREE FOR ALIMONY AND ACCOUNTING—CONFORMITY WITH PLEADINGS. The plaintiff, in an action for divorce and an accounting, alleged in her complaint that a conveyance, purporting to be a deed, was made with the intent to defraud plaintiff and was without any consideration whatever; but the court, upon the trial, found that the conveyance was a mortgage, based upon a valuable consideration.

Held, that a decree under this complaint ordering a division of the mortgaged property in payment of plaintiff's claim for alimony is inconsistent with the case made out and should be reversed.

2. SAME—PARTITION OF LANDS—MORTGAGEE IN POSSESSION.

A decree in an action for divorce cannot order a partition of the common real estate of the parties thereto, where a mortgagee is in the lawful possession of the property under a mortgage covering the whole of the land.

3. SAME—NECESSARY PARTIES.

In an action for divorce, wherein plaintiff asked for an accounting, a nonsuit was granted to one of the defendants, whom the decree showed held a mortgage on the property of the defendant husband, and was a necessary party to the accounting. *Held* that, although the decree might be valid as to the other defendant, yet it should be reversed, and the discharged defendant made a party to the suit, in order to settle the rights of third persons.

4. SAME—APPOINTMENT OF RECEIVER.

A mortgagee, in the lawful possession of mortgaged lands, and authorized to receive the rents and profits of the same to apply on his mortgage, cannot, in the absence of evidence showing he has committed waste or abused his position, be succeeded by a receiver, who is given the power to subordinate the claims of the mortgagee to claims of the divorced wife of the mortgagor, for alimony, etc.

In bank. Appeal from superior court, Santa Cruz county; McCANN, Judge.

Action for divorce and an accounting by Mary R. Cummings against William N. Cummings, Morgan L. Ketchum, James L. Simpson, and the Bank of Watsonville. Judgment for plaintiff, and defendant Morgan L. Ketchum appeals.

A. P. Kittredge, for appellant. *Goldsby & Jettie*, for respondent.

MCKINSTRY, J. The appeal is by the defendant Morgan L. Ketchum from portions of the judgment, and no point is made by respondent that the judgment of the superior court is not final and appealable. It is not necessary to decide whether the court below did or did not err in overruling the demurrer to the complaint of the defendants Ketchum and the Bank of Watsonville. If it be conceded the demurrer was properly overruled, the portions of the judgment appealed from must still be reversed. And even if, upon the complaint, a judgment decreeing an accounting and for a redemption from the mortgages of the defendants Ketchum and the bank would, under any circumstances, have been justified, the portions of the judgment from which an appeal has been taken must be reversed. The superior court decreed a dissolution of the marriage between plaintiff and the defendant William N. Cummings; that plaintiff was entitled to the custody of the infant daughter, sole issue of the marriage; and that defendant Cummings pay to the plaintiff \$50 a month as alimony, and a sum as suit money. And further decreed that the property described in the complaint was at the commencement of the suit charged with the mortgage in the judgment afterwards referred to; that the said property or tract of land be divided equally, share and share alike, etc., between the plaintiff and the defendant Cummings, and, in case they cannot agree upon a partition, Bart Burke, Esq., be appointed a commissioner to make and report such a partition, etc.; that the share set apart to the defendant Cummings be charged with the payment of costs, alimony, and counsel fees awarded to the plaintiff, and the same be a lien thereon; that the instrument of the 18th of May, 1876, purporting to be a deed from defendant Cummings to defendant Ketchum is, and was intended to be, a mortgage to secure the payment of \$1,500 and interest, and not a deed conveying the land, otherwise than as security, and that the instrument was and is a valid and binding mortgage, free from fraud; that the property is subject to and bound for the payment for the unpaid portion of the mortgages of the Bank of Watsonville and Ketchum; that Ketchum is entitled to a lien on the land for the sum of \$1,500 and interest thereon from 10th day of June, 1874, to the 10th day of February, 1876, at the rate of 1½ per cent. per month, and with legal interest thereon from the last date to the entry of decree, "less whatever sums of

money he may have received as rent or otherwise from the premises held by him under the said instrument, herein declared to be a mortgage, over and above what he has expended thereon for taxes, repairs, and in payment of the principal or interest on the Bank of Watsonville mortgage;" that, for the purpose of ascertaining, etc., Bart Burke is appointed a referee to ascertain and report the amount of reductions, if any, to be made, "and to make and state said account between said Ketchum and his said receipts from said property," etc.; that, as between said plaintiff and defendants Cummings and Ketchum, and those claiming under them, the part or half of the premises awarded to plaintiff be chargeable with the payment of "one-half of the Ketchum and Bank of Watsonville mortgages;" that Bart Burke, Esq., be appointed a receiver to receive the rents, profits, and issues of the land, until further order, to be paid out by him under direction of the court—*First*, for taxes; *second*, for repairs; *third*, for the support of plaintiff and her child; *fourth*, for costs and counsel fees; *fifth*, for interest due and accruing on the Bank of Watsonville mortgage. The judgment recites that the plaintiff, having introduced her evidence in chief, a nonsuit was granted as to the defendant the Bank of Watsonville. The dismissal, or nonsuit, in favor of the bank, of itself, might, perhaps, only show that the bank had no interest in or lien upon the property. But the final judgment declares that the property described is subject to and bound by the unpaid portion of the mortgage of the Bank of Watsonville, and that the defendant Ketchum is entitled to a lien for the amount of his mortgage, less what he may have received as rents, etc., over and above what he has expended for taxes, repairs, and in the payment of principal or interest "on the Bank of Watsonville mortgage." Further, that the referee ascertain what Ketchum has paid for principal or interest of the bank mortgage. And the receiver is directed to pay out the rents by him received, the alimony, and the costs and counsel fees awarded, before paying interest on the mortgage of the bank.

It is apparent that the bank is a necessary party to the accounting. Its mortgage is recognized as valid in the judgment, and no decree could properly be entered determining what sums had been paid to it by the defendant Ketchum, or giving priority to the alimony or suit money, in the absence of the bank. The mortgage of the bank would seem to be a mortgage executed by defendant Ketchum; and, in view of the nonsuit and the recognition of the mortgage in the decree, it cannot be presumed that it was taken with notice that the instrument from the defendant Cummings to Ketchum was other than it purports to be,—a deed absolute. Even, therefore, if the decree, as between the plaintiff and appellant Ketchum could have been upheld if the bank had not been a party defendant, it should be reversed with directions to the court below to cause the bank to be brought in and reinstated as a defendant, as being a necessary party without whose presence the rights of the other parties could not be finally determined. The portion of the decree which provides for a commissioner to make partition of the land described would, in any event, be reversed. In an action for divorce the court may, in certain instances, "divide" the common real estate. Civil Code, § 146. But this does not authorize an actual partition of the land in every instance. Here the land was in the rightful possession of Ketchum, who had a valid lien extending to every portion of it, and there should have been no decree for a partition until the lien was satisfied or redeemed. Aside from the fact that such entry and partition would be an unlawful interference with the occupation of a mortgagee in the rightful possession, the rights of the respective spouses in the property may depend upon and be affected by the fact that the one or the other shall redeem the mortgages. Nor, in any view of the case, could that part of the decree which provides that the one-half of the property awarded to the plaintiff shall be chargeable with the payment of only one-half of the Ketchum mortgage, be permitted to stand. The defendant Ketchum having a valid

mortgage upon all the land, the court was not justified in attempting to limit or change the liability created by it, or in altering in any way his rights or the obligations of the community under his contract. And so of that part of the decree relating to a receiver. Ketchum, a mortgagee in good faith, and in possession, was authorized to remain in possession with the equitable right of protecting his security by paying the taxes and keeping the property in repair, and of applying the excess of the rents and profits to the payment, first, of the interest, and then of the principal of his mortgage. Yet, without any averment or finding that he had committed waste or abused his position, the court appointed a receiver to collect and receive the rents and profits, and to pay them out, giving priority to alimony and counsel fees over the claim of the mortgagee. But the portions of the decree above specified must be reversed for another reason: They are not based upon any pleading in the cause. The complaint, filed April 28, 1888, avers that the defendants Cummings and Ketchum combined and confederated together for the purpose and with the intent of cheating and defrauding the plaintiff out of her rights and interests in a certain described tract of land,—part of the community property of herself and defendant Cummings; and that, to carry out such fraudulent design, on the 18th of May, 1876, the defendant Cummings executed and delivered to the defendant Ketchum, and the latter received, an instrument purporting to be a deed of conveyance of the property described, the consideration therein recited being \$8,000; that, in truth and in fact, no consideration whatever was paid therefor, the sole purpose of the parties to the instrument being to cheat and defraud the plaintiff as aforesaid, and to cover up and conceal the title of the community in said land. The answer of the defendant, Ketchum, denies the allegations of the complaint. The court found that, in the execution and acceptance of the deed of the 18th of May, 1876, there was no design or plan on the part of William N. Cummings and Morgan L. Ketchum, or either of them, to impair or defeat or affect in any way the rights of the plaintiff. But the court also found that the deed, although absolute in form, was executed by said Cummings and received by said Ketchum as security for a debt of \$1,500, which sum, and the interest thereon, remains unpaid; and, as conclusion of law, that there was no fraud in the deed from Cummings to Ketchum, but that the same was a mortgage and a valid lien for \$1,500, and interest. The complaint herein is not framed as a bill to redeem the Ketchum and Bank of Watsonville mortgages, or either of them, and it contains no averments on which can be founded a decree for redemption. Nor are there allegations that defendant Ketchum is a mortgagee in possession on which could be based a decree that he account for the rents and profits. This, independent of the mere fact that the plaintiff does not offer to redeem. No supplemental complaint was filed or offered containing allegations such as would justify the decree entered as against the defendant Ketchum. On the contrary, the complaint expressly denies that Ketchum has any interest in the premises, averring that the deed purporting to convey the legal title was void, made in fraud of the plaintiff's rights, and without consideration. Where a defendant has answered, the court may grant the plaintiff "any relief consistent with the case made by the complaint, and embraced within the issue." Code Civil Proc. § 530. Here the relief which the court below attempted to grant the plaintiff, as against the appellant, was neither consistent with the case made by the complaint nor embraced within the issues made by the answer. In *Gregory v. Nelson*, 41 Cal. 278, it was held that if a judgment in equity decrees the existence of facts not within any issues made or tendered by the pleadings, and then pronounces the judgment of the court upon such facts, such part of the judgment "is superfluous and nugatory." In *Burnett v. Stearns*, 33 Cal. 474, the supreme court said: "The province of the court with respect to facts is to determine, but not to raise the issue." A judgment for the plaintiff must be limited by the facts

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stated in the complaint. Where the defendant has answered, the court may, under the general prayer, grant any relief consistent with the complaint, with the facts alleged in the complaint; but, under the general prayer, no relief can be granted in equity beyond that which is authorized by the facts stated in the pleadings. *Carpentier v. Brenham*, 50 Cal. 549. The court below would have been justified in decreeing that the property specifically described was, as between the plaintiff and defendant Cummings, at the commencement of the action, community property of the spouses, to the extent of any estate therein which had not been conveyed or transferred by the defendant Cummings. The cause is remanded, and the court below is directed to modify as above indicated the part of the judgment which decrees the property described as community property, or by otherwise expressly saving and preserving the estates in the premises, if any they have, of the defendants other than defendant Cummings, and all or any rights the said defendants, or either of them, other than Cummings, may have in or upon said premises by way of mortgage, lien, or incumbrance. The other portions of the decree appealed from are reversed, and the court below is directed to enter instead thereof a judgment in favor of the appellant.

We concur: SEARLS, C. J.; TEMPLE, J.; SHARPSTEIN, J.; PATERSON, J.

McFARLAND, J. I concur in the judgment; although I have great doubt about plaintiff's right to make Ketchum and the bank defendants at all. The only proper parties to a divorce suit are, generally, the husband and wife. If, when such a suit has been commenced, or is about to be commenced, one of the parties, having such suit in view, colludes with a third party, with intent to cover up community property, such third party may, perhaps, be made a defendant for the purpose of keeping the property *in statu quo* until after the determination of the action. But I am not clear that in this case either of the other defendants was properly joined with the husband.

75 Cal. 496

MOGK v. PETERSON. (No. 12,381.)

(Supreme Court of California. March 31, 1883.)

1. INSOLVENCY—ASSIGNMENT—PROPERTY EXEMPT FROM EXECUTION.

In an action by the assignee of an insolvent to recover the value of property claimed to have been transferred to defendant in fraud of creditors, the findings stated that a certain part of the property was exempt from execution. The judgment gave plaintiff none of such part. After more than 60 days, plaintiff appealed from the judgment. *Held*, that under Code Civil Proc. Cal. § 939, sub. 1, providing that a decision or verdict can only be reviewed as to facts, on appeals from judgments, when such appeal is taken within 60 days, the findings must be taken as true; and under Insolvent Act Cal. 1880, §§ 17, 21, prohibiting assignees of insolvents from taking property exempt from execution, the judgment is correct.

2. SAME—SUFFICIENCY OF PETITION—COLLATERAL ATTACK.

An objection that a petition in insolvency proceedings did not sufficiently state the necessary facts cannot be raised by the defendant in a subsequent suit, brought by the assignee of the insolvent, to recover certain property for the benefit of creditors.

3. SAME—BOND OF ASSIGNEE.

The defendant in an action by an assignee of an insolvent estate to recover certain property for the benefit of creditors, cannot raise the question as to whether the assignee's bond was filed properly within the time allowed by statute, the creditors and debtor having acquiesced in such bond.

4. SAME—ASSIGNMENT BY CLERK OF COURT.

Insolvent Act Cal. 1880, § 17, provides that "the clerk of court shall * * * assign and convey to the assignee all the estate, real and personal, of the debtor." The clerk in an assignment, after styling himself "party of the first part," proceeded to convey "all the property, etc., of the said party of the first part." The instrument is entitled, "*In the matter of A. B., an insolvent debtor.*" It recites the steps in the insolvency proceedings, and that the instrument is made by the assignor as clerk of the court; also that it is in obedience to the insolvent act. *Held*,

that it is evident, from the recitals in the instrument, that it was intended to convey the insolvent's property, and that the words "part of the first part" may be held to mean the clerk acting under the statute as assignor of the insolvent's estate.

Commissioners' decision. Department 1. Appeal from superior court, Colusa county; E. A. BRIDGFORD, Judge.

Action by John C. Mogk, as assignee of William J. Coombs, an insolvent debtor, against Peter Peterson, to recover certain property for the benefit of creditors.

H. M. Albery, for plaintiff. *Richard Bayne*, for defendant.

HAYNE, C. Action by the assignee of an insolvent to recover the value of certain property which is claimed to have been transferred to the defendant in fraud of the rights of the creditors. The court below gave judgment for a portion only of the amount claimed, and each side appeals.

Upon the appeal of the plaintiff the question is whether the court was right in holding that part of the property transferred was exempt from execution, and therefore not a part of the property to which plaintiff was entitled as assignee. The findings state that all this portion of the property consisted of "farming implements," and that, "at the time of the transfer of said property, said Coombs was by occupation a farmer, and used all of said last described articles in his business of farming;" and that each article thereof "was, at the time the same was sold and transferred by said Coombs to said defendant, exempt from forced sale and execution." The appeal was from the judgment alone, and was not taken within 60 days from its rendition; hence the findings must be taken as conclusive. Code Civil Proc. § 939, sub. 1. Taking the above finding to be true, it is manifest that this part of the judgment was correct. For the statute provides that "such assignment shall operate to vest in the assignee all the estate of the insolvent debtor not exempt by law from execution," (section 17;) and that the assignee shall have power to take possession of "all the estate of such debtor except property exempt by law from execution," (section 21, sub. 2.) The clerk had no authority to transfer exempt property to the plaintiff, and therefore the plaintiff can claim nothing by virtue of the transfer.

Upon the appeal of the defendant several points are made:

1. It is said that the petition in insolvency does not show the facts necessary to confer jurisdiction upon the court in which the insolvency proceeding was commenced. The particular matters in which the petition is claimed to be insufficient are, in the first place, that it merely alleges that the insolvent was "indebted" to the petitioners, etc., without stating the facts out of which such indebtedness arose, and that hence it is within the rule laid down in *Re Russell*, 70 Cal. 132, 11 Pac. Rep. 622; and, in the second place, that it does not show that the debtor was insolvent within the meaning of the act, because it merely alleges that he "was on the 29th day of September, 1884, insolvent, and has suffered his property to remain under attachment or legal process for more than four days, and attempted to conceal some of his property to avoid its being attached," without showing that he was insolvent at the time he suffered his property to remain attached; and, further, that the allegation as to concealment was not that he did conceal, etc., but that he attempted to conceal. Probably these matters would have been ground for a demurrer by the insolvent to the petition. As to that we express no opinion. But they certainly cannot be raised by a third party in a collateral proceeding. Even if the position that the superior court acts in such proceedings as a court of inferior and limited jurisdiction be assumed to be true of the present statutes, nevertheless it does not follow that the objections to the petition must prevail. The objections are, in effect, not that there is a total absence of essential facts, but only that the facts are not sufficiently stated. That is not an objection which a third party can raise in a collateral action. This conclu-

sion is strengthened by the provision of the act to the effect that, "In suits prosecuted by the assignee, a certified copy of the assignment made to him shall be conclusive evidence of his authority to sue." Section 18.

2. It is said that no bond was filed by the assignee within the time allowed by the act. It appears that the bond filed on December 17, 1884, which was within the time specified, was defective, and that thereupon the court made an order allowing a new bond to be filed "as of date December 17, 1884," and that thereupon a proper bond was filed. We are inclined to think this was sufficient for all purposes. But, however this may be, the defendant cannot raise the question. As was said in *Luhrs v. Kelly*, 67 Cal. 291, 7 Pac. Rep. 696, "the creditors and debtor were alone interested in the amount and sufficiency of the bond, and they acquiesced in the bond given."

3. It is contended that the assignment was insufficient to pass the title to the assignee. This point is based upon the careless language of the assignment. The act requires that when the assignee is appointed and qualified, "the clerk of the court shall by an instrument under his hand and seal of the court, assign and convey to the assignee all the estate, real and personal, of the debtor, with all his deeds, books, and papers relating thereto," etc. Section 17. In complying with this provision the clerk executed an instrument in which he styled himself "the party of the first part," and, after reciting the insolvency proceedings, proceeds to "grant, assign, transfer, and set over unto the said party of the second part * * * all the * * * property, estate, and effects of the said party of the first part." And it is argued that this is an assignment of the property of the clerk of the court, and not of the insolvent. It is apparent from the recitals, however, that the intention was to transfer the property of the insolvent. And, if a suit had been brought to reform the instrument, it would not have been necessary to introduce any evidence to show that such was the intention. And, this being the case, we think it is not straining the language too much to hold that the assignment is an assignment of the insolvent's property. The paper is a paper in the proceeding. It is entitled: "*In the Matter of Wm. J. Coombs, an insolvent debtor*," and recites the various steps in the insolvency proceedings, referring to the act by its title, and further recites that the assignment is made by the assignor as clerk of the court, and "in consideration of the premises, and of the benefits of said act, and in pursuance of and in obedience to the above recited order and the said act," and "for the uses and purposes in the said act declared." In view of these recitals we think the words "party of the first part," in the beginning of the paper, may be construed to mean, "William H. Miles, clerk of the superior court, acting under the statute as assignor of the estate of the insolvent;" and that the subsequent words referring to the property of the party of the first part, may be taken to mean the property which, by virtue of the authority conferred upon him by the statute, he was authorized to transfer.

4. Finally, it is urged that the evidence is insufficient to show fraud. The court finds that, at the time of the transfer, the said Coombs was insolvent, and unable to pay his debts; and that such transfer "was made with the intent and purpose on the part of said Coombs to hinder, delay, and defraud the general creditors of the said Coombs;" and that the defendant "had reasonable cause to believe that said Coombs was at said time insolvent, and that said assignment, transfer, and conveyance was so made by said Coombs with a view to prevent the last described property from being distributed ratably among his creditors, and to defeat the object of, and to hinder, impede, and delay the operation of, and to evade the provisions of, the insolvent act of 1880." We think this a sufficient finding to avoid the transfer. Insolvent Act, § 55. The counsel, however, says that the finding is not supported by the evidence, and that "appellant's testimony shows positively that he did not have such knowledge or notice." But, as remarked by Judge BALDWIN in

Blankman v. Vallejo, 15 Cal. 645, "we do not understand that the credulity of a court must necessarily correspond with the vigor and positiveness with which a witness swears." And this is peculiarly true of questions of mere knowledge or intent. In the present case it is not much disputed that the intention of the assignor was in fraud of the act. The main contention seems to be that the defendant was not aware of such intention. But, if such was the assignor's intention, it is exceedingly improbable that he would have concealed it from the assignee. And the haste with which the transaction was concluded tends to cast a shade over it. Besides, the defendant admits that he knew Coombs was in want of money; and there was evidence that defendant had made declarations to the effect that some other persons had "got the best of him on the thrashing bill last year, and he didn't propose they would this year; that he had taken wheat enough." Upon the whole evidence we cannot say that the court below was not justified in its conclusions as to the facts.

The other matters do not require special notice.

We therefore advise that the judgment and order appealed from be affirmed in all respects.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

75 Cal. 502

SCHWARTZ *et al.* v. WILSON, Auditor. (No. 11,399.)

(Supreme Court of California. March 31, 1888.)

COUNTIES—LIABILITIES AND INDEBTEDNESS—EXCESS OVER AMOUNT ALLOWED BY LAW.

Under Const. Cal. art. 11, § 18, which provides that no county shall incur indebtedness exceeding for any year the income provided for such year, without a special election, etc.; and the California county government act, § 36, which provides that the board of supervisors shall not allow, nor the auditor or treasurer pay, any such indebtedness,—a petition for a writ of mandate to enforce the payment of a claim for supplies furnished said county, which had been ordered paid by the board of supervisors, is deficient if it fails to show that the debt was ordered paid out of funds provided for such purpose for the fiscal year in which the supplies were furnished and the claim filed.

In bank. Appeal from superior court, San Luis Obispo county; D. S. GREGORY, Judge.

J. M. Wilcoxon and *R. B. Treat*, for appellants. *Graves, Turner & Graves*, for respondent.

SEARLS, C. J. This is an application for a writ of mandate to compel the respondent, Wilson, as auditor of the county of San Luis Obispo, to draw his warrant on the county treasurer in favor of Schwartz & Beebe for \$195.30. A demurrer was sustained to the petition in the superior court, and appellants electing to stand upon such petition without amending, judgment dismissing the application was entered, from which judgment this appeal is taken. It appears from the verified petition filed on application for the writ that Schwartz & Beebe, as copartners, on the 20th of March, 1884, sold and delivered goods, wares, and merchandise to the value of \$195.30 to the county of San Luis Obispo. That on April 20, 1884, the demand therefor, duly itemized and verified, was filed with the clerk of the board of supervisors of said county. That on the 7th day of January, 1885, the demand was by the board of supervisors allowed for the full amount thereof, and ordered paid "out of the funds of road-district No. 1." At the date of the sale and delivery of the goods, there was money unappropriated, and in excess of all outstanding indebtedness of said road-district No. 1, in the county treasury to the credit of

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said road-district; and this claim, together with the other liabilities before that time accrued, were not in excess of the revenue actually provided for the year 1884 for said road-district. The goods were sold and delivered to and for road-district No. 1. On or about August 19, 1884, road-district No. 1 was changed to road-district No. 7, which latter district succeeded to all the rights, funds, and liabilities of No. 1. On the 14th day of July, 1885, the claim of petitioner being unpaid, the board of supervisors entered the following order: "It appearing to this board that there is a surplus of money in road fund of road-district No. 7 for the fiscal year ending June 30, 1885, and there is no outstanding claims against road-district No. 7 for fiscal year ending June 30, 1885, and that \$804.75 is remaining in said fund: Now, under the power invested in us under subdivision 20, section 25, of 'An act to establish a uniform system of county and township government,' approved March 14, 1883, we hereby order that \$334.85 belonging to and in said road-fund district No. 7 for fiscal year ending June 30, 1885, be, and the same is, transferred to the general road fund, and to pay the claims No. 60, Phelix Dolan, for \$26.50; No. 64, Patrick Murphy, for \$7; No. 71, Albert Smith, \$29; No. 73, Schwartz & Beebee, \$195; No. 583, T. J. Williams, \$77.35. And the county auditor and county treasurer of San Luis Obispo will make the proper entries in their books, and otherwise comply with this order. By the board of supervisors of San Luis Obispo county, Cal." That on the day last aforesaid the said board of supervisors, by an order duly made and given, made and passed their order in the words and figures following, to-wit: "Whereas, this board did on the 7th of January, 1885, examine, allow, and order paid from the district No. 1 fund (road fund) the following claims, to-wit: No. 60, claim of Phelix Dolan for \$26.50; No. 64, claim of Patrick Murphy, \$7; No. 71, claim of Albert Smith, \$29; No. 73, claim of Schwartz & Beebee, \$195; No. 583, claim of T. J. Williams, \$77; and whereas, it appears that at the time of said allowance of said claims that there were no funds belonging to or in district No. 1 (road) fund; but that the same was an impoverished fund and road-district: Now, the said orders, so far as they order said claims paid from district No. 1 (road) fund, are hereby revoked, and said claims are examined, allowed, and ordered paid out of the general road fund of the county, as follows: No. 60, claim of Phelix Dolan, for \$26.50; No. 64, claim of Patrick Murphy, for \$7; No. 71, claim of Albert Smith, for \$29; No. 73, claim of Schwartz & Beebee for \$195; No. 583, claim of T. J. Williams, for \$77.35. By the board of supervisors, San Luis Obispo county, Cal., July 14, 1885." Duplicate lists of the claims allowed, and orders for the payment of money, were prepared as by law provided, and, duly signed, were delivered to the auditor in due time, and a demand was made upon the auditor for a warrant on the treasurer in favor of appellants, which was refused, and thereupon, and on the 9th day of November, 1885, the application for a writ was filed.

From the foregoing statement, it clearly appears that the supplies were furnished, and the claim therefor filed, April 12, 1884; that is to say, during the fiscal year which ended June 30, 1884. There was at that time sufficient money in the fund of road-district No. 1 to pay the demand. The petition shows that it was ordered paid on the 14th of July, 1885, out of the general road fund of the county which had been provided for the fiscal year 1885; or, at least, it fails to show, as it should have done, that the claim was ordered paid out of the funds provided for such purpose for the fiscal year ending June 30, 1884. In *San Francisco v. Brickwedel*, 62 Cal. 641, it was said: "Each year's income and revenue must pay each year's indebtedness and liability; and no indebtedness or liability incurred in any one year shall be paid out of the income or revenue of any future year." The eighteenth section of article 11 of our constitution provides that, in cases like the present, no indebtedness or liability shall in any manner, or for any purpose, be incurred exceeding in any year the income and revenue provided for such year. Sec-

tion 36 of the county government act contains substantially the same provision as the constitution, and, after providing a method by which to estimate and determine the amount which may be allowed against each fund, then proceeds to declare, in reference to supervisors, as follows: "The board shall have no power to make allowances against any fund which, with allowances previously made, and salaries and liabilities fixed by law payable therefrom, shall exceed the auditor's estimate of revenue for the year. * * * Any allowance made contrary to the provisions of this section shall be null and void, and the auditor shall not draw his warrant therefor, nor the treasurer pay the same."

Under section 2651 of the Political Code, it was proper for the board to order petitioners' claim paid out of the general road fund, instead of out of the fund of district No. 1; or, what is the same thing, its successor, No. 7; subject, however, as therein provided, to the proviso that the appropriation should not be in excess of the estimated receipts of the current year. Were the question discussed in *San Francisco v. Brickwedel* a new one, we might hesitate in reaching the conclusion arrived at there; but in view of the very salutary influence it is calculated to exercise over public affairs, and in view of the fact that since 1882 all persons having dealings with these municipalities must be presumed to have done so in view of the constitutional construction given in that case, we are not inclined to overturn it. We deem it conclusive of the present case, and the judgment appealed from is affirmed.

We concur: PATERSON, J.; MCFARLAND, J.; THORNTON, J.; SHARPSTEIN, J.; MCKINSTRY, J.

75 Cal. 388

PEOPLE v. CITY AND COUNTY OF SAN FRANCISCO. (No. 11,456.)

(*Supreme Court of California.* March 28, 1888.)

1. PUBLIC LANDS—MEXICAN GRANTS—CONFIRMATION AND SURVEY—EFFECT OF PATENT.
Where the survey of a Mexican grant has been confirmed by the general land-office, a patent issued in pursuance thereto, setting out such survey, cannot be collaterally impeached on the ground that the survey does not conform to the boundaries fixed in the decree of the United States circuit court confirming the grant. PATERSON, J., dissenting.
2. SAME—WHO ARE THIRD PARTIES—ACT CONG. MARCH 3, 1851.
A party claiming title to certain California lands in opposition to a government survey and patent, such alleged title having been acquired since 1850, the time

when the rights of the government attached thereto, is not a third person, within the meaning of act Cong. March 3, 1851, providing that a patent shall be conclusive between the United States and claimants only, and shall not affect the interests of third persons.

In bank. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Suit by the people of the state of California against the city and county of San Francisco, to quiet the title to certain lands claimed by plaintiff. Judgment for defendant, and plaintiff appeals.

E. Marshall, Atty. Gen., (*Phillip G. Galpin*, of counsel,) for appellant. *John Lord Love*, City and Co. Atty., and *Garbee, Thornton & Bishop*, for respondent.

MCKINSTRY, J. The appeal is from a judgment in favor of the defendant, based upon an order sustaining a demurrer to the complaint. The prayer of the plaintiff is that the title of the plaintiff to the premises in question be forever quieted against adverse claims of the defendant, etc., and for other and further relief. The complaint avers that the land in controversy is "swamp and overflowed," and also that it is "tide land," lying below the line of ordinary high tides. It cannot be both "swamp and overflowed" land, included in those ceded by the United States to the state by the act of congress extending the "Arkansas Act," and tide land, so called; but as the title relied upon by plaintiffs in argument is the title in the state, by virtue of her sovereignty, to all lands within her borders lying below the line of ordinary high tides, we shall disregard the averment with respect to the land being swamp and overflowed. This we are justified in doing, because every consideration in favor of the right of the state to the land as swamp and overflowed applies with redoubled force in favor of the state's claim to the land as tide lands.

It is alleged in the complaint that the defendant, as the successor in interest of the pueblo of San Francisco, "a Mexican citizen, claiming to have existed before said conquest," (July 7, 1846,) filed its petition before the board of land commissioners appointed under the act of March 3, 1851, "to ascertain and settle private land claims in the state of California," to procure a determination by them "of its rights to four leagues of land situated upon the peninsula where now stands the city of San Francisco;" that said tribunal, after due proof taken, duly made its decree in regard to the matters set forth in said petition; that said cause was subsequently appealed to the district court of the United States for the Northern district of California; that said cause was again transferred under a special act of congress, passed on the 1st day of July, A. D. 1864, and entitled "An act to expedite the settlement of titles to lands in the state of California," to the circuit court of the United States for the circuit of California; that said cause in said court was entitled "*The City of San Francisco vs. The United States*;" that such proceedings were thereafter had and taken in said cause that a decree final was ultimately rendered by said court, whereby, as between the government of the United States and the city of San Francisco, it was adjudicated and determined "that the claims of the petitioners, the city of San Francisco, to the land herein-after described, is valid, and that the same be confirmed. The land of which confirmation is made is a tract situated within the county of San Francisco, and embracing so much of the extreme upper portion of the peninsula above ordinary high-water mark (as the same existed at the date of the conquest of the country, namely, the 7th of July, 1846) on which the city of San Francisco is situated as will contain an area of four square leagues,—said tract being bounded on the north and east by the bay of San Francisco, on the west by the Pacific ocean, and on the south by a due east and west line drawn so as to include the area aforesaid; subject to the following deductions, namely: Such parcels of land as have been heretofore reserved or dedicated to public

uses by the United States; and also such parcels of land as have been, by grants from lawful authority, vested in private proprietorship, and have been finally confirmed to parties claiming under said grants by the tribunals of the United States, or shall hereafter be finally confirmed to parties claiming thereunder by said tribunals, in proceedings now pending therein for that purpose; all of which said excepted parcels of land are included within the area of four square leagues above mentioned, but are excluded from the confirmation to the city. This confirmation is in trust for the benefit of the lot-holders under grants from the pueblo, town, or city of San Francisco, or other competent authority, and, as to any residue, in trust for the use and benefit of the inhabitants of the city." And the complaint further alleges that the premises therein described, the title whereof the plaintiff asks to have quieted, "are without the boundaries of said pueblo, as given in said decree. The same were at the date of said conquest below high-water mark." The complaint further alleges that, "for the purpose of carrying said decree into execution," a survey was made and approved by the surveyor general of the United States for the district of California in the year 1867-68, of which notice was given as provided in the act of congress of July 1, 1864, and the same was duly advertised; that objections were made to the survey, and the commissioner of the general land-office approved the survey, but allowed an appeal to the secretary of the interior; that the secretary disapproved the survey, and ordered a new survey to be made; that a new survey and plat was made by the surveyor general for California, and transmitted to the commissioner of the general land-office, the same being certified by said surveyor general as having been made in strict accordance with the instructions of the commissioner, the said instructions having been given under direction of the secretary of the interior. And the complaint further avers: "Thereafter a patent in due form of law, based upon the said last-mentioned plat and survey, was issued under the great seal of the United States, and signed by the president thereof, which purported, by virtue of the authority of said decree, and in pursuance thereof, to grant and convey to the city of San Francisco the tract of land embraced and described in said last-mentioned plat and survey, and embracing four square leagues, and including said premises within the exterior boundaries thereof." It is also again directly alleged that the premises here in controversy are included in the plat and survey so as aforesaid made under the direction and supervision of the department of the interior; that the defendant claims some interest under the patent and otherwise in the premises adverse to plaintiff; and that the patent is a cloud on plaintiff's title. Then follows a description by metes and bounds of the tract of land (containing 150 acres more or less) of which the plaintiffs claim to be the owners.

It is contended on the part of appellants that as the surveyor general had no power to include in a survey any land, the claim to which was not confirmed by the decree of the circuit court, so neither the commissioner of the land-office nor the secretary of the interior had any power to direct or approve such a survey; that the powers of these officers are defined and limited by law, and, as the law gave them no power to include in the survey or patent land the claim to which was not confirmed to San Francisco, the patent must read as relinquishing only the right of the United States in the land included in the description in the decree. Furthermore, that the United States had no interest to relinquish in lands below ordinary high-water mark, inasmuch as the title to such lands attached to the state of California.

There was never any demarkation of the boundaries of the pueblo lands by the authorities of Mexico. The right or title of the defendant in the pueblo lands was therefore incomplete when California was ceded to the United States; but it is unimportant whether the right to the pueblo lands, such as it was, was complete or incomplete, perfect or imperfect. If a claimant un-

der a Mexican grant, which gives a perfect title, has presented his claim to the land commissioners appointed under the act of congress of 1851, and it has been confirmed and surveyed, and patent issued, but by the survey a portion of the land included in the judicial measurement of the Mexican authorities was excluded, the claimant is estopped from asserting title to land not included in the survey made by the United States, (*Cassidy v. Carr*, 48 Cal. 339;) not only the claimant, but all other persons, except such as may have derived a title from the Mexican government before the grant or cession upon which the claimant secured a confirmation. In *Moore v. Wilkinson*, 13 Cal. 487, it was said: "The title to the grantees to the land contained within the map (*deseno*) may be admitted to have been perfect, and yet no conclusion follows against the claim of the plaintiffs. If they have accepted the land described in their patent as satisfying their claim, no other persons can object that a portion of the land thus taken is without the boundaries of the grant, unless their prior rights are interfered with." Whatever may be rights of the respective parties to this action, their rights are not affected by the circumstance that the right of the pueblo to lands was or was not perfect or complete. In *Moore v. Wilkinson* a portion of the lands surveyed, and patented by the United States, was without the limits of the tract to which, it was claimed, the predecessors of the plaintiff had received a perfect title from Mexico.

We are to inquire what were the powers of the surveyor general and land department under the acts of congress relating to claims to land derived from Mexico, or existing under the laws of that state. We need not consider the act of June 14, 1860, as none of the proceedings for the confirmation of the pueblo title were taken, so far as appears, under that act. The fourth section of the act of July 1, 1864, provides that in certain circumstances the district court may order a case appealed from the commissioners to be transferred to the circuit court. The pueblo claim was so transferred. But, with reference to such cases, the powers of the circuit court and of the surveyor general and officers of the land department were the same as were, in other cases, the powers and duties of the district court and surveyor and other officers of the land department. By the treaty of Guadalupe Hidalgo, the United States had stipulated that property rights acquired under the former sovereign should be respected. The act of congress of March 3, 1851, "to ascertain and settle the private land claims in the state of California," made provision for the appointment of commissioners, to whom should be presented all claims to land derived from the Spanish or Mexican government. It further provided that when a case should be ready for hearing, etc., the commissioners should proceed promptly to examine the same, "and to decide upon the validity of said claim." The act allowed an appeal to the district court, and thence to the supreme court of the United States; each court in turn to decide upon the validity of the claim. Section 13 of the act provided: "For all claims finally confirmed by said commissioners, or by said district or supreme court, a patent shall issue to the claimant upon his presenting to the general land-office an authentic certificate of such confirmation, and a plat or survey of said lands, duly certified and approved by the surveyor general of California, whose duty it shall be to cause all private land claims which will be finally confirmed to be accurately surveyed, and furnish plats of the same," etc. The first section of the act of 1864 provides that "whenever the surveyor general shall, in compliance with the thirteenth section of 'An act to ascertain and settle the private land claims in the state of California,' approved March 3, 1851, have caused any private land claim to be surveyed, and a plat to be made thereof," he shall give notice of the same by a certain publication, and, if no objections are made to such survey within the time named in the publication, he shall approve the same, and transmit a copy of the survey to the commissioner of the general land-office at Washington for his examination and ap-

proval; but, if objections are made, he shall transmit such objections, together with affidavits or proofs, that, if the commissioner disapprove of the survey, then, when a new survey is made in accordance with the directions of the commissioner, and the commissioner shall approve of the same, he shall cause a patent to issue, etc. By the acts of 1851 and 1864, the commissioners or the district or circuit or supreme court, as the case may be, have power to determine whether a claim is valid, and such as should be confirmed. The power of locating the confirmed claim is conferred upon the surveyor general, his survey being subject to revision by the executive officers authorized to supervise and direct the surveyor's action. There is no provision for a return of the survey or plat to the commissioners, or into court; but when a survey becomes final, and a patent issued, the limits of the claim as confirmed are definitely and conclusively determined by reference to the patent, and the survey therein recited. "The government had provided a board for the determination of the validity of claims to land held under Mexican grants, and a system for the survey and location of the lands, upon the recognition and confirmation of such claim. The survey and location are to follow the decree of confirmation. The approval of the survey by the proper officers is the determination—the judgment—of the appropriate department of the government that the survey does conform to such decree. That determination or judgment is not then a subject of review by the judiciary. * * * The patent, which is the final document issued by the government, is conclusive evidence of the validity of the original grant, and of its recognition and confirmation, and of the survey, and its conformity with the confirmation, and of the relinquishment to the patentee of all interests of the United States in the land." FIELD, C. J., in *Moore v. Wilkinson*, *supra*. And in *Chipley v. Farris*, 45 Cal. 539, our predecessors, speaking by Mr. Justice RHODES, said: "It is contended by the plaintiffs that the survey, which is incorporated into the patent, does not accord with the decree of confirmation, and that they are entitled to rely upon the decree—which is also incorporated into the patent—for title to lands within the decree, but not within the survey. * * * The patent purports to convey the lands described within the survey; and its scope cannot be extended, nor, on the other hand, can it be limited, by showing that the decree comprised a greater or less area than the survey." But section 15 of the act of 1851 declares that the decree of the commissioners, or of the district or supreme court, or any patent to be issued under the act, shall be conclusive between the United States and claimants only, "and shall not affect the interests of third persons;" and it is insisted that plaintiffs are third persons, within the meaning of the clause quoted.

If the Mexican government had power to grant lands below the line of the ordinary tides, the state of California, upon its admission into the Union, became the owner of such tide lands only as had not been previously disposed of by Mexico. No authority has been cited in support of the statement that, by the law of Mexico, tide lands could not be included within pueblo lands; and, as the proper department of our government has determined that a survey which included such lands conformed to the decree of confirmation, that question cannot be reconsidered here. The land department has power to locate all claims confirmed. It follows that the state never had any title to the land here in controversy. Conceding that the United States, from the date of the treaty to the admission of California into the Union, held the legal title to all the tide lands, not previously granted by Mexico, in trust for the state to be created, the title of the United States was not acquired previous to the acquisition of the territory, and when it passed to the state it was taken in subordination to the future action of the United States in determining the location of the older claim and title of the pueblo.

The supreme court of this state has said: "Unless a patent is issued without authority, or is prohibited by statute, or is void upon its face, its opera-

tion against the government, and those claiming by title subsequent, cannot be questioned in any collateral suit." As against a patent, issued under the law of 1851, who are parties claiming by title subsequent?

In *Leese v. Clark*, 18 Cal. 574, the court, by FIELD, C. J., said: "The defendants, taking whatever interest they possess in subordination to the future action of the government * * * in determining the location of the older grant, are in no position to question these proceedings;" that is, proceedings for the location of the older grant. And the same learned judge said: "The term 'third persons' refers, not to all persons other than the United States and the claimants, but to those holding independent titles arising previous to the acquisition of the country." *Leese v. Clark*, 20 Cal. 425.

Teschmacher v. Thompson, 18 Cal. 11, was an action of ejectment, wherein the plaintiff relied on a patent issued upon a confirmed Mexican grant. The premises demanded were, as claimed by the defendant and assumed by the court, below the ordinary high-water mark, covered by the ordinary or neap tides, and the defendant's contention was that they were the property of the state. The court held that the land, at the date of the admission of California as a state, belonged to the state, unless it had been the subject of a previous grant by the Mexican government, which the United States, upon the acquisition of the country, were bound to protect, and which they have since recognized and confirmed. And Chief Justice FIELD, on behalf of the court, said: "Until the acquisition of the country, the land was of course under the jurisdiction, control, and disposition of the former government, and the rights acquired by the limited states were in subordination to the action of that government, so far as such action was entitled to consideration, either from the law of nations or the stipulations of the treaty of cession. In that respect, the land under the tide-waters of the bay, between low and highwater mark, stood in no different position from that of any other land over which the former government possessed the power of disposition." The court, after referring to the obligation imposed upon the government of the United States by the law of nations, and by specific provision of the treaty of Guadalupe Hidalgo, proceeds to say that the power of the government of the United States to protect by appropriate legislation, as by the act of 1851, all titles, legal or equitable, acquired previous to the cession of the territory, cannot be questioned. "The power results from the fact that it is sovereign and supreme as to all matters connected with the treaty, and the enforcement of the obligations incurred thereunder. * * * It must determine for itself what claims to property existed at that date, which it is bound to protect, and consequently the lands to which they apply, and the parties by whom they were then held. In protecting those claims, it must necessarily make them good as against others asserting interests from events subsequently transpiring; otherwise, its powers to carry out the stipulations of the treaty, and the obligations imposed by the law of nations, would be limited and dependent, and not sovereign and supreme. Subsequent claimants must therefore take in strict subordination to its action. * * * Nor can subsequent claimants have any just grounds of complaint; for whatever interest they may possess was acquired with full knowledge of the treaty, and of the obligations and powers of the new government." "By the act of March 3, 1851, the government has established a tribunal for the investigation of the validity of the titles asserted to have existed previous to the cession; required evidence to be presented respecting the same; designated law-officers to appear and litigate the matter on behalf of the United States; authorized appeals, first to the district, and then to the supreme court; and appointed surveyors to survey and measure off the land when once the title has been recognized and confirmed. * * * As the last act in the series of proceedings, a patent is to issue to the claimant." The court then holds that the patent, "as the record of the government of the existence and validity of the grant," establishes the title

of the patentees from the date of the Mexican grant. If the boundaries of a grant had not been definitely fixed by the authorities of Mexico at the date of the cession of the territory within which California is comprised, the duty devolved upon the government of the United States to make the location. This, by reason of the duty to protect the grant. "The duty of the government attaching at the date of the cession, its performance could not be interfered with or defeated by any matters subsequently occurring. The patent, therefore, to the plaintiff * * * is evidence that the grantees possessed at the date of the session a vested interest in the quantity of land mentioned in the grant,—a right to so much land, to be afterwards laid off by official authority; * * * and that the government of the United States, in discharge of its duty, has, through its appropriate departments, made the appropriation, and thereby given precision to the title of the grantees, and attached it to the tract as surveyed. The 'third persons' against whose interest the action of the government and patent are not conclusive—under the fifteenth section of the act of March 3, 1851—are those whose title accrued before the duty of the government, and its rights under the treaty, attached."

In *Ward v. Mulford*, 32 Cal. 365, the plaintiff claimed under a decree confirming a Mexican grant, and a survey made under the act of congress of 1860, approved by a decree of the district court of the United States, which included tide lands. But in the opinion of the court (by Mr. Justice SANDERSON) *Teschemacher v. Thompson* is approved, and it was said that, when the state of California came into the Union with her claim to such lands as she then acquired by virtue of her sovereignty, she acquired such claim in subordination to the prior equities of grantees under the former sovereign, and was bound by such action as the federal government might take in ascertaining and settling such equities. "In this respect no distinction can be made between the lands acquired by federal grants and such as she took by virtue of her sovereignty. In respect to the latter, as well as the former, the United States succeeded to the title, and took it upon precisely the same terms upon which the Mexican government held it at the date of the cession, and so of the state."

Nothing is decided in *More v. Massini*, 37 Cal. 432, which is in conflict with the views above expressed. There, it was held that, by the true construction of the survey set forth in the patent, the sea-shore was the southern boundary of the land granted. The court said. "The survey mentions the sea-shore as the termination of the fourth course, and the twelfth course commences at the sea-shore; but at the intermediate stations no visible object, nor any monument, either natural or artificial, is mentioned. The call for the sea-shore as the southern boundary must be regarded as the more definite and certain, 'and will prevail over a call for a mere station,' and over the courses and distances." In that case the question was whether the demanded premises were within the survey recited in the patent, and the court held they were not. In the case at bar the complaint avers that the lands described therein are within the plat and survey finally approved, and which include the lands patented. Here, the lands in dispute are embraced by the patent, and by the lines of the survey. Therefore, as said in *More v. Massini*, (page 435,) *Teschemacher v. Thompson*, and *Ward v. Mulford*, *supra*, are decisive of this case.

Our conclusions are: (1) The land, the title of the United States wherein is granted by the patent to the city and county of San Francisco, is the land embraced in the approved survey set forth in the patent; (2) the patent is conclusive evidence of the right of defendant to all the lands embraced within the survey, except that it does not affect the interests of the "third persons" mentioned in section 15 of the act of 1851; (3) the plaintiffs are not a "third person" within the meaning of section 15 of the act. Judgment affirmed.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; THORNTON, J.

PATERSON, J. I dissent. Conceding that the state is not a "third person" within the meaning of that phrase as employed in section 15 of the act of 1851, there is but one question left for determination in this case. It is a question simply of construction. It is not a question of collateral attack. The decree and patent must be read together. In fact, we know that it is the practice of the land department to make the decree a part of the patent. The case, in effect, is one simply where the plaintiff claims that the defendant's title depends upon a deed describing the property by natural boundaries, and also by metes and bounds; that the description by metes and bounds includes lands not included within the natural boundaries; that defendant claims an interest in the lands lying between the natural and the artificial lines; that plaintiff is the owner of all of the lands between the two lines, and his title thereto should be quieted, because the natural and permanent boundary lines given in the deed should prevail over the description by metes and bounds. The city could in no way be prejudiced by a determination of this question. No survey would be required to fix new lines. The work that has been done would not be undone. The location of the south line would not be disturbed. To determine the issue here, it would be necessary only to draw upon the earth a line corresponding with the metes and bounds given in the patent; and unless the plaintiff could show that some portion of the land in controversy lies between that line and existing, well-defined natural and permanent boundary lines, indicating the line of high-water mark referred to in the decree, they would, of course, fail to make out their case. It cannot be presumed, in aid of the demurrer, that the shore of the sea which bounds the land in question on three sides has been obliterated. The complaint alleges as a fact which must be taken as true, that the lands in controversy lie below ordinary high-water mark. If a patent should describe a tract of land as bounded on three sides by well-known, natural, and perpendicular walls, like those of Yosemite, or should describe it as lying in a triangle at the junction of navigable streams, like that adjacent to the confluence of the Sacramento and San Joaquin rivers, and should also give a description by metes and bounds, the former, for the purposes at least of stating a cause of action,—a *prima facie* case,—would be preferred to the latter. The lands are described in the decree as being bounded on three sides by the bay of San Francisco and the Pacific ocean. The court cannot say, as a matter of law, that no portion of the land in controversy, although admitted to be below high-water mark, lies in a portion of the peninsula where the ocean or the bay is not a natural, fixed, and certain boundary line, and that therefore the metes and bounds given in the survey are in no way controlled by the natural boundaries. The admission kills the conclusion.

The questions here are not whether the state courts can review the action of the officers of the land department or whether the land department of the United States could divest the state of her title to the land in controversy, or whether the patent protects the grant of the confirmee from collateral attack. The questions are: What is the effect of the action of the land department? Has the state been divested of her title through this patent, in view of its descriptions and recitals? Which description shall prevail,—that by metes and bounds, or that by natural monuments? In determining these questions, there is no violation of the principles which forbid a collateral attack upon such instruments. There is no such attack. Surely, if the surveyor had run his lines through the bay of San Francisco and included lands of the state in the county of Alameda, which she became owner of by virtue of her relations to the paramount source of title, the state, as such owner of land across the bay, would not be bound by the survey so long as that natural monument and limit of boundary, the bay of San Francisco, remained where it is, a notice

to all the world; and the decree of confirmation, which is a link in the chain of title, remained as a public muniment of title.

No case has been cited inconsistent with the rule that in cases of this kind the natural and permanent boundaries will prevail. In many of the cases cited there was no variance between the decree of confirmation and the patent. In *Teschmacher v. Thompson* the grant was assumed to be one of quantity only. The grant was confirmed by the court, and its boundaries as defined in the decree were followed in the patent which was issued in November, 1857; at which time the federal courts controlled the surveys, and were empowered and expected to make them conform to the decree. In none of the cases cited is the question of the power of the officer to issue a patent for land not embraced in the decree considered. *More v. Massini*, 37 Cal. 432, is directly in point. In that case the patent did not show upon its face that any land below high-water mark was included in the tract granted, but the fact was shown at the trial by witnesses,—surveyors; and it was there held that the clause of the decree of confirmation which confirmed the tract bounded by the sea-shore, should prevail over a description by metes and bounds. In the case of *Chipley v. Farris*, 45 Cal. 528, upon which respondents place their chief reliance, there were two inconsistent descriptions, but both were descriptions given by a surveyor, and it is expressly admitted by respondent in that case in his written points that if the side line of the tract in controversy were the sea-shore, a different rule would apply and that *More v. Massini* would be in point; the line of high-water mark in such cases being considered by the government the more certain boundary line. Of course, where both descriptions are lines established by surveyors for the decree and for the patent, the last—that one contained in the survey, and incorporated into the patent—will control. Where water-courses, mountains, or other natural objects are called for in patents, it has been said that distances must be lengthened or shortened, and courses varied, so as to conform to these objects, because mistakes in distances and courses are more probable and more frequent than mistakes as to trees, rivers, mountains, and other objects capable of being clearly and accurately fixed. *McIver v. Walker*, 9 Cranch, 177. In the case at bar three sides of the triangular tract described are bounded by the shores of the ocean and bay. Unless we must shut our eyes to what every resident of the peninsula can see, we know judicially that a great portion of those lines have remained for ages as they now appear; but if they have changed it is a matter of defense which should be alleged, and which may be easily proved.

HASTINGS v. YOUNG. (No. 11,613.)

(*Supreme Court of California*. March 29, 1888.)

In bank. Appeal from superior court, Lake county; RODNEY J. HUDSON, Judge.

Action by C. S. Hastings against L. A. Young, a member of the board of supervisors of Lake county, to cause defendant's removal from office for violation of official duty, and to secure for complainant the penalty of \$100, pursuant to act of March 30, 1874, (St. 1873-74, p. 911.) Complainant obtained judgment, and defendant appeals.

R. W. Crump and J. J. Bruton, for appellant. Crawford & Tabor, for respondent.

PER CURIAM. On the authority of *Fraser v. Alexander*, (No. 11,564,) 16 Pac. Rep. 757, (decided February 20, 1888,) the judgment and order appealed from are reversed, and the court below directed to dismiss the action.

RIGGS v. POSTON. (No. 11,603.)

(*Supreme Court of California*. March 29, 1888.)

In bank. Appeal from superior court, Lake county; RODNEY J. HUDSON, Judge.

Action by E. C. Riggs against Dallas Poston, a member of the board of supervisors of Lake county, to cause defendant's removal from office for violation of official duty,

and to secure for complainant the penalty of \$100, pursuant to act of March 30, 1874, (St. 1873-74, p. 911.) Complainant obtained judgment, and defendant appeals.

E. W. Britt and *S. K. Welch*, for appellant. *Oliver P. Evans* and *Ben P. Tabor*, for respondent.

PER CURIAM. On the authority of *Fraser v. Alexander*, (No. 11,564,) 16 Pac. Rep. 757, (decided February 20, 1888,) the judgment and order appealed from are reversed, and the court below directed to dismiss the action.

75 Cal. 459

ANDRADE v. SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO. (No. 12,427.)

(*Supreme Court of California.* March 30, 1888.)

PARTNERSHIP—SURVIVING PARTNER—JURISDICTION OF PROBATE COURT.

In California the probate court has jurisdiction to require a surviving partner, who does not deny that a partnership between himself and the decedent formerly existed, to file an account of the partnership affairs, and, as an incident thereto, to examine such survivor as to the sufficiency of the account filed.

In bank. Appeal from superior court, city and county of San Francisco; *J. V. Coffey*, Judge.

Ryland B. Wallace, for petitioner. *John A. Wright*, for administrator. *E. R. Taylor*, for absent heirs.

SEARLS, C. J. This is a proceeding to review the action of the superior court of the city and county of San Francisco (department 9, in probate) in requiring the petitioner to testify touching certain lands and property. It appears, from the petition, that Philip A. Roach is the duly-qualified and acting administrator of the estate of Thomas H. Blythe, deceased, which estate was and is being administered in said court, and under the jurisdiction thereof. That on, to-wit, July 25, 1887, said Roach, as administrator, represented to the court in probate that the petitioner was the surviving partner of the said Thomas H. Blythe, deceased, in certain lands and enterprises in the republic of Mexico; that thereafter the court made an order requiring petitioner to render an account as to said matters, as such surviving partner; that in obedience to said order petitioner rendered an account as required by said order; that thereafter, and on the 18th day of November, 1887, the said court ordered this petitioner to be sworn, at the instance of the administrator, and to answer questions concerning said account, and concerning said lands and enterprises. Counsel for petitioner objected to the examination upon the ground that the court had no jurisdiction to so order, or to examine the petitioner as to the matters aforesaid; and the objection being overruled, and the court having proceeded to such examination, and continuing the same, petitioner sues out a writ of review. An examination of the record shows that the court proceeded upon the theory that Andrade was a surviving partner of Blythe. The petition of the administrator upon which the order for an accounting was made avers such to be the fact; the order of the court requiring him to account describes him as such; and, while his account is preceded and followed by a protest against being required to render such account, he nowhere, so far as we can see, expressly denies his *status* as such surviving partner. The report as rendered the court by petitioner was objected to by the administrator as affording no adequate information in respect to the matters of and concerning which petitioner was required to account; and on the 11th day of November, 1887, the matter coming on regularly for hearing, upon the objections of the administrator to the sufficiency of the account, counsel for the administrator called Andrade as a witness, claiming the right to examine him, under oath, touching the matters involved in said account. Counsel for Andrade objected to his being sworn, or compelled to testify, upon the ground that the court, while exercising probate jurisdiction thereof, had no jurisdiction to

compel such oath, or the giving of such testimony. The court overruled the objection, to which ruling an exception was noted. Counsel for petitioner put certain questions to him with a view to showing, as he claimed that there had been since the death of Blythe, certain breaches of a contract or contracts by the estate, existing between Blythe and the petitioner, whereby the partnership, or trust relation, between petitioner and the estate of Blythe had ceased, and, therefore, that the estate had no further interest in the property. Objection was made to this testimony upon the ground, as nearly as we can see from the record, that, if there was a partnership at the date of Blythe's death, the right to an accounting existed, etc. Objection sustained. But little progress was made when a continuance of the examination was had, and, pending such continuance, the application was made to this court for a writ of review as in the petition stated.

"When a partnership exists between the decedent, at the time of his death, and any other person, the surviving partner has the right to continue in possession of the partnership, and to settle its business; but the interest of the decedent in the partnership must be included in the inventory, and appraised as other property. The surviving partner must settle the affairs of the partnership without delay, and account with the executor or administrator. * * * Upon the application of the executor or administrator, the court, or a judge thereof, may, whenever it appears necessary, order the surviving partner to render an account, and, in case of neglect or refusal, may, after notice, compel it by attachment, and the executor or administrator may maintain against him any action which the decedent could have maintained." Code Civil Proc. § 1585. The probate court has no authority to settle and adjust accounts between a surviving partner and the representative of a deceased one. Its power is limited to requiring the survivor to account. The right to demand and have an account includes the right to have all that the term imports, viz.: such a detailed statement of the partnership affairs as will afford information of the condition of the business,—the assets, the credits, and indebtedness of the firm as such, and the condition of the accounts as between the partners themselves. Under the authority conferred by section 1585, *supra*, we have no doubt but that, upon the coming in of an account by a surviving partner which is lacking in the essentials imported by the term, the court may require and enforce such other and further account as may be in the power of the survivor to furnish, and necessary to a correct understanding of the affairs of the partnership. This duty performed, and the limit of power is reached. The court cannot settle and adjust the account. If unsatisfactory, this can only be done by a court of equity. In *Theller v. Such*, 57 Cal. 447, it was said: "The probate court has no more jurisdiction to provide for a partnership account, and decree a balance, where the partnership has been dissolved by the death of a partner, than where it has been dissolved by any other cause." The assets which pass to the executor or administrator consist of the individual estate of the decedent. Partnership assets, as such, form no part of such individual estate; the residuum only, after satisfying liabilities and advances, if any, made by the survivor, becomes the property of the estate. If questions arise, in the course of settlement of partnership affairs, which cannot be adjusted without recourse to the courts, the probate court is not the forum in which such questions can be solved, but, like other questions cognizable in courts of equity, they must be determined in the last-named courts. If the existence of a partnership between a decedent and survivor is denied by the latter, the probate court cannot adjudicate the question, and decree the existence or non-existence of the relation. The *status* being admitted, the court may be called upon to render an account. As ancillary to the right of the court to enforce an accounting by the surviving partner, and to enable it to determine whether what purports to be an account is such in reality, or whether another and further account is requisite, the right to examine the

surviving partner under oath, or any other witness or witnesses, who may possess information germane to the question, would seem proper. The court cannot be supposed to know intuitively, when such an account is presented, whether or not it is, in substance and detail, such as should be furnished under the statute. The needed information can only be acquired through the medium of testimony. Petitioner was a competent witness by whom to establish facts which the court had a right to possess before approving the account rendered. Assuming then, as we do, that the record shows the existence of a partnership between Blythe and petitioner at the time of the death of the former, we hold that the court had authority to require the latter to file his account of the partnership affairs; and, as an incident thereto, to examine witnesses, the petitioner included, for the purpose of determining the sufficiency of the account as filed.

The judgment of this court is that the proceedings of the court below be, and they are hereby, affirmed.

We concur: MCFARLAND, J.; THORNTON, J.; PATERSON, J.; TEMPLE, J.; SHARPSTEIN, J.

75 Cal. 452

DAVIS v. COUNTY OF YUBA. (No. 11,880.)

(*Supreme Court of California.* March 30, 1888.)

MUNICIPAL CORPORATIONS—BONDS—PAYMENT—INTEREST ON COUPONS.

Bonds issued in pursuance of the California act of 1872, (St. 1871-72, p. 662,) authorizing "the county of Yuba to issue bonds for the purpose of constructing and repairing wagon roads and bridges in said county," are not authorized to be paid prior to the expiration of 20 years from their issue, except out of a surplus remaining after payment of interest due, in the "wagon road and bridge interest and sinking fund" provided for in the act; and an attempt by the county to pay such bonds before maturity in any other manner than out of such surplus is void as against a non-assenting holder, and such holder, having presented his coupons to the county treasurer for payment, is entitled to interest thereon from that time.

In bank. Appeal from superior court, Yuba county; PHIL W. KEYSER, Judge.

For statement of facts, see former opinion in same case, 13 Pac. Rep. 874. *W. C. Belcher*, for appellant. *E. A. Forbes* and *A. L. Hart*, for respondent.

PER CURIAM. A rehearing was granted and the case resubmitted. After carefully considering the matter, we still adhere to our former opinion, except that we think the plaintiff should recover interest on his coupons from the time he presented them to the county treasurer for payment. Judgment and order reversed, and a new trial ordered.

2 Cal. Unrep. 854

HUGGINS *et al.* v. HANDY *et al.* (No. 11,347.)

(*Supreme Court of California.* March 29, 1888.)

APPEAL—PRACTICE—FAILURE TO APPEAR—REHEARING.

That a case was set for the last day of the session of the supreme court, and the court for years past had never been able to finish the calendar, and that defendants' attorney did not expect the case to be reached, is not sufficient to justify setting aside a judgment of affirmance, made because there was no appearance, or points or authorities on file, for defendant.

Department 2. Appeal from superior court, Santa Clara county; D. BELDEN, Judge.

This case was set for hearing at the January term, and, on being reached on the calendar, there was no appearance, and no points or authorities on file, for appellant. The judgment of the lower court was affirmed. Subsequently, on motion, an order was made to show cause why the order of affirmance

should not be set aside, and the accompanying affidavit was filed on the hearing of the order to show cause:

"I, W. S. Goodfellow, being duly sworn, depose and say as follows: I am the attorney for the appellants in this cause. On Thursday last the judgment and order appealed from were affirmed by this court, for the reason that there was no appearance by counsel for appellants, and no points and authorities on file. My failure to appear personally, or to file points and authorities, was due to the following causes: On the day on which this cause was reached on the calendar of this court I was engaged in the actual trial of a case in the superior court of Tulare county at Visalia, and had been so engaged all of that week. Moreover, I did not expect this cause to be reached on the calendar. When the calendar of this court in bank and in departments was published last January, I noticed that there were only three causes to which I would be required to give my personal attention,—one in bank, one in department 1 early in February, and this cause, which I found to be set for the last day of the session. The other cases I knew would be heard, and I made preparation, and argued them in due course. I felt almost certain that this cause would not be reached this session. Since 1880 this court has been so much overburdened with work, and with the hearing of cases of public importance, and the returning of prerogative writs, which are specially set and do not appear on the regular calendar, that, as I believe, neither department has hitherto been able to finish its regular calendar at the San Francisco session. I am told by a deputy in the clerk's office that this is the first occasion in his experience in which the court has been able to dispose of all the cases on the San Francisco calendar. As I have said, therefore, on reading the calendar in January I concluded that this case would not be reached, and I was afterwards confirmed in that opinion when the order was made postponing all cases on the calendar two weeks. I would perhaps have noticed the progress the court was making had I not been absent in the country a considerable portion of the time. During the past five weeks I have been absent attending to cases in four different counties outside of San Francisco, namely, in Contra Costa, Tuolumne, Santa Clara, and Tulare. I was absent from San Francisco—on the trial of the case at Visalia, and afterwards for one day attending to a case in Fresno,—from Saturday, the 3d day of March, until the afternoon of Saturday last, the 10th day of March; and on my return on the last-named day I discovered for the first time from the Law Journal that this case had been reached, and disposed of in my absence. The same afternoon I tried without success to find the presiding justice of this department, intending to make application for an order to show cause why the judgment should not be set aside. If I had not been absent in Tulare county, as above stated, I certainly would have been in attendance in the supreme court on the day this cause was reached. There is now, and for more than thirteen years there has been, published in this city a daily Law Journal in which appears the calendar of the day of every court of record holding court in this city and county. I have always been accustomed to rely upon the Law Journal for information as to what cases will be called for trial each day. I keep a diary of prospective events, but its chief purpose is to note the expiration of time to plead, etc. I sometimes, though not always, note upon that diary the dates of causes set for trial. [This cause was not noted on the diary.] I depend and have always depended upon the Law Journal to ascertain what causes are set for trial each day, and to protect me from allowing them to go by default. When cases are specially set, that fact also appears in the Law Journal. The calendar of this court, as a whole, was not published, as I believe, after January 23d, but there was published each day the list of cases to be heard on that day. My invariable practice is and has been to consult the Law Journal on my first arriving at the office in the morning. As an evidence that this system is sufficiently safe I may say, as the fact is, that in my experience of nearly thirteen years I have never omit-

ted to be present in the supreme court when any case in which I was interested was called for hearing; nor, as far as I can remember, have I ever failed to be present on the trial of any cause in any of the other courts of record in this city and county. If I had not been absent in Visalia I would have seen the calendar of this department for March 8th, which was duly published on that day, and I would, of course, have been in attendance. When I am absent I have some one to attend to my cases, of course, but for the reasons above stated I gave no directions as to this particular case. The clerk who was with me when the case was tried in the superior court, and who attended to preparing the appeal, left me nearly three years ago, and nothing has been done in connection with the case since. Although, therefore, the case appeared in the Law Journal of Thursday last, in my absence it was not recognized by any one as a case in which the office was interested.

"I further depose and say that this appeal was taken and has been prosecuted in perfect good faith in the belief that the judgment of the court below is erroneous, and not in any degree for the purposes of delay, or from other unworthy motives. The amount involved is \$2,000, with several years' interest. The action is upon a written contract for the payment of money upon certain contingencies, and the only question is whether upon facts almost undisputed the contingencies have happened or not. The judgment below was in favor of the plaintiffs. The defendants are fully solvent, and have, besides, given an adequate bond conditioned to stay execution. The defendants, as I believe, fully and fairly stated to me as their counsel the facts of the case. I also heard all the evidence given in open court. After such statement, and also after such hearing, I believe, and so advised them, and, so far as I can know, they each believe, that they had a good and sufficient defense to the action and grounds of appeal on the merits. I reside in the county of Alameda, and, so far as this is an affidavit of merits, or such affidavit as required, I make it on behalf of the defendants, for the reason that I do not know where at present they can be found. The transcript in this cause is not long, nor are the questions involved specially intricate. If the judgment herein be vacated I will be prepared to argue the cause orally at a moment's notice, or I can file a brief in five days' time, or even less, if time be material. I know no reason why the judgment entered on Thursday last cannot be vacated without prejudice or injury to the rights of the respondents or either of them.

"Subscribed and sworn to before me this 12th day of March, 1888."

The following order was then entered by the court: "Upon reading and filing the affidavit of W. S. Goodfellow in the above-entitled cause, it is ordered that the respondent show cause before this court, department No. 2, on the 22d day of March, 1888, at 10 o'clock in the forenoon of that day, why the order heretofore made affirming the judgment and order of the court below should not be vacated and set aside, and it is further ordered that a copy of said affidavit, and of this order, be served upon the attorney for the respondents five days before the said 22d day of March, 1888."

W. S. Goodfellow, for appellants. *S. F. Leib*, for respondents.

PER CURIAM. The showing made is not sufficient to justify the setting aside of the judgment of affirmance herein, and the motion is denied. So ordered.

HEILBRON *et al.* v. FOWLER SWITCH CANAL CO. (No. 11,800.)

Supreme Court of California. March 29, 1888.)

1. INJUNCTION—TO RESTRAIN DIVERSION OF WATER.

Plaintiffs owned a ranch bounded for 30 miles by a river, a branch of which flows through the land, and used the water for irrigation and to supply about 10,000 cattle. The river at its lowest stages carried about 1,000 cubic feet per second, all of

which flowed through the branch, and during the time of melting snows a much larger volume, sometimes as much as 15,000 feet. *Held*, that to divert from 300 to 1,500 cubic feet per second would produce a material injury, to prevent which an injunction will be granted.

2. SAME.

In a suit against a corporation to enjoin it from diverting water from a river by means of a canal, the fact that it had instructed its head-gate keeper that, whenever the water was low in the river, and there could be cause of complaint by any one, to shut down the gate at the head of the canal, and only take water when it would make no appreciable difference in the quantity, is no defense.

3. SAME—INTEREST TO MAINTAIN PERPETUAL INJUNCTION—LEASEHOLD.

Possession of land under a lease for years is sufficient to enable the tenants to sustain a suit for perpetual injunction to restrain the diverting of water necessary to the enjoyment of the land, the injunction necessarily ending with the estate.

4. PLEADING—AMENDMENT—PLEA IN ABATEMENT.

Originally the parties to two suits for injunction pending at the same time were precisely the same, and the latter suit differed from the former in that no judgment for damages was asked. After a plea in abatement was filed, plaintiffs, by leave of the court, amended by making new parties coplaintiffs. *Held* that, the parties not being the same, the plea in abatement could not be sustained.

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Suit for an injunction by August Heilbron, Adolph Heilbron, and others, against the Fowler Switch Canal Company. Judgment for plaintiffs, and defendant appeals.

Edward J. Pringle and *E. C. Winchell*, for appellant. *Brown & Daggett* and *Terry & Terry*, for respondents.

TEMPLE, J. The facts constituting the plaintiffs' case in this action are pretty much the same as in the case of *Heilbron v. Ditch Co.*, 17 Pac. Rep. 65, recently decided by us. Plaintiffs are in possession of the Rancho Laguna de Tache, containing about 50,000 acres of land, under a lease for 10 years, with the privilege of purchasing during their term. Kings river forms a boundary of this farm for 30 miles, and, dividing at a point within this distance, one channel of the river, called "Cole Slough," flows through the rancho for a distance of 10 miles. Plaintiffs claim under a Mexican grant made January 10, 1846. The claimant filed his petition for the confirmation of his title with the land commissioners to ascertain and settle private land claims in California, February 15, 1853; and, the title being confirmed, a patent was issued for the same March 6, 1866. Kings river rises in the Sierra Nevada mountains, and carries at its lowest stages only about 1,000 cubic feet of water per second, and at the highest stages, during the time of melting snows in the spring and summer, a much larger volume, sometimes as much as 15,000 cubic feet per second. During ordinary stages of water Cole slough carries the larger portion of the waters of Kings river, and during the period of low water all that reaches the point of divergence. For more than two years before the bringing of this action, the plaintiffs had maintained and cultivated about 3,000 acres of alfalfa upon the land; and to irrigate the alfalfa, water their stock, and increase the productiveness of their land, they had built a dam in Cole slough, and constructed canals and ditches leading out of Cole slough, conducting the water over their land, increasing its productiveness, and furnishing water for their cattle, amounting to 10,000 head, which were entirely dependent upon the river for water to drink. The defendant is a corporation, organized to appropriate and divert the water of Kings river, and avers in its answer that it has taken all the steps required under the Civil Code to authorize it to appropriate 1,500 cubic feet per second, flowing continuously, and at great expense has constructed a canal with a capacity of from 1,000 to 1,500 cubic feet per second, sufficient for irrigating 240,000 acres of land; that the stockholders own about 60,000 acres of land along the canal and its branches. The land owned by the stockholders is a long distance from the river, none of them being riparian owners, and no portion of the water

would ever find its way again into the river. It was found as a fact that the defendant threatens, and unless enjoined will, divert 300 cubic feet of water per second, and as much as 1,500 cubic feet of water per second when there is the last-named quantity flowing in the river at the head of defendant's canal, and the Rancho Laguna de Tache will be deprived of a material and substantial quantity of water; that plaintiffs will be deprived of the use of water with which to irrigate said land, their cattle of sufficient quantity to drink, and that great damage and injury will occur annually, and of such extent that the same cannot be justly computed or estimated, and an action for damages would not afford an adequate remedy. The defendant does not deny that it threatens to divert from the stream 1,000 cubic feet of water per second, but denies that it proposes to take all the water of Kings river, or a sufficient quantity to injure the lands of plaintiffs, and alleges that defendant claims the right of withdrawal of water only in proportion to the supply which may be flowing in the river, and does not intend to divert the whole amount provided in its articles of incorporation, nor 300 cubic feet as alleged in the complaint. The answer also avers that defendant was incorporated for the purpose of acquiring the title to 1,000 cubic feet of water per second, which amount they purchased from one Dusy; and that since they have taken under the Code 500 additional cubic feet per second; and that it has commenced the construction of a suitable dam and head-gate sufficient to divert the amount of water, the canal being 80 feet wide and 5 feet deep, and had so far completed the work as to be able to divert 1,500 cubic feet of water per second, "so appropriated and owned by defendant, into its canal, and to conduct the same along and through its said canal a distance of 21 miles;" and that they have expended in its construction \$110,000. Plaintiff recovered judgment, and the defendant appeals from the judgment, and from an order denying its motion for a new trial. The appeal from the judgment, not having been taken within one year, must be dismissed. On the trial the defendant attempted to prove its right as an appropriator by showing its compliance with the provisions of the Code. This evidence was excluded, on the objection of plaintiffs, and defendant excepted. The court also excluded, against the exception of the defendant, evidence tending to show that there was no appreciable difference in the quantity of water in Kings river at a time when defendant was taking water, and at a time when it was not taking water, from the river. In like manner the court refused to permit the defendant to show that its officers had instructed its head-gate keeper that, whenever the water was low in the river, and there could be any cause of complaint by any one, or it would make an appreciable difference in the quantity of water in the river, he was not to take water, but to shut down his gate, and only take water when it would make no appreciable difference in the quantity flowing in the river.

The first point made by appellant is that where a party suffers no appreciable injury, and is threatened with none, he cannot invoke the aid of a court of equity to restrain a trespass, but will be left to his remedy at law. Perhaps this proposition might be admitted without affecting the merits of this appeal. It does not follow because the injury is incapable of ascertainment, or of being computed in damages, and therefore only nominal damages can be recovered, that it is trifling or inconsiderable. It is doubtful if it can properly be said that there is any evidence in the case which tends to show, or if that which was offered would have tended to show, that the injury to plaintiffs was inconsiderable. That it was unascertainable, and in that sense inappreciable, may be a good reason why an injunction should issue. This question is, however, not an open one in this state, but has been repeatedly passed on and settled in unmistakable terms. *Lux v. Haggin*, 69 Cal. 258, 10 Pac. Rep. 674; *Moore v. Water-Works Co.*, 68 Cal. 150, 8 Pac. Rep. 816; *Stanford v. Felt*, 71 Cal. 249, 16 Pac. Rep. 900; *Parke v. Kilham*, 8 Cal. 77; *Ferreira v. Knipe*, 28 Cal. 341. No doubt there are cases in which a court will refuse to

interfere by injunction to prevent a trespass, where it can see that the injury will be slight, and the injunction may work great injury. Here the defendant professes to take from plaintiffs their property, really, upon the plea that it is worth but little to the plaintiffs, and much to the defendant. It is not an ordinary trespass. It is a perpetual taking of the property of the plaintiffs,—a continuous nuisance, which, may ripen into a right unless prevented. The injury is one, also, which, in its nature, cannot be estimated. In the recent case of *Heilbron v. Ditch Co.* it was said: "The flow of the water of a stream, whether it overflow the banks or not, naturally irrigates and moistens the ground to a great and unknown extent, and thus stimulates vegetation, and the growth and decay of vegetation add not only to the fertility, but to the substance and quantity, of the soil." If this be so,—and it cannot be doubted,—it is obvious that in a climate like that where this land is situated, the benefit derived from a flow of water for 30 miles along its boundary, and 10 miles through it, cannot be inconsiderable; but yet the extent of benefit must ever be an unknown quantity. The defendant here states that the channel of the river above and along this land is deep, and, therefore, at times of ordinary flow, the seepage cannot be great. If so, it must be important to plaintiffs that the channel should carry a full stream, and evidently at such times the percolation would be increased.

The right claimed by the defendant is not to appropriate the surplus waters of extraordinary floods, when the flow is more destructive than useful. It claims as an appropriator a certain quantity of water, adversely to the riparian proprietor; and, if the claim be valid, it may be asserted at any stage of the water. But the rights of the riparian proprietor do not depend upon the quantity of water flowing in the stream. Nor can that flow be said to be an extraordinary flood which can be counted upon as certain to occur annually, and to continue for months. The defendant has no reservoir to retain the surplus waters of casual and unusual freshets, and its works would be of little value if its dependence were only upon such waters. And certainly it would be a poor protection to the plaintiffs to have to depend upon the keeper of the head-gate of defendant to take only a proportionate amount of water, or to take water only when it could be done without injury to plaintiffs. There was no error in excluding the offered testimony.

We see nothing in the suggestion that defendant is presumably the licensee of the United States, and that the United States, being an upper riparian proprietor, could take a reasonable quantity of water as against the lower riparian owner. A riparian owner may not authorize, as against a lower proprietor, a company to take water from the stream, to be conducted at a distance, and sold. We see no occasion to discuss the question as to whether the river is navigable or not. In either event the result would be the same. The riparian owner on a non-tidal navigable stream has all the rights of a riparian owner not inconsistent with the public easement. *Brown v. Chadbourne*, 31 Me. 9; *Moore v. Sanborne*, 2 Mich. 519; *Wood, Nuis.* § 485; *Smith v. City of Rochester*, 92 N. Y. 463; *Woodruff v. Mining Co.*, 18 Fed. Rep. 753. Besides, Cole slough is not claimed to be a navigable stream. The right of the state to interfere with the flow there would certainly be limited to the interest of navigation.

The estate of the plaintiffs is sufficient to enable them to maintain this action. They were lessees for a term of 10 years, with the privilege of purchasing during that time. If they fail to perfect the purchase, the fact that the injunction is in form perpetual cannot injure the defendant. If the estate which the injunction was designed to protect cease to exist, there would be no one to enforce the judgment, for there would be no one in privity with the plaintiffs. Practically it would cease to exist.

The plea in abatement cannot be sustained. The same plaintiffs, excepting only the representatives of the estate of Poly, commenced a suit for a

similar purpose against this defendant, but in that suit claimed damages. That suit is still pending, and in it defendant has appeared and answered. Originally the parties to the two suits were precisely the same, but, after the plea in abatement was filed, the plaintiff, by leave of the court, amended, making the representatives of Poly co-plaintiffs. Now the action differs from the former one in that the plaintiffs are not entirely the same, and no judgment for damages is asked, and the last complaint charges the actual diversion, and the threats to continue, at a date subsequent to the bringing of the first action. Considered merely as a matter of amendment, the court properly allowed it. The plea in abatement is not favored, and the fact that the parties are not the same justifies the ruling of the court below.

The appeal from the judgment is dismissed, and the order denying the motion for a new trial is affirmed.

We concur: MCKINSTRY, J.; MCFARLAND, J.; THORNTON, J.; SHARPSTEIN, J.

75 Cal. 422

MALONEY *et ux.* v. HEFER. (No. 9,866.)

(*Supreme Court of California.* March 29, 1888.)

HOMESTEAD—REQUISITES—RESIDENCE.

A person who owns a lot having upon it a front and rear house separated by a fence cannot claim a homestead in the whole lot when she resides in one of the houses only, and has rented out the other for years.

In bank. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

E. J. & J. H. Moore, (*Nathaniel Bennett* and *Edward J. Pringle*, of counsel,) for appellants. *N. B. Mulville*, for respondent.

SEARLS, C. J. This cause was heard and decided by department 1, in an opinion filed November 30, 1887. 15 Pac. Rep. 763. A rehearing was subsequently granted, and the cause has been reargued before the court in bank. Counsel for appellants urge that the effect of the former judgment was to reverse a finding of the court below which was not attacked. We draw no such inference from the decision. Plaintiffs and appellants sought by their action to quiet title to a lot of land claimed as their homestead, having upon it a front and rear house, the former of which was rented to tenants, and the latter occupied by them as a family residence. The wife made a declaration of homestead upon the whole property while so occupying the rear building, and had then rented such rear building, except one room therein, reserved for storing the family furniture, and had removed temporarily from the premises and remained absent therefrom for three or four months, during which time the declaration of homestead was filed and recorded. Defendant had caused that portion of the lot covered by the front house to be sold upon an execution issued on a judgment in his favor, and held a sheriff's deed therefor. Defendant claimed title to the front portion of the lot under this sheriff's deed, but did not make any claim to the rear house and premises. The court found that the front house and premises were not the homestead of plaintiffs, and that defendant had title thereto; that the rear house and premises were the homestead of plaintiffs, etc., and quieted their title thereto. Plaintiffs appealed from so much of the judgment as decreed defendant to be the owner of and quieted his title to, the front house and premises.

As to that portion of the decree which awarded the rear house and premises to plaintiffs as their homestead, and quieted their title thereto, there was no appeal. It follows: (1) That what was said in the former opinion did not have, and could not have, any reference to the rear house and premises; and (2) that, as plaintiffs claimed the front house and premises as a homestead,

all questions touching the validity of such claim were pertinent to the inquiry on this appeal. The fact that the same declaration of homestead covered the entire property, a portion of which is not in dispute, cannot preclude an inquiry into the sufficiency of that declaration, or the existence of the facts necessary to uphold it, so far as applicable to the subject of this controversy. "The homestead consists of the dwelling-house in which the claimant resides, and the land on which the same is situated." Civil Code, § 1237. It is the principal use to which property is put, and not quantity, which furnishes the test in determining the question whether or not property is subject to dedication as a homestead. *Ackley v. Chamberlain*, 16 Cal. 182; *Gregg v. Bostwick*, 33 Cal. 220. And, if only a part of the land described in the homestead declaration be actually used and appropriated as the home of the family, the remainder not so used and appropriated forms no part of the homestead claim, in the sense of the statute. *Mann v. Rogers*, 35 Cal. 319. In *Tiernan v. His Creditors*, 62 Cal. 286, it was held that, in case of the ownership of a double house, one side of which was occupied by the insolvent as a family residence, and the other side rented to tenants, the part so rented could not be set off as a homestead to the insolvent. In *Laughlin v. Wright*, 63 Cal. 113, it was said: "But the mere filing of a declaration of homestead does not of itself constitute the premises embraced within it the homestead of the declarant. The use of the property is an important element to be considered. From the record in this case it appears that the premises in question were used by the Wrights primarily and principally as a hotel for the accommodation of the public. * * * But their residence there was but incidental to the business of running the hotel. * * * It would be doing violence to the statute to regard property so used as a homestead which is, and was intended to be, the place where the home is." The benign object of the statute was to protect the home of the owner from forced sale, and not to withdraw from the reach of creditors property of the debtor as a source of revenue for the support of himself or family. In view of this paramount object the justice of the distinction made, and the limitation placed upon the right of the homestead claimant, is manifest.

As to the premises in dispute, the finding of the court, which is amply supported by the evidence, is against the appellants. It is as follows: "The plaintiffs have not lived in or occupied said front house or premises for over ten years last past, but have been renting the same to tenants during that time." The findings then proceed to show that the premises in question are separated from the residence in the rear by a tight board fence, and are separate and independent from each other, etc. Premises thus separated and thus used were not subject to dedication as a homestead by the mere filing of a declaration, as provided by the statute; and, waiving all question as to a homestead right initiated by a declaration made when the parties lived upon the rear premises, but filed and recorded after they had left and temporarily rented such premises, and the conclusion is still inevitable that, as to the front lot, it did not and could not become a homestead, because not used as a home at the time of, or for many years prior to, the declaration by which it was sought to impress it with that character.

The judgment and order appealed from are affirmed.

We concur: MCKINSTRY, J.; TEMPLE, J.; MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.

75 Cal. 419

In re BULLOCK'S ESTATE. (No. 12,204.)

(*Supreme Court of California.* March 29, 1888.)

EXECUTORS AND ADMINISTRATORS—ACCOUNTING—ORDER OF COURT.

An order directing an administrator to dismiss a suit brought by him on a claim alleged to be due the estate, and finding that thereupon there is no property in the

hands of the administrator, and directing that he forthwith file his final account, is an attempt on the part of the court making it to state and settle the account of the administrator, and is erroneous.

In bank. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

Henry Thompson, for appellant. *David McClure*, for respondent.

MCKINSTRY, J. By the last will and testament of deceased, his mother, Almira W. Wheeler, was made sole legatee and devisee of his estate. She was also his only heir at law. Washington Ayer, as assignee of Almira W. Wheeler moved the superior court, wherein the administration was pending, that citation issue to George A. Worn, administrator with the will annexed of the estate of deceased, commanding him to appear and show cause why an order should not be entered directing him to dismiss a certain action theretofore brought by said Worn, as administrator, etc., against the executors of E. M. Fry, deceased, and Charles S. Neal, and then pending in the superior court of San Francisco; and further requiring the said Worn, as administrator, etc., to file his final account as such. On the return-day of the citation, Worn, as administrator, showed, or attempted to show, cause. The court below made and entered an order entitled in the transcript "Order directing administrator to file account," etc., wherein the court directed that the said administrator with the will annexed, "on the coming to him of a certified copy of this order, do forthwith file in this court an account of the receipts and disbursements made by him as administrator with the will annexed of said estate since his qualification as such, and of his actions and proceedings as such administrator since said date." The order then proceeds—and it is from that portion of the order which follows that this appeal is taken: "Which said account shall stand and serve as the final account as to such administrator. And it is further ordered, adjudged, and decreed that said George A. Worn, as administrator with the will annexed of the estate of Frank Dyer Bullock, deceased, do forthwith dismiss, abate, and discontinue, and that he do order and require to be dismissed, abated, and discontinued, that certain action hereinabove mentioned as pending in the superior court of the city and county of San Francisco, state of California, numbered 16,665, and entitled, *George A. Worn, as Administrator with the Will Annexed of the Estate of F. D. Bullock, Deceased, Plaintiff vs. J. D. Fry, Executor of the Last Will and Testament of E. M. Fry, Deceased, and Charles S. Neal, Defendants*, and that no further proceeding be had or taken therein by said George A. Worn, except as may be necessary to procure the dismissal, abatement, and discontinuance of said action. And it having appeared to the court that no property of any nature, kind, or description belonging to said estate has ever come to the hands of said George A. Worn, as such administrator or otherwise, and that there are not any claims in favor of said estate except the claim which is the subject and basis of the above-mentioned action, it is therefore ordered by the court that upon the settlement of the said account (for the filing of which order and direction has been hereinbefore made) the said George A. Worn shall be relieved and discharged from the duties of his trust as the administrator with the will annexed of the estate of said Frank D. Bullock, deceased, and that estate of Frank D. Bullock, deceased, be thereupon and immediately thereafter terminated, settled, ended and closed."

We express no opinion as to the validity of the orders contained in the portion of the decree appealed from. Void orders may be appealable. If the orders appealed from can be treated simply as orders commanding the dismissal of the action against the executor of the estate of Fry, deceased, and another, and directing the discharge of Worn, administrator, upon and after the settlement of an account not yet filed, they were premature, but not appealable. Code Civil Proc. § 963. But they were neither mere recitals nor orders inde-

pendent of the settlement of the account which was ordered in the same decree. When the court undertook to direct the dismissal of an action brought by the administrator upon a claim alleged to be due the estate, and to find thereupon that there was no property in the hands of the administrator, it undertook both to state and settle his account to that extent. It determined his rights in that regard, and settled, or attempted to settle, his account, as effectually as if the order had been made after he had filed an account. Whether an order is appealable is to be determined by what it purports to determine; not by what may be its actual operative effect. The portion of the decree appealed from was, if operative, a settlement of an account.

From what has been said, it appears that the court below erred in entering and making it. That portion of the judgment or order appealed from is reversed.

We concur: TEMPLE, J.; THORNTON, J.; SHARPSTEIN, J.

75 Cal. 506

McCORMICK *et ux.* v. CENTRAL R. Co. (No. 9,925.)

(*Supreme Court of California.* April 17, 1888.)

NEW TRIAL—GROUNDS FOR—NEWLY-DISCOVERED EVIDENCE.

The evidence was conflicting as to whether plaintiff was struck by a horse attached to defendant's car, as she alleged, or by the pole of a truck near the car. *Held*, that a new trial will not be granted to plaintiff on the affidavits of two persons that the truck did not move, and from its position could not have struck her; such newly-discovered evidence being merely cumulative.¹

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; T. H. REARDON, Judge.

Action by John McCormick and Susan McCormick, his wife, for injuries alleged to have been sustained by the latter through the negligence of defendant, the Central Railroad Company. Verdict and judgment for defendant. Plaintiffs appeal.

Manuel Eyre, for appellants. *Gunnison & Booth*, for respondent.

HAYNE, C. Action against a street-car company for personal injuries. Verdict and judgment for defendants. The only point made is that the plaintiff's motion for new trial should have been granted on the ground of newly-discovered evidence. The plaintiff's theory was that she was struck by the horse attached to the car, and that the car-wheel passed over her leg. The defense was that the plaintiff was struck by the pole of a truck which was near the car, and that this was the cause of the accident. Upon this question the plaintiff testified that she was struck by the horse, and that the truck did not move at all. One Offerman and one Newman testified to the same effect. On the other hand, the driver of the car testified that it was the pole of the truck which struck her, and not the horse or car; and he was corroborated by a Miss Annie Norton, a by-stander.

The evidence which is claimed to be newly discovered is shown by the affidavits of one Galbraith and one O'Brien to the effect that the truck did not move, and from its position it could not have struck the plaintiff; and the affidavit of plaintiff's husband to the effect that a certain Mrs. Stewart had told him that the witness Norton had made declarations to the contrary of her testimony, but that Mrs. Stewart would not make affidavit to that effect. As a matter of course, this hearsay evidence is not to be regarded, and the other matters stated in the affidavit are unworthy of special notice. The affidavits of Galbraith and O'Brien are upon a subject which was much disputed at the trial and are merely cumulative and not such as to render a different

¹ See note at end of case.

result probable, and therefore, under the well-settled rule, were not sufficient to warrant a new trial. We therefore advise that the order denying a new trial be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order denying a new trial is affirmed.

NOTE.

NEW TRIAL—NEWLY-DISCOVERED EVIDENCE. A new trial will be granted on the ground of newly-discovered evidence when it appears that the evidence was brought to the knowledge of defendant after the trial, and could not have been previously discovered. *Greenwalt v. Tucker*, 10 Fed. Rep. 884; *Seeley v. Perry*, (Iowa,) 3 N. W. Rep. 678; *Kelleher v. Kenney*, (Cal.) 4 Pac. Rep. 1095. The granting of a new trial for newly-discovered evidence is largely in the discretion of the trial judge, *Eldridge v. Railway Co.*, (Minn.) 20 N. W. Rep. 151; the exercise of which will not be disturbed, unless it appears that it violated a clear legal right of the appellant, or that it involved an abuse of judicial discretion, *Lampsen v. Brander*, (Minn.) 11 N. W. Rep. 94; *Smith v. Smith*, (Wis.) 8 N. W. Rep. 868; *Regents v. Linscott*, (Kan.) 1 Pac. Rep. 81.

A new trial will not be granted on the ground of newly-discovered evidence when such evidence is merely cumulative, or is upon unimportant matters in the case, or is of an impeaching character, or where, in the opinion of the court, such evidence, if produced, would not affect the action or verdict of a jury. *Brown v. Evans*, 17 Fed. Rep. 912; *Marshall v. Mathers*, (Ind.) 3 N. E. Rep. 120; *Blackburn v. Crowder*, (Ind.) 10 N. E. Rep. 933; *Donnelly v. Burkett*, (Iowa,) 34 N. W. Rep. 330; *Ethridge v. Hobbs*, (Ga.) 3 S. E. Rep. 251; *Bailey v. Landingham*, (Iowa,) 3 N. W. Rep. 460; *Hickenbottom v. Railway Co.*, (Iowa,) 11 N. W. Rep. 652; *Morrow v. Railway Co.*, (Iowa,) 16 N. W. Rep. 572; *Halliday v. Briggs*, (Neb.) 18 N. W. Rep. 55; *Krueger v. City*, (Wis.) 27 N. W. Rep. 836; *Ketchum v. Breed*, (Wis.) 26 N. W. Rep. 271; *Baughman v. Penn*, (Kan.) 6 Pac. Rep. 890; *Reed v. Drais*, (Cal.) 8 Pac. Rep. 20; *Chandler v. Thompson*, 30 Fed. Rep. 38; *De Hart v. Aper*, (Ind.) 8 N. E. Rep. 275; *Railroad Co. v. Boon*, (Tex.) 1 S. W. Rep. 632; *Walker v. Brown*, Id. 797; *Munro v. Moody*, (Ga.) 2 S. E. Rep. 688; *Hart v. Jackson*, (Ga.) 3 S. E. Rep. 1; *Fuller v. Harris*, 29 Fed. Rep. 814; *Pennsylvania Co. v. Nations*, (Ind.) 12 N. E. Rep. 309; *Cirkel v. Ellis*, (Minn.) 31 N. W. Rep. 513; *Chandler v. Thompson*, 30 Fed. Rep. 33.

On the application the party moving must show—*First*, that the proposed evidence has been discovered since the trial, and that due diligence was exercised to discover it prior to that time; *second*, that the evidence is competent and material. *Town of Manson v. Ware*, (Iowa,) 19 N. W. Rep. 275; *Carson v. Henderson*, (Kan.) 8 Pac. Rep. 727; *Brickley v. Walker*, (Wis.) 32 N. W. Rep. 773; *Fenno v. Chapin*, (Minn.) 8 N. W. Rep. 762. The affidavit must set forth the facts relied upon as constituting due diligence on the part of the applicant. *Gorachi v. Hintz*, (Neb.) 14 N. W. Rep. 379; *Smith v. Wagonman*, (Iowa,) 11 N. W. Rep. 713; *Pinschowers v. Hanks*, (Nev.) 1 Pac. Rep. 454; *Wilkes v. Wolback*, (Kan.) 2 Pac. Rep. 508; *Ross v. Sedgwick*, (Cal.) 10 Pac. Rep. 400; *Patterson v. Collier*, (Ga.) 3 S. E. Rep. 119; *Moore v. Wills*, (Tex.) 5 S. W. Rep. 675; *Allen v. Bond*, (Ind.) 14 N. E. Rep. 493; *Poullain v. Poullain*, (Ga.) 4 S. E. Rep. 81.

Where the affidavit in support of the application is met by counter-affidavits, and there is no probability upon the record that the result would be affected, a new trial will be refused. *Peterson v. Faust*, (Minn.) 14 N. W. Rep. 64.

75 Cal. 508

SIMMONS v. OULLAHAN. (No. 12,358.)

(*Supreme Court of California.* April 17, 1888.)

ACCORD AND SATISFACTION—COMPROMISE OF DEBT—TIME OF THE ESSENCE.

A creditor agreed to accept 50 cents on the dollar in satisfaction of his claim; the payment to be made in installments on stated days. Time was made of the essence of the agreement, and the whole indebtedness was to be revived on failure to pay any installment on the stated day. *Held*, that accord without satisfaction was no bar, and, on defendant's failure to pay on the days stated, the original indebtedness was revived.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

J. C. Campbell, for appellant. S. D. Woods and A. L. Levinsky, for respondent.

HAYNE, C. Action for goods sold and delivered. Defendant admitted that the goods were sold and delivered as alleged, but relied upon an agreement

whereby the assignor of the plaintiff agreed to accept 50 cents on the dollar in satisfaction of the claim. This agreement contained the following clause: "That each and all of said acts shall be made and done promptly at maturity, and, as to this condition, time is hereby made of the essence of this agreement; so that, in case of default or miscarriage regarding performance and payment on the day or days said sums severally become due, the whole of said original indebtedness is hereby renewed and revived."

The first installment due under this agreement was \$63.69. The court below found that only \$43.45 was paid, and we think that the evidence justifies this finding. The expressions in the receipts to the effect that the sum paid was "our *pro rata*" of the distribution amount to nothing. A receipt is never conclusive; and in view of the contract, and the admissions of the defendant, it is apparent that the sum paid was not the amount due under the agreement. Furthermore, there is no evidence that the defendant had paid the "costs, attorney's fees, and expenses incurred," mentioned in the composition agreement. It is an elementary principle that an accord without satisfaction is not a bar; and, as a matter of course, the defendant who relies upon an accord and satisfaction must plead and prove the satisfaction as well as the accord. The other points seem frivolous. We think the appeal was taken for delay, and therefore advise that the judgment and order be affirmed, with 10 per cent. damages.

We concur: BELCHER, C. C; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed, with 10 per cent. damages.

75 Cal. 415

PEOPLE v. YEATON. (No. 20,348.)

(Supreme Court of California. March 29, 1888.)

1. CRIMINAL LAW—EVIDENCE—CONFESSIONS—IMPEACHMENT.

It is not permissible upon cross-examination to compel a defendant in a criminal action to testify to statements, made out of court, amounting to a confession of the crime, upon the theory of showing contradictory statements to impeach the witness, unless it is first shown that such confession was voluntary.¹

2. SAME.

The defendant in a criminal action upon cross-examination testified that a certain letter offered as a confession was written at the request of her mother, who visited her at the jail with A., and told her that she had consulted an attorney who had advised the writing of the letter. In connection with this matter defendant offered to prove, by her mother and A., that at that conference she told them she was innocent of the alleged crime. Held that, under the circumstances, this conference and the writing of the letter should be considered one transaction, and should all go to the jury.

In bank. Appeal from superior court, Shasta county; AARON BELL, Judge. *Jackson Hatch*, for appellant. *Atty. Gen. Geo. A. Johnson*, *Edward Sweeny*, and *Clay W. Taylor*, for the People.

McFARLAND, J. The defendant, a young girl about 15 years old, was convicted of the crime of an attempt to commit arson. When the prosecution had closed its case in chief, the only evidence against the defendant was circumstantial; and it was of such a character that the jury might well have considered it insufficient to warrant a verdict of guilty. The defendant then took the stand as a witness for herself. She testified to some circumstances connected with her residence as a servant with Mrs. Ludwig, (whose house

¹ As to when a confession is admissible in evidence, see *Steele v. State*, (Ala.) 3 South. Rep. 547, and note. As to the impeachment of a witness by showing previous contradictory statements, see *Zebley v. Storey*, (Pa.) 12 Atl. Rep. 569, and note.

she was charged with the attempt to burn,) and denied that she had anything to do with the alleged crime, or knew anything about the origin of the fire. She was then subjected to a cross-examination, which, even in its general features, went to the utmost bounds of, if it did not exceed the limits to which, under section 1323 of the Penal Code, and *People v. O'Brien*, 66 Cal. 602, 6 Pac. Rep. 695, the cross-examination of a defendant in a criminal case should be allowed to go. But, in addition to other things, she was compelled on the cross-examination, against the objections of her counsel, to testify to statements, made by her out of court, which were not merely admissions of facts which tended to prove her guilt, but absolute confessions of the commission of the crime. And this was done without any pretense on the part of the prosecution to show, preliminarily, that the confessions were voluntary. It is true that these confessions were admitted upon the asserted theory that they were not introduced as confessions, but merely as contradictory statements for the purpose of impeaching the defendant as a witness, and upon the apparently innocent belief that the jury would not consider them at all except for the special purpose indicated. But we think that under such a guise, the prosecution cannot be allowed to introduce confessions without the proper preliminary proof required by well-settled rules of evidence. The defendant was arrested the morning after the fire, and taken to jail. She saw no attorney, or other person capable of giving her advice. She swears that Mrs. Ludwig, and the constable, and her mother, and, in fact, every one who had access to her, told her that she would certainly be found guilty, and that the best thing she could do would be to confess, and thus try to gain the kindness and mercy of her prosecutor; and that she was also offered money and other inducements to confess. The prosecution in making out its case did not offer these confessions, presumably because it could not prove that they were made voluntarily. Therefore, at the close of the evidence in chief of the prosecution, the defendant was in this condition: She either had to forego the privilege of testifying in her own behalf, and denying the charge under oath, or, if she did testify, then, upon the theory of the prosecution, it could get in the confessions, on cross-examination, without the preliminary proof. We do not think this to be the fair meaning of the law; and we think that the admission of the confessions was a material error.

One of the confessions introduced was a letter written by defendant, when in jail, to Mrs. Ludwig. Defendant testified that this letter was written at the request, and on the advice, of her mother, who visited her at the jail with one Mr. Oxendine, and told her that she (her mother) had consulted an attorney, who had advised the writing of the letter. In connection with this matter defendant offered to prove by her own testimony, and by the testimony of her mother and said Oxendine, whom she called to the witness stand for that purpose, that at that conference she told her mother and Oxendine that she was entirely innocent of the alleged crime. This testimony was rejected, and, we think, erroneously. Under the circumstances this conference and the writing of the letter should be considered as one transaction, and should all have gone to the jury.

We are not prepared to say that the appointment of an elisor to summon the jury was erroneous, or that it was a matter that can be reviewed on this record. In such matters, however, courts should follow the statutes as closely as possible. The instructions to the jury were very voluminous; but we do not see any material error in them, except as they may be inconsistent with the views hereinbefore expressed. Judgment reversed, and new trial ordered.

We concur: SEARLS, C. J.; TEMPLE, J.; THORNTON, J.; PATERSON, J.; SHARPSTEIN, J.

75 Cal. 413

KIMPLE v. CONWAY et al. (No. 9,700.)

(Supreme Court of California. March 29, 1888.)

DIVORCE—SALE OF COMMUNITY PROPERTY—CONFIRMATION.

In California there is no law requiring the confirmation of a sale of land made by a sheriff under a decree for the sale of the community property of a husband and wife to whom a divorce has been granted, and no such confirmation being required in the decree, the sale is complete without confirmation.

Department 2. Appeal from superior court, city and county of San Francisco; JAMES G. MCGUIRE, Judge.

Action to quiet title by Kate Kimple, appellant, against Margaret Conway, Patrick Conway, and Patrick Connolly, sheriff, appellees.

Aug. M. Heslep and *D. L. Smoot*, for appellant. *W. R. Daingerfield*, for respondents.

SHARPSTEIN, J. This is an action to quiet title. Judgment was entered against the plaintiff. She moved for a new trial, which was denied, and from that order and the judgment this appeal is taken. The only question before us is whether the evidence is sufficient to justify the decision. The grounds on which the court below based its decision, as stated in the transcript, are as follows: "Defendants, Margaret and Patrick Conway, were husband and wife. A divorce was decreed between them, and their community property, including the land in controversy, was ordered to be sold by the sheriff, Mathew Nunan. The sheriff, under the decree, sold the property to the plaintiff, and, without reporting the sale to the court, executed a deed for the same to the plaintiff. After the execution of the deed, the sale was reported to the court, and the court refused to confirm it. Plaintiff claims title to the land in controversy under this deed. The sheriff, in executing the decree aforesaid, was not acting as sheriff, but as a commissioner, an agent of the court. As a commissioner his sale was incomplete until confirmed by the court. The deed made by the commissioner, without such confirmation, was void. A certificate of purchase, so called, was issued by the sheriff to the plaintiff. It conveys no title, and is of no effect as a receipt for the money paid by plaintiff on the unconfirmed purchase. Plaintiff's claim of title to the land in controversy, resting solely upon the deed and certificate aforesaid, is entirely without legal foundation." It appears that the property was sold by an order of the court, which is in the following words: "On motion of counsel for plaintiff, counsel for defendant consenting, it is further ordered and decreed that the property hereinbefore described be sold by the sheriff of the city and county of San Francisco, state of California, in the manner prescribed by law * * * And the said sheriff is hereby ordered and directed to sell said property forthwith, and pay the said commissioner and said attorneys the sums of money hereinbefore specified in the order named; and in case a surplus remains, after making such payment, to divide such surplus equally between plaintiff and defendant."

Section 147 of the Civil Code authorizes the court granting a divorce to order a sale of the community property, and a division or other disposition of the proceeds. Section 684 of the Code of Civil Procedure provides that "when the judgment requires the sale of property, the same may be enforced by a writ reciting the judgment or the material parts thereof, and directing the proper officer to execute the judgment by making the sale and applying the proceeds in conformity therewith." The power conferred is ample, and the sheriff appears to have followed the directions contained in the judgment by making the sale in conformity therewith. The judgment did not direct the sheriff to report the sale to the court for confirmation, and the Code does not require the confirmation of such sales. In the absence of such requirement we are not prepared to hold that the sale and conveyance are void because the sale was not confirmed. Some judicial sales become complete and valid

on being confirmed, and not before, but the Code expressly requires confirmation in such cases. The judgment of the court in this particular was subject to revision on appeal. Civil Code, § 148. No appeal was taken, and, as the court did not exceed its jurisdiction in the premises, the purchaser who purchased at sheriff's sale cannot, without manifest injustice, be deprived of the property for which she has paid and received a deed in due form. In this case neither the Code nor the order of the court required that the sale should be confirmed before becoming complete, and we are of the opinion that the court erred in holding that the sale in this case was void for want of such confirmation, and for that error the motion for a new trial should be granted. Order denying the motion for a new trial reversed.

We concur: MCFARLAND, J.; THORNTON, J.

75 Cal. 523

In re FISHER'S ESTATE, (two cases. Nos. 11,732, 11,869.)

(Supreme Court of California. April 19, 1888.)

1. APPEAL—FAILURE TO TAKE, WITHIN STATUTORY PERIOD—JURISDICTION OF APPELLATE COURT.

The fact that an appeal was too late under the statute goes to the jurisdiction of the appellate court, and the validity of a motion to dismiss such appeal will not be considered.

2. SAME—REVIEW—RULINGS ON EVIDENCE.

On an appeal from an order refusing to change the record so as to show that a decree was in fact entered at a later date than appears from its face, where the affidavits of appellants' attorney and the clerk, as to the time of entering such decree, are directly in conflict, the conclusions of fact by the court below will not be disturbed.

Commissioners' decision. Department 1. Appeal from superior court, Marin county; E. B. MAHON, Judge.

S. L. Francis and E. A. Neale filed a petition for a partial distribution under the will of Catherine Fisher, deceased. The decree of the superior court was favorable to the executor, who was the husband of the testatrix. Notice of appeal was filed by the petitioners more than 60 days after the date of the decree; the statutory limit being 60 days. The petitioners claim that the minutes of the court below are erroneous, and the decree was actually entered later than such minutes show, and moved the court to change the record to that effect, which the court refused to do. The affidavits of appellants' attorney and the clerk of the superior court, as to the time of entering the decree, are directly in conflict. The petitioners appeal from the original decree, and from the refusal of the court to change the record.

Vincent Neale, for appellants. *Hepburn Wilkins*, for respondent.

HAYNE, C. The first appeal is from a decree of partial distribution. It was taken 62 days after the entry of the decree. This was too late. Code Civil Proc. § 1715; *Estate of Burns*, 54 Cal. 226; *Estate of Harland*, 64 Cal. 379, 1 Pac. Rep. 159; *Estate of Burton*, 64 Cal. 428, 1 Pac. Rep. 702. The argument as to the construction and constitutionality of the statute does not require refutation. The fact that the appeal was too late goes to the jurisdiction, and hence it is unimportant whether the motion to dismiss has lapsed or not.

The second appeal is from an order refusing to change the records so as to show that the decree above mentioned was in fact entered at a later date than it shows on its face. We shall assume, without expressing any opinion on the point, that this order is appealable. In our view, however, the affidavit of the clerk is directly in conflict with that of the attorney for the appellant; and we cannot say that the court below came to a wrong conclusion as to the facts.

We therefore advise that the appeal from the decree of partial distribution be dismissed, and that the order refusing to change the record be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the appeal from the decree of partial distribution is dismissed, and the order refusing to change the record is affirmed.

75 Cal. 539

MILLIKEN v. HOUGHTON *et al.* (No. 11,334.)

(Supreme Court of California. April 20, 1883.)

APPEAL—REQUISITES—NOTICE—CODE CIVIL PROC. CAL. § 940.

A judgment against several defendants was reversed, as to one of them, upon appeal of that one alone; and, on motion of such defendant and one of those not appealing, an execution theretofore issued on such judgment was quashed, and from the order quashing the execution plaintiff appealed. *Held*, under Code Civil Proc. Cal. § 940, providing that notice of appeal must be served upon the adverse party or his attorney, that, unless notice of appeal was served on all the defendants, the appellate court cannot take jurisdiction of the appeal.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

The plaintiff, J. M. Milliken, had obtained judgment against defendants, S. O. Houghton, the Hibernia Savings & Loan Society, F. H. Burke, R. P. Kelly, John Higgins, and P. Hannigan, which ordered the premises described in complaint to be sold to satisfy a street assessment. The judgment was appealed from by one defendant only, the Hibernia Savings & Loan Society, and as to said defendant was reversed. This appeal is from an order, made after final judgment, granting the motion of the defendants Houghton and the Hibernia Savings & Loan Society to quash the execution of the judgment, on the ground that the reversal of the judgment on the appeal of one defendant reversed it as to all. The notice of the appeal was served only upon the Hibernia Savings & Loan Society, and Houghton.

J. M. Wood, (J. C. Bates, of counsel,) for appellant. *Tobin & Tobin* and *F. Thos. Barry*, for respondents.

SEARLS, C. J. This is an appeal from an order of the court below quashing a writ of execution on motion of two of the defendants, viz., S. O. Houghton and the Hibernia Savings & Loan Society. Respondents the Hibernia Savings & Loan Society and S. O. Houghton moved to dismiss the appeal, upon the grounds that the other defendants in the cause, viz., F. H. Burke, R. P. Kelly, John Higgins, and P. Hannigan, were not mentioned in the notice of appeal, and were not served therewith. Turning to the decree, we find that

it is against all of the defendants above named. The Hibernia Savings & Loan Society alone appealed to this court, and the judgment, as against it, was reversed. Upon the return of the case to the court below, plaintiff dismissed the action as to said last-named defendant, and thereupon procured an execution, with a copy of the decree attached, which was and is in all respects such as might have issued upon the decree as originally entered, except that it recites the appeal, reversal, and dismissal as to the defendant the Hibernia Savings & Loan Society. This writ was quashed by the court, on motion of the defendants as hereinbefore mentioned, and the notice of appeal therefrom is addressed to and served upon them only.

The notice of appeal must be served upon the *adverse party* or his attorney. Code Civil Proc. § 940. The term "adverse party" has been held to include all the parties to the action having an interest to be affected by a reversal, and in *O' Kane v. Daly*, 63 Cal. 317, it was held that the notice of appeal by one of several co-defendants should be served, not only on the plaintiff, but also on the non-appealing co-defendants; they having an interest in the judgment to be affected by the reversal, (*Senter v. De Bernal*, 38 Cal. 640; *Hiscock v. Phelps*, 2 Lans. 118; *Cotes v. Carroll*, 28 How. Pr. 446; *Thompson v. Ellsworth*, 1 Barb. Ch. 627.) In *Williams v. Mining Ass'n*, 66 Cal. 194, 5 Pac. Rep. 85, it was said: "This court has not jurisdiction to hear an appeal from a judgment, unless the appellant shall have served a notice of appeal on all the adverse parties; that is to say, upon all whose rights may be affected by a reversal of the judgment," etc. The defendants not served with the notice of appeal in this case are as directly interested in the affirmance or reversal of the order appealed from as are the two defendants who were served. It may be said the objection cannot come from the moving respondents here, as they can suffer no injury by appellant's failure to notify the other defendants. The answer is, the objection goes to the jurisdiction of the court to hear and determine the appeal; and the right to make the objection by any respondent before the court has been often recognized. Indeed, they are interested in having such judgment as may be rendered by this court binding upon all the parties whom after notice it can affect. It may well be that as the motion in the court below was by only two defendants, and one of them a party as to whom the action had been dismissed, it should have been denied, except as to the moving parties; or, if one only of them was interested, then only as to him. But, however this may be, the execution ran against all the defendants except the Hibernia Savings & Loan Society. It was quashed as to all of them, and the appeal is from the whole order. They are therefore all interested, and should have been served as respondents in the appeal.

The appeal is dismissed.

We concur: MCKINSTRY, J.; PATERSON, J.

75 Cal. 509

ZEIMER v. ANTISELL. (No. 9,824.)

(Supreme Court of California. April 17, 1888.)

FACTORS AND BROKERS—REAL-ESTATE AGENTS—COMMISSIONS.

A broker authorized to sell a tract of real estate called the attention of the purchaser to the same, and received an offer from him, which was less than he was authorized to accept. After the expiration of the broker's authority, such purchaser bought said tract of real estate from the owner, paying a price greater than he had originally offered. Held, that the broker was not entitled to commissions on such sale.¹

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

¹Respecting the rights of real estate brokers, and when their commissions are earned, see *Jarvis v. Schaefer*, (N. Y.) 11 N. E. Rep. 634; *Robinson v. Kindley*, (Kan.) 12 Pac. Rep. 587; *Ratts v. Shepherd*, (Kan.) 14 Pac. Rep. 496.

Action by Leo Zeimer, assignee of David Levitzky, against T. M. Antisell, to recover commissions for effecting the sale of certain real estate. Judgment for defendant. Plaintiff appeals.

Ladd & Allen and Raphael Citron, for appellant. *York & Whitworth*, for respondent.

BELCHER, C. C. On the 28th day of June, 1883, the defendant in writing authorized David Levitzky, a real-estate broker, to offer for sale certain real property which defendant owned in the city of Oakland, and agreed, if Levitzky should find a purchaser of the property for the sum of \$125,000, to pay him a commission of $2\frac{1}{2}$ per cent. for his services. By express provision, the agreement, and Levitzky's authority under it, were to terminate at the end of 30 days from its date. Within the 30 days allowed, Levitzky found and introduced to the defendant one Hooker, who offered to purchase the property for the sum of \$110,000, and defendant thereupon agreed to accept his offer, and to sell to him for the sum named. Subsequently, about the 15th or 20th of July, Hooker refused to take the property, and thereafter, on the 31st day of that month, defendant and Levitzky entered into another agreement in writing, to the effect that if Hooker should take the property, and pay therefor the sum of \$110,000, the defendant would pay Levitzky, as and for his commission, the sum of \$1,000, and a style 7 upright piano; but, if Hooker should not take the property, then the defendant should be in no way liable to Levitzky for his services. At the time of entering into this last agreement, defendant refused to extend Levitzky's authority under the former agreement, and expressly took the property out of his hands and forbade him thereafter to offer it for sale to any person. Hooker refused absolutely to purchase or take the property, and on August 10, 1883, defendant contracted to sell it to one B. H. Levy for \$110,000, and on the 2d day of October following consummated the sale to him for that sum. Levitzky claimed that he was entitled to a commission of $2\frac{1}{2}$ per cent. on the \$110,000, for which the property was sold to Levy, and on 13th day of October, 1883, he assigned his claim to the plaintiff, who thereupon commenced this action to recover the same. The court below found the facts to be substantially as above stated, and gave judgment for the defendant, from which, and from an order denying him a new trial, the plaintiff has appealed.

To entitle a broker to recover commissions for effecting a sale of real property, he must show that he was employed by or on behalf of the owner to make the sale, and that his authority, or some note or memorandum thereof, was in writing, subscribed by the party to be charged, or by his authorized agent. Civil Code, § 1624; *McCarthy v. Loupe*, 62 Cal. 299. And, before a broker can be said to have earned his commission, it must also be shown that he produced a purchaser, who was ready and willing to make the purchase on terms satisfactory to his employer, and that he was the efficient agent or procuring cause of the sale. *McGarock v. Woodlief*, 20 How. 221; *Wylie v. Bank*, 61 N. Y. 415. "The duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made, and until this is done his right to commissions does not accrue." *Sibbald v. Iron Co.*, 83 N. Y. 382. It must further appear that the broker performed the duty assumed by him within the time limited in his contract, or within such extension of time as may have been granted by his employer. If he failed to do that, he is not entitled to the commission, even though he made efforts to sell the property, and first called to it the attention of the party who subsequently made the purchase, unless the delay was caused by the negligence, fault, or fraud of the owner. *Fultz v. Wimer*, 34 Kan. 576, 9 Pac. Rep. 316; *Wilson v. Sturgis*, 71 Cal. 226, 16 Pac. Rep. 772.

In the light of the foregoing well-settled rules of law, was the plaintiff entitled to recover? We think not. There was no proof that Levitzky, while

acting as defendant's agent, was the "efficient agent or procuring cause" of the sale to Levy. He did not bring the minds of the buyer and seller to an agreement for a sale; nor, so far as appears, accomplish anything which even foreshadowed the sale that was subsequently made. It is true that, before the arrangement was made with Hooker, he took Levy to see the property, and received from him an offer for it of \$90,000, but he rejected the offer at once, without even informing defendant that it had been made. Nothing more was done by him to effect a sale of the property to Levy until after his contract had expired and his authority had ceased. What, if anything, he did after that it is not necessary to consider, for it cannot constitute a cause of action for the plaintiff here.

In our opinion, the findings were justified by the evidence, and the judgment and order should be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

75 Cal. 544

MARSHALL v. BEYSSEY *et al.* (No. 11,797.)

(Supreme Court of California. April 26, 1888.)

LIMITATION OF ACTIONS—ADVERSE POSSESSION—COLOR OF TITLE.

In ejectment it appeared that defendant and her grantor, by themselves, their lessees and agents, had been in possession of the land in controversy from 1876 to 1884, and had paid all the taxes thereon; and that defendant's grantor claimed under a deed from one B., whose title did not appear. *Held*, that under the statute of limitations, which requires possession under color of title for five years, such possession is sufficient.¹

Commissioners' decision. Department 1. Appeal from superior court, Calaveras county; C. V. GOTTSCHALK, Judge.

Action of ejectment by Marshall against Catherine Beysser and others. Judgment for defendants, and plaintiff appeals.

Reddick & Solinsky, (*Eugene N. Deuprey*, of counsel,) for appellant. *J. A. Louttit*, (*S. D. Woods* and *A. L. Levinsky*, of counsel,) for respondents.

HAYNE, C. Action of ejectment. The plaintiff relies upon a patent from the state of California, issued March 12, 1870. He never had any possession of the land until he forcibly dispossessed the defendants, on March 23, 1884. The defendants rely upon the statute of limitations. Special issues were submitted to the jury, which answered all the questions in favor of the defendants. The court adopted the findings of the jury, and made certain additional findings of its own, and ordered judgment thereon in favor of the defendants. The plaintiff appeals from the judgment, and an order denying his motion for a new trial.

The point mainly relied on is that the evidence is insufficient to show a five-years possession of the kind required by the statute. We think there is ample evidence to sustain the findings. It appears that in 1873 one T. N. Beatty, the nature of whose title does not clearly appear, conveyed the land in controversy to one John Urquilux, who was one of three partners commonly known as the "Bascos," probably from their nationality. The Bascos were in pos-

¹Color of title is not every pretense or claim of title, but consists in a writing or conveyance of some kind purporting to convey the land under which the claim of title is asserted. *Armijo v. Armijo*, (N. M.) 13 Pac. Rep. 92. Any instrument purporting upon its face to convey title to the grantee is sufficient to constitute color of title. *Swift v. Mulkey*, (Or.) 12 Pac. Rep. 76, and note; *Webber v. Clarke*, (Cal.) 15 Pac. Rep. 431; *Hill v. Weir*, 33 Fed. Rep. 100; *Weineg v. Holcomb*, (Iowa,) 34 N. W. Rep. 787; *Hickman v. Link*, (Mo.) 7 S. W. Rep. 12.

session under this deed. According to the witness Carnduff: "Along in 1870, '71, '72, '73, the Bascos had somewhere near one thousand head of cattle. * * * The Bascos had possession in 1874. They had cattle then." It is not necessary, however, to trace the possession so far back. Five years prior to March 23, 1884, will be sufficient. And there is sufficient testimony of this. The witness Leon Chapin testifies that he went to the ranch in January, 1877, and worked there until February or April, 1880; that he had charge of the ranch for the Bascos; that in 1876 the land was rented to one Walker, who kept possession until 1878, and had sheep pastured on the land, and was then "out for ten months;" that witness had charge of the ranch during this ten months, being paid by the Bascos, and living on the premises; that in 1879-80 the land was rented to Walker and Willis. Walker testifies as follows: "I rented the whole Basco ranch, commencing in 1877 and succeeding through the year 1878. * * * I used all the Basco ranch for grazing purposes for sheep. The sheep were in charge of a herder. No other sheep or cattle were allowed to pasture on the land. * * * I leased the Basco ranch and land in controversy in March or April, 1879, the lease to commence September 15, 1879. Mr. Willis was in partnership with me. * * * Chapin was living on the Basco ranch as keeper in that house on section 19, defendant's extension 1, during the intervening space between 1878 and 1879. We held possession of the Basco ranch for three years. * * * We didn't have the land all of 1879; rented it in April, the lease to commence in September, 1879. We had it during 1880, '81, '82. Mr. Willis had it in 1883. Willis, I know, used part of the Basco ranch for grazing." These tenants sublet portions of the land to tenants who cultivated portions of it, and pastured other portions, paying their rents to the original tenants, who in turn paid to the Bascos. Willis testifies as follows: "We leased the entire Basco ranch from Beysser (who was then the agent) from September, 1879. I mean Mr. George W. Walker and myself. We were partners. In 1879, we occupied the 1,280 acres, and sublet this 640 acres to Piper. Our sheep were in charge of a herder. Piper farmed part of the land along Rock creek. He sublet the balance to Shields for grazing sheep. Shields had them in charge of a herder. In 1880, we rented to Piper again, and he sublet to Shields. I saw Shields' sheep pasturing on the land. Piper cultivated a part of the creek. In 1881, we sublet to Piper again. He farmed a part of the creek, and sublet to Shields. In 1882, we kept the land in controversy ourselves; used it for grazing sheep. Had a herder, and didn't allow other cattle or sheep to feed on the land. In 1883, I had the land in controversy, and sublet to Piper. He farmed part, and sublet to Shields. He farmed along the creek." On July 16, 1883, John Urquilux, who held the title as aforesaid, conveyed the premises in controversy to the defendant Catherine Beysser; and she entered under the deed. Her husband testifies as follows: "The deed was made in July, 1883, but it was subject to a lease which ended only on the 25th day of November, and it is then that we got possession of the land. We at once drove our cattle on it, between sixty and seventy head. We used the land for pasturage until the 23d of March, 1884. We had a herder to drive the cattle in charge on the land and watch them." This was corroborated by the testimony of Mrs. Beysser, and the herder, Fairbanks. Part of the land was fit for cultivation, and part for pasturage only.

There is no evidence substantially conflicting with the foregoing. And there is nothing to show that during all this time there was any attempt at adverse possession by any one else, until the forcible dispossession by plaintiff in March, 1884. The defendant and her predecessors paid all the taxes. We think the evidence shows a case of possession under color of title within the rule of *Webber v. Clarke*, 15 Pac. Rep. 431.

It is claimed that there was error in the admission of evidence. We are inclined to think that the declarations of Mrs. Beysser, while in possession, were

admissible as part of the *res gestæ* upon the question of the openness and notoriety of the possession. See, generally, *Draper v. Douglass*, 23 Cal. 348. But, however this may be, we think that the answers were so vague that no injury could have resulted.

We see no error in the instructions, and therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

75 Cal. 627

PEOPLE v. BURNS. (No. 20,382.)

(Supreme Court of California. April 26, 1888.)

1. ELECTIONS AND VOTERS—OFFENSES AGAINST ELECTION LAWS—INDICTMENT—SUFFICIENCY.

An indictment against an election inspector, under Pen. Code Cal. § 41, prescribing certain punishments for willful neglect or refusal of election officials to perform duties incumbent on them in their official capacity, and for knowingly and fraudulently acting in contravention of existing election laws, alleged that the prosecutor, a duly-qualified elector, on offering to vote at defendant's polling station, was challenged as having voted before; that he then and there demanded the defendant to administer to him the oath prescribed by Pol. Code Cal. § 1234; and that defendant, well knowing the law relating to elections, and his duties as inspector, knowingly, willfully, fraudulently, and feloniously refused to administer the oath. *Held*, that the indictment related clearly and fully facts constituting the offense, and informed defendant of the charge he had to meet, as required by Pen. Code Cal. § 959, and that it need not aver that the prosecutor was registered as required by St. Cal. 1877-78, p. 303, § 15, providing that "no person shall vote at any election except he be legally registered upon the precinct register of the precinct in which he is a qualified voter."

2. SAME—VIOLATION OF ELECTION LAWS—REFUSAL TO ADMINISTER OATH.

On the prosecution of an election inspector for violation of Pen. Code Cal. § 41, prescribing certain punishments for willfully neglecting or refusing to perform duties required of him in his official capacity, and for knowingly and fraudulently acting in contravention of existing election laws, in that he refused, when demanded, to put the oath to a *bona fide* elector, as provided by Pol. Code Cal. § 1234, on the latter being challenged as to previous voting, the court properly charged that "defendant is presumed, as inspector, to know at his peril what the law was, and it would furnish him no excuse that he may have supposed that the law was different from what it was. But, in order that you may find him guilty, it must appear that he acted knowingly and fraudulently."

In bank. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

The defendant, Burns, was convicted on indictment for neglect of duty in his official capacity as an election inspector. The indictment conformed with the provisions of Pen. Code Cal. § 959, subsecs. 6, 7, requiring that the offense be clearly and distinctly set out in ordinary and concise language, such as a person of common understanding would know what was intended, and that the offense be stated with such a degree of certainty as to enable the court to pronounce judgment, upon conviction, according to the rights of the case. Defendant appeals.

Robert Ferral and Gabriel W. McEnerney, for appellant. *George A. Johnson*, Atty. Gen., for respondent.

THORNTON, J. The defendant was convicted of a violation of section 41 of the Penal Code. That section is as follows: "Every person charged with the performance of any duty, under the provision of any law of this state relating to elections, who willfully neglects or refuses to perform it, or who, in his official capacity, knowingly and fraudulently acts in contravention or violation of any of the provisions of such laws, is, unless a different punishment

for such acts or omissions is prescribed by this Code, punishable by fine not exceeding \$1,000, or by imprisonment in the state prison not exceeding five years, or by both." The defendant did not demur to the indictment, but makes the objection here that the facts stated in it do not constitute a public offense. The indictment set forth that on the 12th day of April, 1887, at the city and county of San Francisco, at a special election called by the board of election commissioners for the purpose of voting for or against the new charter proposed by the board of freeholders elected, etc., that defendant was the duly appointed, qualified, and acting inspector of election of the First precinct of the Twenty-Ninth assembly district, in the said city and county, and while defendant was acting as such inspector at the said election, for the district and precinct aforesaid, one Charles Myron Emerson, "a duly-qualified elector of the said city and county, offered to vote at the polling place of said precinct;" that said Emerson was thereupon challenged that he had before voted that day; that Emerson then and there demanded that defendant administer to him the oath prescribed by section 1234 of the Political Code, (reciting the oath;) and that defendant, well knowing the provisions of the laws of the state of California relating to elections, and the duties with which he was charged thereunder as inspector aforesaid, knowingly, willfully, fraudulently, and feloniously refused to administer to said Emerson the oath aforesaid. It is prescribed by the act of the legislature in regard to the registration of voters in the city and county of San Francisco, (see St. 1877-78, p. 303, § 15,) which provides, *inter alia*, for the registration of electors on precinct registers, "that no person shall vote at any election except he be legally registered upon the precinct register of the precinct in which he is a qualified voter."

It is contended that, to constitute a person a duly-qualified elector of the city and county of San Francisco, he must be registered on the register of the precinct where he offers to vote, and that the allegation that Emerson was a duly-qualified elector of the city and county of San Francisco, without making it appear by averment that he was registered on the precinct register, is insufficient; and that, as the indictment is wanting in this latter averment, it does not state facts constituting a public offense. The offense to which the indictment is directed is the refusal of the defendant, in his official capacity as inspector, to administer the oath to Emerson when he was challenged on the ground stated in it. These facts constitute the offense, and they are clearly and fully stated in the indictment. The averment objected to as insufficient is matter merely introductory to the offense charged,—matter of inducement. Such matter need not be stated with the same minuteness as the main charge. *State v. Mayberry*, 48 Me. 218. The allegation as made in the indictment necessarily includes the fact that Emerson's name was on the precinct register. The general form of averment adopted in the indictment includes the particular fact that the voter's name was on the register of the precinct where he offered to vote. Therefore, when it is averred that Emerson was a duly-qualified elector of the city and county of San Francisco, all the facts, by an implication as strong as an express allegation, are averred which are necessary to make him a qualified elector. We are of opinion that the indictment apprised the defendant of what he had to meet on the trial, and that it complies with the requirements of section 959 of the Penal Code, which sets forth in detail the requisites of a sufficient indictment, and is sufficient.

At the request of the prosecution, the court instructed the jury as follows: "Defendant is presumed by law, as inspector, to know at his peril what the law was, and it would furnish no excuse to him that he may have supposed that the law was different from what it was. But, in order that you may find him guilty, it must appear that he acted knowingly and fraudulently." Defendant contends that by this instruction the jury was directed that they

might find defendant guilty of a penal offense for an error of judgment. As a general rule, a person who has done an act which is criminal cannot defend himself by reason of his ignorance of the law. See Broom, Leg. Max. (6th Amer. and 4th London Ed.) pp. 249, 250, and 264, on maxim, "*Ignorantia facti excusat*," etc. Ignorance of fact excuses, but ignorance of law does not. "The law," says TINDAL, C. J., in *McNaghten's Case*, 10 Clark & F. 210, "is administered upon the principle that every one must be conclusively taken to know it, without proof that he does know it." The signification of the word "knowingly," when used in the Penal Code, is defined by its seventh section (fifth subdivision) as importing only a knowledge that the facts exist which bring the act or omission within its provisions. It does not require any knowledge of the unlawfulness of such act or omission. The word "knowingly," when used in any section of the Penal Code, must be construed to import only a knowledge of facts. It has no reference to a knowledge of the law. So construed, the fifth subdivision of section 7 of the Penal Code accords with the maxim referred to and the rule above stated, that ignorance of fact does, and ignorance of law does not, excuse. In accordance with the above, the defendant must be held to have known the penal law which he was charged with violating in refusing, in his official capacity, to administer the oath to Emerson, and that the court did not err in charging the jury. The remainder of the instruction is substantially in the language of the statute. Pen. Code, § 41.

We find no error in the record, and the judgment is affirmed. So ordered.

We concur: SEARLS, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; MCKINSTRY, J.

75 Cal. 519

WALSH v. McKEEN. (No. 11,084.)

(Supreme Court of California. April 17, 1888.)

1. PLEADING—FORM OF ACTION—AMENDMENT.

Under Code Civil Proc. Cal. § 580, providing that "the court may grant any relief consistent with the case made by the complainant, and embraced within the issue," the error in overruling a demurrer for insufficient allegations to a complaint, which, although seeking legal redress, also alleged facts sufficient to sustain a suit in equity, is cured by an amendment making the complaint seek equitable relief.

2. SAME.

Under Code Civil Proc. Cal. § 307, establishing "but one form of civil actions," and section 580, which allows the court to grant any relief consistent with the complaint, it is not error to permit the plaintiff to amend the prayer of his complaint so as to change the action from one at law to one for equitable relief.

3. SAME—AMENDMENT—WAIVER OF DEFECTS.

Applications to amend pleadings are addressed to the discretion of the court, and should be allowed at any stage of the trial when justice requires it; and where the court permits an amendment, over defendant's objection of want of notice, offering to grant a continuance if defendant were surprised, the error, if any, is waived by a failure to ask a continuance.

4. PARTNERSHIP—ACCOUNTING—WHEN ACTION LIES.

It is not necessary that all the assets of a partnership be collected, and all claims against it filed, before an action for accounting is brought.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Action by Sarah Walsh, executrix of the last will, etc., of Thomas Walsh, deceased, the respondent, against Robert McKeen, the appellant. Respondent's decedent and the appellant had been partners, and during the trial the action, originally brought for damages in a fixed sum, was so amended as to demand an accounting.

J. C. Bates, for appellant. *H. A. Powell*, for respondent.

BELCHER, C. C. This is an appeal by the defendant from a judgment entered against him, and from an order denying a new trial. The findings cover all the issues, and are not assailed, but it is claimed that errors of law were committed by the court, for which a new trial should be granted. In the complaint it is alleged that Thomas Walsh, the plaintiff's testator, and the defendant entered into partnership for the purpose of constructing a sewer in the city of San José; that, while the sewer was being constructed, Walsh died, and defendant afterwards completed the work; that about the time they commenced to construct the sewer Walsh advanced \$1,100 for the purpose of carrying on the work, and that the money was delivered to and used by defendant for that purpose; that defendant had received on account of the partnership business the sum of \$20,505.50, and had paid out and disbursed the sum of \$19,632.50, and that all the debts of the partnership had been paid; that plaintiff had demanded of defendant payment of the \$1,100, and one-half the balance of the proceeds of the partnership, but defendant had not paid the same to the plaintiff as executrix, or otherwise. As originally filed, the prayer of the complaint was for judgment against defendant for the sum of \$1,536.50, with interest and costs of suit. The defendant demurred to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action, and that it was ambiguous and uncertain, because it did not appear therefrom but what Walsh, in his life-time, received all moneys due or coming to him, or which he was entitled to receive, from the partnership business. The demurrer was overruled, and defendant then answered, and, among other things, denied that Walsh at any time advanced the sum of \$1,100, or any sum, for the purpose of commencing and carrying on the work of constructing the sewer, and further denied that all the debts of the partnership had been paid or satisfied. And he alleged that the cost and expense of constructing the sewer exceeded the contract price, and that there

was not then, and never had been, any money or proceeds of the partnership in his hands or possession; and, further, that there had never been any accounting or settlement of the partnership affairs with the plaintiff. During the progress of the trial, the plaintiff was permitted, against the objections of the defendant, to amend the prayer of her complaint so as to ask for an accounting, and for such other or further relief as might be deemed equitable and proper.

1. It is claimed that the court erred in overruling the demurrer. The argument is that the action was one at law, and that such an action cannot be maintained by one partner against another, or one who had been such, until the accounts have been settled, and a final balance ascertained. *Ross v. Cornell*, 45 Cal. 133. Conceding this to be so, still the complaint stated all the facts necessary for an accounting, and when the prayer was amended the action ceased to be one at law. The new complaint was not demurred to, and the error, if any, was then cured.

2. It is further claimed that the court erred in permitting the plaintiff to amend the prayer of her complaint. The objection interposed to the motion was that it was made without sufficient notice, and that the amendment would operate to change an action at law into a suit in equity. We see no error in the ruling. As to the first part of the objection, it is enough to say that applications to amend pleadings are addressed to the discretion of the trial court, and should be allowed at any stage of the trial when necessary for the purposes of justice. *Bank v. Stover*, 60 Cal. 387. The record shows that, in overruling the objection, the court stated that it would grant a continuance, if defendant was surprised by the amendment. No continuance was asked for, and defendant cannot therefore claim error on this ground. As to the alleged change in the nature of the action, an answer is found in the fact that we have in this state but one form of civil actions for the enforcement or protection of private rights, (Code Civil Proc. § 307;) and, where an answer has been filed, any relief may be granted to the plaintiff which is consistent with the facts stated in the complaint, (Code Civil Proc. § 580.) An action does not now, as formerly, fail because the plaintiff has made a mistake as to the form of his remedy. If the case which he states entitles him to any remedy, either legal or equitable, his complaint is not to be dismissed because he has prayed for a judgment to which he is not entitled. "Legal and equitable relief are administered in the same forum, and according to the same general plan. A party cannot be sent out of court merely because his facts do not entitle him to relief at law, or merely because he is not entitled to relief in equity, as the case may be. He can be sent out of court only when, upon his facts, he is entitled to no relief, either at law or in equity." *Grain v. Aldrich*, 38 Cal. 520; *Emery v. Pease*, 20 N. Y. 64; Pom. Rem. § 71. In *Blood v. Fairbanks*, 48 Cal. 171, the plaintiff prevailed in the court below in an action at law. The defendant appealed, and this court held that the plaintiff's remedy was in equity for an accounting. It accordingly reversed the judgment, and remanded the cause for a new trial, with leave to the plaintiff to amend his complaint. If it was proper in that case to remand the cause with leave to amend, it certainly was not error for the court below to permit the amendment to be made which is complained of in this case.

3. The point is made that the action was prematurely brought. This is rested upon the fact that, after the action was commenced, defendant collected \$228.11 of the partnership funds, and, when it was commenced, a suit for \$150, extra wages, was pending against the defendant and plaintiff, but afterwards dismissed. It is not necessary that all the assets of a partnership be collected, and all claims against it be paid and satisfied, before an action for an accounting is brought. If it were, the surviving partner might never get the affairs of the partnership into a condition when such action could be maintained. On the contrary, the action is often brought to settle

all the affairs of a partnership, and, when necessary, the court can provide for the collection of the assets, and the payment and protection of creditors.

We discover no error in the record, and therefore advise that the judgment and order be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

75 Cal. 513

METROPOLITAN LOAN ASS'N v. ESCHÉ *et al.* (No. 9,814.)

(Supreme Court of California. April 17, 1888.)

1. BONDS—INDEMNITY—RIGHTS OF SURETIES.

In an action on the bond of a secretary of a corporation for misappropriation of funds, it appeared that, prior to the acts complained of, the secretary had been charged with misappropriation, and on an investigation by the corporation, it appearing that he had received money in small amounts, and had, within the time allowed by the regulations of the company, turned it over to the treasurer, he was exonerated. *Held*, that the failure of the company to inform the sureties of such facts would not release them; the court having found, as a matter of fact, that there had been no misappropriation.

2. SAME—REFORMATION FOR MISTAKE—NEGLIGENCE.

In an action on a secretary's bond which was conditioned that the secretary should faithfully perform his duties during his official term, and during any succeeding term for which he might be elected, the sureties claimed that the condition with reference to the succeeding term had been inserted by mistake of both plaintiff and defendant. It appeared that the bond was drawn by the company's attorney and given to the principal, who procured the signature of the sureties, and that the latter had signed the bond on the principal's representation, without reading it. *Held* that, as the principal was not acting as the agent of the company, but for himself, the sureties were not entitled to claim exemption from liability for their own carelessness in failing to read the bond.¹

3. SAME—FUTURE TERMS OF OFFICE—CONSIDERATION.

The fact that a bond given by the secretary of a company for the faithful discharge of his duties is conditioned for the discharge of such duties during any succeeding term to which he may be elected, is no evidence of want of consideration; and where his sureties, in an action on such bond, allege want of consideration, the burden of proof is on them,—the bond being presumptive evidence of consideration.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

This was an action on a bond of indemnity, brought by the Metropolitan Loan Association against Otto Esche, principal, and Henry Hoesch, H. Neilsen,

¹A person capable of reading and understanding an instrument which he signs is bound in law to know the contents thereof, unless prevented by some fraudulent device, such as the fraudulent substitution of one instrument for another. *Taylor v. Fleckenstein*, 30 Fed. Rep. 99, and note. But in an action on a promissory note against one who was unable to read, held, that the fact that the note was misread to defendant was a good defense to the action; the evidence being such as would sustain a finding of the jury that reasonable care had been exercised by defendant. *Bowers v. Thomas*, (Wis.) 22 N. W. Rep. 710. So held that the fact that a person signs a note which has been read to him, without reading it himself, if able, is no excuse for the fraud practiced by the person who reads it, but omits purposely a material portion thereof. *Brooks v. Matthews*, (Ga.) 3 S. E. Rep. 627. See, also, *Warden v. Reser*, (Kan.) 16 Pac. Rep. 60. In an action on a written contract, which was read to defendant by plaintiffs' agent, and which the former disputes on the ground of fraud, where he testifies that he had no spectacles, and could not read without them unless the writing was plain, his negligence in failing to read the contract before signing it is a question for the jury. *Chatham v. Jones*, (Tex.) 7 S. W. Rep. 600.

and Charles Meinecke, sureties in such bond. There was a judgment for plaintiff, and defendants Meinecke and Neilsen appealed.

Cowdery & McCutchen, for appellants. *Naphtaly, Friedenrich & Ackerman*, for respondents.

BELCHER, C. C. This action was brought to recover money misappropriated by Otto Esche, while acting as secretary of the plaintiff, and is based upon a bond given to secure the faithful performance of his duties. The defendants, Charles Meinecke and Henry Neilsen, were two of the three sureties on the bond. The court below gave judgment against Esche for the full amount claimed, and against Meinecke and Neilsen for their proportions of that amount. Meinecke and Neilsen moved for a new trial, and have appealed from the judgment and order denying their motion. The facts shown by the record are as follows: The plaintiff was organized as a corporation to make loans to its members for the purpose of aiding them in acquiring and improving real estate. By its by-laws the directors were required, at their regular annual meeting, which was to be held on the first Monday of March in each year, to elect a secretary, and the secretary so elected was required to "give adequate security, in such amount as the board may direct, for the faithful performance of his duties." The duties of the secretary were to keep precise minutes of all the proceedings of the association and board of directors, and to receive all moneys paid into the association, and pay the same to the treasurer, taking his receipt therefor, on or before the monthly meeting of the directors. In March, 1875, the defendant Otto Esche was elected secretary, and a resolution was passed by the board "that the bond of the secretary, to be given as provided by the by-laws, be fixed at \$7,500 in United States gold coin." Esche gave a bond in the sum required, and the defendants Meinecke and Neilsen signed it as sureties. The condition of the bond reads as follows: "The condition of the foregoing obligation is such that if the said Otto Esche shall well and truly perform all and singular the duties of secretary of said association for and during his official term, and for and during any succeeding terms for which he may hereafter be elected," etc. In April, 1875, Esche entered upon the discharge of his duties as secretary of the plaintiff, and he was annually re-elected thereafter, and continued to act as such secretary until March, 1883, but never gave a new bond. In 1878 a question arose before the board as to whether Esche had misappropriated \$1,225, money which had been paid to him for the association. He admitted that he received the money, but claimed that he received it in small parcels, and, within the time allowed him to do so, deposited the parcels in bank to the credit of the treasurer. The treasurer denied that the money was placed to his credit, or ever came into his hands. Subsequently the matter was referred for consideration to a general meeting of the stockholders, and after some investigation Esche was fully exonerated by them from all liability or blame. In 1881, Esche misappropriated \$4,300 of the association's money, but the fact that he had misappropriated it was not known until early in 1883. Shortly after the misappropriation was discovered, demand was made that the sureties on his bond make good the loss, and, the demand being refused, this action was commenced.

In their answer to the complaint the appellants alleged that, prior to the defalcation for which they are sought to be held liable, Esche became indebted to the plaintiff in the sum of \$1,225, for money which he had received and misappropriated while acting as its secretary, and that the plaintiff, knowing these facts, released him from payment of that indebtedness, and again re-elected him its secretary; that the plaintiff failed and neglected to notify them of the misappropriation or release, and that they had no notice or information thereof until about the month of March, 1883; that, if they had had such notice, they would have withdrawn from the bond before the misappropriation

of the \$4,300 occurred; and that the release, and the neglect on the part of plaintiff to notify them thereof, operated to release them from any subsequently accruing liability on the bond. And they further, by way of cross-complaint, alleged that the words "and for and during any succeeding terms for which he may hereafter be elected," which are found in the bond, were inserted therein by the mistake of both plaintiff and defendants; that, when the bond was given, it was the intention of plaintiff, and all the parties thereto, that it should only bind the sureties thereon during the term of office ending in March, 1876; that, when the bond was executed, it was presented to them by Esche, and they were requested to sign it as his sureties, and they thereupon did sign it, without reading and without any knowledge of its contents, except that, before signing, Esche informed them that the plaintiff's by-laws required the secretary to give security, and that the bond was nothing more than an agreement on their part to be sureties for him for and during the ensuing year; that they first learned, on or about the 23d day of March, 1883, that the words extending their liability were in the bond, and they were informed and believed that the plaintiff, on or about the same date, first learned of that fact. They, therefore, prayed that the bond be reformed by striking out the words "and for and during any succeeding terms for which he may be hereafter elected."

1. The court below found, as to the alleged "shortage" of \$1,225, that Esche did not misappropriate that sum of money, or any part thereof; and that, prior to the misappropriation of the \$4,300, he was not indebted to the plaintiff in any sum of money whatever. There was testimony tending to support the finding, and it is unnecessary, therefore, to consider what would have been the effect of a different finding. Under the well-settled rule in such cases, the judgment cannot be reversed on this ground.

2. The court also found that the words in the bond which appellants asked to have stricken out, were not inserted therein by the mistake of both plaintiff and defendants; that plaintiff well knew, when it received the bond, that those words were in it, and had so known ever since; and that, when the bond was given, it was not the intention of plaintiff, or of all the parties thereto, that it should bind the sureties thereon only during the term of Esche as secretary, ending in March, 1876. There was testimony to support this finding. The bond was drawn by the attorney, and, when signed, was approved by the president of the association. It was delivered to Esche to procure sureties, and he procured the appellants to sign it. Esche testified that he said nothing about the contents of the bond to either Meinecke or Neilsen. Meinecke testified: "Esche showed me the bond, and said I promised him to sign it. I said I supposed it was in the ordinary form of bond, and that it was not necessary for me to read it. He said 'Yes;' so I signed the bond." Neilsen testified: "Esche brought the bond to me; did not have any conversation with him at the time I signed it." In procuring appellants to sign the bond, Esche was not acting as the agent of plaintiff, but for himself. Appellants would have known the contents of the paper if they had read it, as they should have done before signing, and, there being no special relation of trust or confidence between the parties, they cannot claim exemption from liability, because the bond contained a clause of which, in consequence of their own carelessness, they were ignorant at the time. *Hawkins v. Hawkins*, 50 Cal. 558.

3. It is contended for the appellants that there was no consideration for their undertaking to be responsible as sureties after the expiration of the first year. The point is not tenable. The action is based upon a written instrument, and "a written instrument is presumptive evidence of a consideration." "The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it." Civil Code, §§ 1614, 1615. No want of consideration was shown here. Actions upon

similar bonds have been upheld in other courts. *Manufacturing Co. v. Lawrence*, 1 Allen, 339; *Railroad Co. v. Etwell*, 8 Allen, 372; *Oswald v. Mayor of Berwick*, 5 H. L. Cas. 856.

The other points do not require special notice.

We find nothing in the record calling for a reversal, and we therefore advise that the judgment and order be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

75 Cal. 534

ONDERDONK v. CITY AND COUNTY OF SAN FRANCISCO. (No. 9,927.)

(Supreme Court of California. April 19, 1888.)

1. MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—ABUTTING UNITED STATES PROPERTY—LIABILITY OF CITY.

Act Cal. March 13, 1868, authorizes the board of supervisors to pay for street improvements in front of United States property in San Francisco, "provided the government * * * shall by its officers refuse to make such payment." *Held*, that the commanding officer of United States forces stationed on the property, the assistant treasurer, and the secretary of war are proper officers to make such refusal.

2. LIMITATION OF ACTIONS—FAILURE TO FIND ON PLEA OF—HARMLESS ERROR.

Where defendant, in a suit on a writing made within the state, pleaded in bar Code Civil Proc. Cal. § 839, which provides that actions on contracts not in writing, or on writings executed out of the state, shall be barred after three years, his defense is not made out, and failure to find upon it is not material error.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JAMES G. MCGUIRE, Judge.

Action on contract to grade a street, by A. Onderdonk against city and county of San Francisco. Judgment for plaintiff, and defendant appeals.

George Flournoy, Jr., for appellant. *Whittemore & McKee*, for respondent.

FOOTE, C. The appeal herein was taken from a judgment in favor of the plaintiff, Onderdonk, and from an order refusing to grant a new trial to the defendant, the city and county of San Francisco. The judgment was entered on the 24th day of January, 1885. The appeal was taken on the 3d day of November, 1884, which, being premature, must be dismissed, upon the authority of *McLaughlin v. Doherty*, 54 Cal. 519.

The action was brought upon a contract to grade Bay street, in the city and county of San Francisco, from the easterly line of Van Ness avenue to Gough street. In the statement on motion for a new trial, the appellant, viz., the city and county of San Francisco, above mentioned, assigned for error several particulars in which it claimed the evidence to have been insufficient to support the decision made and given, and wherein the court making it did so "against law."

The first point, viz., that the evidence did not show the work to have been completed within the time provided in the contract, is abandoned, and need not be noticed.

It is next contended that, under the provisions of the contract itself, the defendant was not liable. The clause of the contract under discussion is as follows: "And it is agreed and expressly understood by the parties to this agreement that in no case (except where it is otherwise provided in the acts aforementioned and referred to) will the said city and county of San Francisco be liable," etc. The contract was made under and by virtue of an "Act repealing article 4 of an act entitled 'An act to repeal the several charters of the city and county of San Francisco,' etc., approved the 19th day of April, 1856," etc. The clause of the contract *supra* includes no exemption on the

part of the city, aforesaid, to pay for improvements made of the kind sued for here, under any law which has become such since 1856. The act authorizing the grading of Bay street, for which this action is instituted, was approved on the 1st day of April, 1878, and has been held to be a modification of and supplemental to the general street laws then in force. *Jennings v. Le Roy*, 63 Cal. 397. According to the terms of that act, the board of supervisors of the defendant here were empowered to have the grading done for which the contract sued on was executed. By the act to be found at page 148, Acts 1868, the board of supervisors of the city and county of San Francisco were authorized to pay for work of the kind done in pursuance of the contract sued on herein, provided the assessments therefor were made in accordance with law; and there is no specification in the statement that the assessment for the street improvement, here alleged to have been made, was not in pursuance of the law in such cases made and provided. So it would appear that the board of supervisors were authorized to have the grading done and to pay for the work, and that the defendant was liable on the contract as made, provided there be not some other bar to the action than the one just discussed. It seems that the proviso was fully met, viz., that the refusal of the government of the United States, by its officers, to pay for such street improvements as this, mentioned in the act of 1868, *supra*, was necessary before the city should pay for them; that such refusal to pay, upon due application, was made by the general in command of the forces of the United States in charge of the government reservation, in front of which the improvement was made; also by the assistant treasurer of the United States, who pays all moneys at San Francisco which are due from that government, on proper requisitions, and by the secretary of war, who is the head of the war department of the government, upon whose requisitions all moneys for army purposes are paid. Rev. St. U. S. 1878, §§ 214, 3673. And the reason of such refusal, as stated by the commanding general and the secretary of war, was that congress had appropriated no money to pay for such improvement. It is not perceived from what other officers of the government an authorized refusal could more properly come, or upon whom a more proper demand for payment could have been made. Further, if there was no appropriation to pay for the improvement, no demand could cause its payment. It must of necessity have been refused payment; and as soon as the fact appeared, as it does in the record, that no money could be paid, because none had been appropriated by congress, there was an end of any further need for a demand that it be paid. The refusal to pay it must have been made by any officer of the government whatsoever, unless he paid it out of his own pocket; and that was not contemplated by the law. The law seems to have been framed with a view that a demand be made on the proper officer of the government; so that, if any appropriation had been made therefor, the city could get the benefit of it, and, if there was no appropriation, the city would pay, and afterwards the government could refund the money, which seems to have been done once before, when paving and curbing was done by the city in front of government property. St. at Large, 1874-75, p. 469. The property in front of which the improvement herein was made, appears to have been declared a military reservation under orders of President Fillmore, of date November 6, 1850, December 31, 1851, and has been held to be a valid reservation for military purposes. *Grisar v. McDowell*, 6 Wall. 381. It was in the immediate charge of the then commander of the department of California, Gen. McDowell, and the secretary of war, who has control of all military posts, as is shown by reference to various acts of congress, and the recognized rule laid down by other departments of the government. 1 Lester, Land Law, 692; 18 St. at Large, 85; 1 Copp, Pub. Land Laws, 117-155; 21 St. at Large, 69-198.

It is urged that there should have been a new trial granted for a failure to find upon the defense of the statute of limitations, under subc. 1, § 339, Code

Civil Proc. We find nothing in this subdivision referred to germane to the action. It relates to a contract, obligation, or liability not founded on an instrument in writing, or upon an instrument in writing executed out of this state. But in this case the action is based either on a contract founded on an instrument in writing, or on an obligation or liability arising out of an assessment made in writing, both executed in this state; and, whatever it may be, it is clear that the defense is not made out. A failure to find on such defense would, then, be an immaterial error, for which the order denying a new trial should not be reversed.

We perceive no error in the findings that the action was not barred by the provisions of sections 338, 342, Code Civil Proc., nor does the appellant in its points and authorities contend to the contrary, although doing so in the assignment of errors.

The point made as to the sufficiency of the pleadings was evidently made under the supposition that the appeal from the judgment would be entertained here; but, as that cannot be, the objections to the pleadings will not be considered on the appeal from the order refusing a new trial. *Shepard v. McNeil*, 38 Cal. 72; *Mason v. Austin*, 46 Cal. 385; *Jacks v. Buell*, 47 Cal. 163. For these reasons, the order refusing a new trial should be affirmed.

I concur: BELCHER, C. C.

I concur in the conclusion: HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order refusing a new trial is affirmed, and the appeal from the judgment is dismissed.

75 Cal. 552

FOORMAN v. WALLACE. (No. 9,891.)

(Supreme Court of California. April 20, 1888.)

1. VENDOR AND VENDEE—PURCHASER AT EXECUTION SALE—PRIORITY OF UNRECORDED DEED—CIVIL CODE CAL. §§ 1107, 1214.

A *bona fide* purchaser at an execution sale acquires a good title as against a prior deed where such deed is recorded after the sheriff's certificate, but before the sheriff's deed, under Civil Code Cal. §§ 1107, 1214, giving priority to instruments first recorded.

2. SAME—BONA FIDE PURCHASER—EXECUTION SALE.

A judgment creditor who purchases land at a sale under his own judgment, and merely credits the net proceeds upon such judgment, is a purchaser in good faith, and for a valuable consideration, within the meaning of Civil Code Cal. § 1214, giving deeds executed in good faith, and for a valuable consideration, which are first recorded, priority.

3. SAME—TITLE UNDER RECORDED INSTRUMENT—WHAT IS—CIVIL CODE CAL. § 1107.

A sheriff's certificate of sale, which, by the terms of Code Civil Proc. Cal. § 700, transfers to the purchaser all the right, title, and interest of the judgment debtor, subject to redemption, is an instrument whereby a title is acquired, within the meaning of Civil Code Cal. § 1107, providing that a purchaser who "acquires a title by an instrument that is first duly recorded" may contest a prior unrecorded deed.

4. SAME—CERTIFICATE OF SALE—RECORDATION—NOTICE.

Under Pol. Code Cal. § 4237, requiring the recorder to record all certificates of sale of real estate, and not providing for any acknowledgment of the same, such a certificate, filed and recorded, imparts notice to the world although unacknowledged.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

This action was brought by plaintiff, Simon Foorman, to redeem from a mortgage, and obtain possession of certain land, held by the defendant, James H. Wallace. William Treen, the owner of the land in question, conveyed the same on the 30th day of May, 1878, to one Siefert, but the deed was not put on record until the 17th day of March 1880. Siefert, on the 3d day

of October, 1881, conveyed to plaintiff. The defendant, James H. Wallace, having recovered judgment against Treen, purchased the land on the 30th day of September, 1879, at an execution sale, under his own judgment, and the sheriff's certificate of such sale was recorded on the 3d day of October, 1879. No redemption was made, and upon the 3d day of April, 1880, he received the sheriff's deed, not having prior to that time any knowledge or information of any conveyance by Treen. Judgment was rendered for the defendant, sustaining his title under the sheriff's certificate and deed, and the plaintiff appeals.

R. Thompson and Frank Otis, for appellant. *Jarboe, Harrison & Goodfellow*, for respondent.

SEARLS, C. J. The question involved in this appeal may be stated thus: A. brings an action against B., sues out and levies an attachment upon the land of the latter, obtains a judgment upon which an execution issues, and the land in question is sold. A., the judgment creditor, becomes the purchaser, receives a sheriff's certificate of sale, which is filed and recorded, and in due time receives a sheriff's deed of the premises. B., the judgment debtor, had conveyed the land, before suit brought, by a deed which was not recorded, and of which A. had no notice until after his receipt and record of the certificate of sale, but which was duly recorded before the sheriff's deed issued. If, upon these facts, the title of A. under his sheriff's deed is paramount to that of B. under his deed recorded after the sale and recordation of the certificate, and before the sheriff's deed was recorded, then the judgment and order appealed from should be affirmed; otherwise a reversal should be had. In other words, is the interest acquired by a purchaser of real estate at a sheriff's sale, whose certificate of sale is properly recorded, destroyed by the production of a deed from the judgment debtor, executed anterior to the sale, but not recorded until after the record of the certificate of sale, and just prior to the expiration of the time for redemption? Appellant answers this question in the affirmative, and further contends that respondent, having purchased the land at a sale under his own judgment, and having merely credited the net proceeds of the sale upon such judgment, is not a *bona fide* purchaser for a valuable consideration.

It has often been held in this state that a conveyance in consideration of the cancellation of a pre-existing indebtedness is a conveyance for a valuable consideration within the meaning of section 1214, Civil Code. *Gassen v. Hendrick*, 16 Pac. Rep. 242; *Frey v. Clifford*, 44 Cal. 335; *Schluter v. Harvey*, 65 Cal. 158, 3 Pac. Rep. 659. A like doctrine prevailed under the recording act in force prior to the Code. *Hunter v. Watson*, 12 Cal. 377, where it was said: "A judgment creditor, purchasing at his own sale, without notice, is a *bona fide* purchaser within the act." It follows from these decisions and the findings, that respondent stands in the position of an innocent purchaser for a valuable consideration, without notice at the date of his purchase, in the same manner and to the same extent as an innocent third party would do who had purchased and paid his money.

The question recurs, was the sheriff's certificate of sale, issued to the respondent and recorded, good as against an unrecorded deed? Section 1107, Civil Code, provides as follows: "Every grant of an estate in real property is conclusive against the grantor, also against every one subsequently claiming under him except a purchaser or incumbrancer who in good faith, and for a valuable consideration, acquires a title or lien by an instrument that is first duly recorded." Appellant contends that a sheriff's certificate is not an instrument whereby a title or lien is acquired within the purview of section 1107, Civil Code. An instrument is a writing which contains some agreement, and is said to be so called because it has been prepared as a memorial of what has taken place or been agreed upon. It includes conveyances,

leases, mortgages, bills, bonds, promissory notes, wills, etc. Bouv. Law Dict. In *Hoag v. Howard*, 55 Cal. 564, it was held that a writ of attachment was not an instrument within the sense of that term as used in section 1107, Civil Code, and therefore a deed executed prior to a levy of the attachment upon the property conveyed, though not recorded until after the levy, would prevail over the attachment. A writ of attachment, an execution, or other writ is not the record or memorial of any agreement, but simply the mandate of the law commanding something to be done, or not to be done, and is quite independent of the will of the party against whom it runs, and is in no sense an embodiment of his agreement, will, or wishes; and we fully concur in the view taken by the court in that case of the writ of attachment. The court in the same case defined the term "instrument," as used in the Civil Code, to mean "some written paper or instrument signed and delivered by one person to another, transferring the title to, or creating a lien on, property, or giving a right to a debt or duty." The sheriff, under a proper writ, is clothed by law with the power to sell and convey the property of a judgment debtor. This can only be done in the cases, and in the manner, and subject to the limitations, provided by law, but, when this is accomplished, the process is as effective in passing the title as a conveyance by the debtor himself. When real estate is thus sold by a sheriff, "the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto; and, when the estate is less than a leasehold of two years' unexpired term, the sale is absolute. In all other cases the property is subject to redemption," etc. Code Civil Proc. § 700. The sheriff is required to give the purchaser a certificate of sale, containing a specification of the facts enumerated in the statute, and a duplicate of this certificate must be filed in the office of the county recorder. The certificate is a memorial signed by the sheriff, in which what has taken place at the sale is set forth. It is the evidence of a sale, whereby, subject to the right of redemption, and of possession in the judgment debtor for the time allowed therefor, the entire equitable title is conditionally vested in the purchaser, subject to be defeated by a redemption; but, if not so redeemed, the certificate is evidence of his right to a deed which shall vest in him the dry, legal title which remained in the judgment debtor. The transfer is not perfect until the execution and delivery of the sheriff's deed, but, by the doctrine of relation, the deed, when thus executed, is to be deemed and taken as though executed at the date when the lien of which it is the sequence originated. The sheriff's certificate to the purchaser is the evidence of the equitable interest which the purchaser has in the land, and is an instrument whereby an interest or title is created, within the meaning of section 1107, *supra*. *Page v. Rogers*, 31 Cal. 301."

By section 4237, Pol. Code, the recorder is required to keep in his office a book to be called "Certificates of Sale," and to record therein all certificates of sale of real estate sold under execution, etc. When the case of *Page v. Rogers*, cited above, originated, the law in force provided for filing certificates of sale, but did not contain a provision for recording them. The court in that case held that the purpose of filing a duplicate of the certificate of purchase made at execution sale was to give notice to third persons of its existence and contents, and although the statute did not define the object, or prescribe the effect, of such filing, yet the effect was to impart constructive notice of the estate acquired under the certificate to subsequent purchasers and attaching creditors, and that such notice continued after the time for redemption had expired, and until the sheriff's deed was executed and recorded. It is objected that there is no provision for the acknowledgment of this class of instruments, and, as this was not in fact acknowledged, its record cannot impart notice. The answer to this proposition is that, the legislature having seen fit to provide for filing and recording duplicate certificates of sale of real property by the sheriff without acknowledgment, none is needed. They are

records of the official acts of a public officer, and, like judgments, need only to be authenticated in the manner provided by law. Doubtless it would be within the power of the law-makers to provide that all instruments should be recorded so as to impart notice without the formality of proof or acknowledgment, had it been deemed proper to do so. As it is, the law requires the sheriff to file, and the recorder to record, duplicate certificates of sale of real property, without providing for their acknowledgment, and this court having long since judicially declared the effect of such filing, and the rule as thus established having become the basis upon which property rights are established, were we inclined to change the conclusion reached, we should hesitate to do so for manifest reasons.

We conclude, therefore:

1. That the certificate of sale given by the sheriff to respondent was an instrument whereby he acquired a title within the meaning of section 1107, Civil Code.

2. That the filing and recording of the duplicate certificate imparted constructive notice to all the world.

3. That such certificate, having been recorded before the deed under which appellant claims, and without actual notice of the existence thereof by respondent, it is prior in time and paramount to appellant's title under such deed, and that, as against respondent, the title of appellant under his unrecorded deed is to be treated as if it had never existed.

The judgment and order appealed from are affirmed.

We concur: MCKINSTRY, J.; PATERSON, J.

75 Cal. 548

DANIEL *et al.* v. SMITH *et al.* (No. 11,051.)

(Supreme Court of California. April 20, 1888.)

GIFT—CAUSA MORTIS—WHAT CONSTITUTES.

Where one a few days before his death delivers to another his bank-book, requesting him to keep it for his daughter, and upon his death deliver it to her, but does not part with the present dominion or control of the book, or the money represented thereby, *held*, there is not a *donatio causa mortis*.¹

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

This was an action by Emma Daniel and John Daniel, her husband, to recover of the Hibernia Savings & Loan Association, one of the defendants, money on deposit with it. The plaintiff Emma Daniel claimed that the money was given her as a *donatio causa mortis* by Abraham Fielding, the depositor, her father, shortly before his death. Holland Smith, as administrator of the estate of Abraham Fielding, set up a claim to the money, and was made defendant to test his claim. It appeared from the evidence that Abraham Fielding died on the 12th day of May, 1880. That one David Cornfoot, upon the 7th day of May, 1880, called upon Fielding, who was ill, and who then de-

¹To constitute a valid gift *causa mortis*, it must be made during some illness or peril of the donor, and in contemplation or expectation of death from that illness or peril, and death must also ensue therefrom. *Parcher v. Bank*, (Me.) 7 Atl. Rep. 266. Actual delivery by the donor in his life-time is necessary, or, if the nature of the property is such that it is not susceptible of corporeal delivery, the means of obtaining possession of it must be delivered. *Emery v. Clough*, (N. H.) 4 Atl. Rep. 796, and note. There must be as complete a delivery as the nature of the property will admit of. *Gano v. Fisk*, (Ohio,) 3 N. E. Rep. 532, and note. See *Vandor v. Roach*, (Cal.) 15 Pac. Rep. 354; *Henschel v. Maurer*, (Wis.) 34 N. W. Rep. 926; *Woodburn v. Woodburn*, (Ill.) 14 N. E. Rep. 53. To sustain a gift the intention of the donor must be established by clear and precise evidence, *Appeal of Madeira*, (Pa.) 4 Atl. Rep. 903; and a gift *causa mortis* must be completely executed, precisely as required in the case of gifts *inter vivos*, subject to be divested by the happening of any of the conditions subsequent, *Basket v. Hasel*, 2 Sup. Ct. Rep. 415; *Shackelford v. Brown*, (Mo.) 1 S. W. Rep. 390.

livered into the hands of Cornfoot his bank-book of deposit in the Hibernia Savings & Loan Association, telling him to keep it during his sickness, and to take charge of his effects, and collect money on a mortgage he owned; and that, if it was necessary to use any of the money on deposit, he would give an order to draw the money; and that Cornfoot should give the book to his daughter, Emma Daniel, when he died. That Cornfoot took the book, and kept it until Fielding's death, when he gave it to her as requested. The plaintiffs appeal from judgment against them.

Sawyer & Burnett and F. J. French, for appellants. Nathaniel Holland and Joseph Leggett, for respondents.

BELCHER, C. C. This is the second appeal in this case, and it was taken from a judgment in favor of the defendants, and from an order denying a new trial. The first appeal was from a judgment in favor of the plaintiffs, and the decision thereon may be found reported in 64 Cal. 346. On turning to the report referred to, it will be seen that the court, by THORNTON, J., after carefully reviewing the testimony, summed up the law applicable to this class of cases as follows: "To constitute a *donatio causa mortis* the gift must be made in contemplation of the near approach of death by the donor, to take effect absolutely only upon the death of the donor. There must be a delivery of the property, either to the donee, or to some person for his use or benefit, and the donor must part with all dominion over the property, and the title must vest in the donee, subject to the right of the donor at any time during his life to revoke the gift." And further along in the opinion it is said: "In view of the strict requirements of the law as to delivery shown by the foregoing, we cannot hold that a delivery was established in this case. Nor does it appear that the dominion or control over the bank-book, or the money in the loan society, ever passed from Fielding, or that any interest ever vested in the alleged donee. There was no language of gift used. On the contrary, the testimony indicates, in our judgment, the creation by Fielding of a bailment in trust or agency, which was to terminate with the death of Fielding."

This decision must be treated as the law of the case, unless the facts shown on the second trial were materially different from those shown on the first trial. It is urged for the appellants that there was, on the last trial, proof of the "manual tradition" of the bank-book, and that this difference in the testimony entitled the plaintiffs to have judgment entered in their favor. It is true that Cornfoot testified very clearly that the bank-book was actually placed in his hands by Fielding, and that he took it away, and kept it till after Fielding died, and then delivered it to Mrs. Daniel. But in other respects there was no material change. It did not appear from the testimony given at the first trial that Fielding parted with the dominion or control of the bank-book, or the money represented thereby, and the testimony in the present transcript is, upon that question, substantially what it was before. There was then nothing showing that any interest ever vested in the alleged donee, and no different showing upon that subject is made now. There was no language or gift used before, and none is shown now. All the authorities seem to hold that, before a gift *causa mortis* can take effect, the donor must part, not only with the possession, but also with all present control and dominion over the subject of the gift. It was so declared in the cases cited by Judge THORNTON upon this point; and in *Basket v. Hassell*, 107 U. S. 602, 2 Sup. Ct. Rep. 415, in which a very learned and exhaustive opinion was delivered by Mr. Justice MATTHEWS, the following language is used: "The instrument or document must be * * * delivered to the donee, so as to vest him with an equitable title to the fund it represents, and to divest the donor of all present control and dominion over it; * * * and a delivery which does not confer upon the donee the present right to reduce the fund into possession by enforcing the obligation according to its terms will not suffice." In that case the donor

had delivered a certificate of deposit into the hands of the donee, but the court said: "This indorsement which accompanied the delivery qualified it, and limited and restrained the authority of the donee in the collection of the money so as to forbid its payment until the donor's death. The property in the fund did not presently pass, but remained in the donor, and the donee was excluded from its possession and control during the life of the donor. That qualification of the right which would have belonged to him if he had become the present owner of the fund, establishes that there was no delivery of possession according to the terms of the instrument, and that, as the gift was to take effect only upon the death of the donor, it was not a present executed gift *mortis causa*, but a testamentary disposition." So in *Walter v. Ford*, 74 Mo. 195, checks were drawn by Walter, and by him delivered to Ford, with directions to deliver them to the parties in whose favor they were drawn if he (Walter) should die, but, if he recovered, to return them to him. The court said: "Ford was the agent of Walter, and bound to obey his instructions, and, so doing, could not have delivered the checks to any one while Walter lived. If they had been given to Ford to be held for the payees, at all events the authorities cited to show that a delivery to an agent or trustee of the beneficiaries is a sufficient delivery would be in point; but that is not this case. The checks were given to Ford, not to be delivered in the life-time of Walter, but after his death. It was in the nature of a testamentary disposition, and possessed none of the elements of a *donatio causa mortis*." Counsel for appellants say there can be no doubt that it was the intention of Mrs. Daniel's father that she should have this money on his death, "and the only question is, shall this intention be defeated by the technical rules of law?" And they "submit that the testimony is clear in making a case that appeals to justice, and that the judgment will be reversed if the court is not bound by the cases."

We consider the court bound by the rules of law established by the cases, and therefore advise that the judgment and order be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

75 Cal. 563.

WATERS v. DUMAS *et ux.* (No. 9,774.)

(Supreme Court of California. April 20, 1888.)

1. PARTIES—MISJOINDER OF WIFE—DEMURRER.

Where a complaint charges defendants with a joint trespass, but does not make it appear that defendants are husband and wife, a demurrer for misjoinder of the wife as a party will be overruled.

2. JUDGMENT—RENDITION AND ENTRY—LIMITATION.

Under Code Civil Proc. Cal. § 664, requiring judgment to be entered upon a verdict within 24 hours after its rendition, and section 561, subd. 6, providing as a penalty that the action shall be dismissed when judgment is not entered within six months after verdict, the court does not lose jurisdiction of the cause if judgment is entered within six months after the verdict is rendered.

3. DAMAGES—EXEMPLARY DAMAGES—WHEN ALLOWED—CIVIL CODE CAL. § 3294.

Under Civil Code Cal. § 3294, providing that in any action of tort where defendant has been guilty of oppression or malice the jury may give exemplary damages, a charge that plaintiff could recover only actual damages was properly refused, where there was evidence of a wanton, aggravated, and malicious trespass by defendants.

Department 2. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Action by Eliza Waters against Lucien Dumas and Emilie Dumas, his wife, for damages for trespass on real estate. Judgment for plaintiff. Defendants appeal.

Robert Ash, for appellants. P. T. Trusseau, (N. B. Mulville, of counsel,) for respondent.

SEARLS, C. J. This is an action to recover damages for a trespass upon real property. Plaintiff had a verdict for \$301, for which sum, together with costs, judgment was rendered in her favor. The appeal is from the final judgment, and from an order denying a new trial. The complaint avers, in substance, that plaintiff was a resident and occupant of the house No. 50 Stevenson street, San Francisco, (describing it;) that on or about the 13th day of February, 1884, the defendants wrongfully and maliciously took down, removed, and carried away the front door of said house; took out and carried away the windows therefrom; stopped and stuffed the flues of the chimney so as to prevent the escape of smoke through the same; that the weather was wet, cold, and stormy, and that, when plaintiff had tacked cloth to the windows to keep out the cold, defendants tore down the same, threatened and reviled her, struck her with a board or piece of stick; that by reason thereof, and by reason of the cold and the open windows, etc., plaintiff suffered severely, both mentally and physically, to the extent of \$1,000. Defendant demurred to the complaint, and urges that as Emilie Dumas, one of the defendants, was the wife of Lucien Dumas, her co-defendant, and as no reasons are given for joining her as a defendant, the demurrer should have been sustained. The answer to the proposition is that there is not a word in the complaint either showing, or tending to show, that the parties defendant are husband and wife. They are declared against as joint trespassers, and the allegations are amply sufficient to render them liable as such.

The motion to set aside the verdict because judgment was not entered thereon within 24 hours after its rendition was properly denied. It is true, section 664, Code Civil Proc., requires judgment to be entered by the clerk in conformity with the verdict within 24 hours after its rendition, unless the cause is reserved for argument or consideration, or a stay of proceedings is granted. The court does not, however, lose jurisdiction of the cause by a failure to enter the judgment within the time prescribed, or by failure of the clerk to perform his duty. The only penalty provided for such a case is to be found in subdivision 6, § 581, Code Civil Proc., which authorizes the court to dismiss the action, where, for six months after verdict or final submission, the party entitled to judgment neglects to demand or have the same entered. In this case less than four months elapsed between verdict and judgment. We have referred to this ruling of the court for the reason that, assuming all that appellant claims, there was no error; but, had there been, there is no bill of exceptions or authentication of the proceedings sufficient to support an assignment of error.

The third instruction asked by defendants, conceding but not holding it to be presented in the record in such form as warrants its review, was properly denied. It is as follows: "You are instructed that the only damages the plaintiff is entitled to recover in this action, if any, is such damages as she may have sustained in the temporary use and occupation of the premises described in the complaint. No special damages are alleged, and no special damages can be allowed under the plaintiff's complaint." The action was for a wanton and malicious trespass. Special facts in aggravation of damages were set out in the complaint, and there was at least some testimony in support of the allegations. The instruction was, therefore, properly denied, and the proofs were sufficient to warrant exemplary damages under section 3294, Civil Code.

We see no merit in the appeal; and, but for the fact that the testimony at the trial shows some extenuating circumstances, and that we deem the verdict quite large enough, we should feel inclined to add a penalty as for a frivolous appeal. The judgment and order appealed from are affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

75 Cal. 558

M'LENNAN v. OHMEN. (No. 11,381.)

(Supreme Court of California. April 20, 1888.)

1. SALE—WARRANTY—ACTION FOR BREACH—EVIDENCE.

In an action for breach of warranty of a contract, in which plaintiff agreed to give defendant, for a new engine, a certain sum of money and an old engine, there being no evidence as to what the old engine was worth, or what plaintiff estimated it to be worth, the finding of the court as to what the contract price of the new engine was is immaterial.

2. SAME—WHAT CONSTITUTES A WARRANTY.

Any affirmation, at the time of a sale, as to the quality or condition of the thing sold, if intended as a warranty, and relied on by the purchaser, is a warranty; and, there being evidence to show such facts, the question should be submitted to a jury for determination.

3. APPEAL—REVIEW—WEIGHT OF EVIDENCE.

The trial court has a better opportunity to judge of the weight and conclusiveness of evidence than the appellate court, and findings of fact of such court will not be disturbed where there is evidence tending to support them.

4. SAME—HARMLESS ERROR—PLEADING—SUPPLEMENTAL COMPLAINT.

Under Civil Code Cal. § 3283, providing that damages may be awarded, in an action for breach of warranty, for detriment resulting after the commencement thereof, the allowance of the filing of a supplemental complaint, claiming damages since the commencement of the action, where there is nothing in the record to show that such complaint was served or answered, or that any such damages were allowed, is not reversible error.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco. F. W. LAWLER, Judge.

Action by F. P. McLennan against W. H. Ohmen for damages for breach of warranties of a steam-engine. Judgment for plaintiff. Defendant appeals.

Royce & Cummins, for appellant. *Olney, Chickering & Thomas*, for respondent.

BELCHER, C. C. This is an action to recover damages for breach of warranties of a steam-engine. The plaintiff had a mill in the city of San Francisco, in which he carried on the business of wool scouring. The work in the mill was done by machinery, which was propelled by a steam-engine. The defendant was a manufacturer of steam-engines in the same city. The plaintiff had an old "slide-valve engine," and was informed that an automatic cut-off engine would save him a large amount of fuel. On or about the 1st day of May, 1884, defendant agreed to manufacture and sell to plaintiff, and plaintiff agreed to purchase from defendant, a 12x12 cut-off engine to be used in plaintiff's mill; and the price to be paid for the same was \$750 and the old engine. The defendant manufactured the new engine, and delivered it to the plaintiff on or about the 1st day of July, 1884, and the plaintiff then paid the defendant therefor the price agreed upon. The new engine was at once placed in the mill, and was used by the plaintiff in running his machinery until the 17th day of October, 1884, when he offered to return it to defendant; because of its defects, and failure to fulfill the warranties made by defendant, and demanded the return of the old engine, and remuneration for all damages which he had sustained in consequence of defendant's failure to comply with his contract. The defendant refused to accede to this demand, and this action was afterwards brought. It is alleged in the complaint that the engine at the time of its delivery to the plaintiff by defendant, was not sound and merchantable; that it possessed a latent defect, not disclosed to plaintiff, in this, that the valves thereof were leaky; that it was not reasonably fit for the purpose for which it was made, to-wit, for the purpose of running plaintiff's wool-scouring machinery; that, at the time of making the contract for the manufacture and sale of the engine, defendant warranted it to save plaintiff 25 per cent. of his coal bills for running his machinery, and thereby induced

plaintiff to enter into the contract; that the engine did not save 25 per cent. in the coal bills, but, on the contrary, caused an increase in the coal bills of 40 per cent.; and that plaintiff had sustained damages, by reason of the premises, in the sum of \$2,500, for which he prayed judgment.

The court below found all the facts to be as alleged in the complaint, except that the damages sustained by the plaintiff were fixed at \$1,600; and for that sum judgment was entered in his favor. In his statement on motion for new trial, defendant specifies as not justified by the evidence (1) the finding that the contract price of the engine manufactured by defendant for plaintiff was \$1,000; (2) the finding that defendant warranted the engine to save plaintiff 25 per cent. of his coal bills; (3) the finding that the engine increased plaintiff's coal bills 40 per cent.; and (4) the finding that plaintiff had sustained damages in the sum of \$1,600. The other findings, in reference to the implied warranties, under sections 1768, 1769, and 1770 of the Civil Code, are not questioned.

The question raised under the first specification is not material. Plaintiff testified that, at the beginning of the negotiations, defendant "stated that he would furnish one of his 12x12 automatic cut-off engines for \$850 in money and my old engine, making \$1,000." Plaintiff afterwards offered \$750 and his old engine; and, as defendant was to have six weeks in which to manufacture the new one, he agreed to accept the price offered. There is nothing to show what the old engine was worth, or what plaintiff estimated it to be worth, and we consider it quite immaterial whether the finding correctly fixed the contract price at \$1,000, or should have fixed it at \$900.

As to the question raised under the second specification, it is enough to say that we think there was evidence from which the court might find the express warranty alleged. To create an express warranty the word "warrant" need not be used, nor are any particular words necessary. Any affirmation made at the time of the sale, as to the quality or condition of the thing sold, will be treated as a warranty, if it was so intended, and the purchaser bought on the faith of such affirmation; and whether it was so intended, and the purchaser acted upon it, are questions of fact for the jury. 5 Wait, Act. & Def. 555; *Polhemus v. Heiman*, 45 Cal. 573; *Horton v. Green*, 66 N. C. 596.

So, as to the third specification. There was evidence tending to show that the new engine consumed as much as 40 per cent. more coal than the old one in doing the same work. We cannot, therefore, say that this finding was not justified.

The law as to the damages which may be recovered in a case of this kind is declared in the Civil Code as follows: "Sec. 3313. The detriment caused by the breach of a warranty of the quality of personal property is deemed to be the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time. Sec. 3314. The detriment caused by the breach of warranty of the fitness of an article of personal property for a particular purpose is deemed to be that which is defined by the last section, together with a fair compensation for the loss incurred by an effort in good faith to use it for such purpose." The plaintiff testified that he had "expended in money since the Ohmen engine was put in, in an attempt to make it do what it was wanted to do, \$1,087.51;" and it was admitted that the then present value of the engine was only \$250. It is claimed for the appellant that the plaintiff's testimony as to some of the items of his expenditures was indefinite and uncertain, and that some of the money alleged to have been expended by him ought not to have been considered in estimating his damages. It is true, the testimony seems open to criticism, but the court below had a better opportunity to judge of its weight and worth than we have. The court evidently rejected some of the items, or the damages would have been placed at a higher figure than they were. We are not informed which items were re-

jected, or how the exact sum of \$1,600 was fixed upon; but, looking at all the testimony, we cannot say that the court was not authorized to find as it did.

During the progress of the trial the plaintiff was permitted, against the objections of the defendant, to file a supplemental complaint, setting forth "that since the commencement of this action the said plaintiff, by reason of the breach of the warranties set forth in said complaint, has suffered damage in the further sum of \$141.05," for which he prayed judgment. Conceding that the court erred in permitting the supplemental complaint to be filed, still we are unable to see that defendant was prejudiced thereby. There is nothing to show that it was served or answered, or that any damages claimed under it were allowed. Besides, plaintiff was entitled, under his original complaint, to recover damages "for detriment resulting after the commencement" of his action. Civil Code, § 3283. Looking at the whole record, we find no sufficient cause for reversal of the judgment, and therefore advise that the judgment and order be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

75 Cal. 525

BRISON v. BRISON. (No. 12,364.)

(Supreme Court of California. April 19, 1888.)

1. TRUSTS—CONSTRUCTIVE TRUSTS—STATUTE OF FRAUDS.

Under Civil Code Cal. § 1572, defining as actual fraud a promise made without intention of performing it, and with intent to induce another to enter into a contract, an oral promise made by a wife, upon a conveyance of land from her husband, to reconvey the same when requested, with no intention to keep such promise, is such actual fraud as to give rise to a trust, and bring the promise within a provision of the statute of frauds excepting from its operations trusts arising by operation of law.

2. SAME—RESULTING TRUSTS—CONFIDENTIAL RELATIONS.

Under Civil Code Cal. § 158, making transactions between husband and wife subject to rules controlling persons occupying confidential relations, a conveyance of land by a husband to his wife, upon her oral promise, in which the husband had confidence, to reconvey the land when requested, is constructively fraudulent, and gives rise to such a trust as to bring such oral promise within a provision of the statute of frauds excepting from its operations trusts arising by operation of law.

3. SAME—ACTION TO ESTABLISH—PAROL EVIDENCE TO CONTRADICT DEED.

In an action by a husband to compel his wife to reconvey to him certain lands conveyed to her upon her oral promise to reconvey them when requested, parol evidence is admissible to contradict the consideration expressed in the deed, and to show fraud and a resulting trust.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

A. P. Catlin and Add. C. Hinkson, for appellant. A. L. Hart, for respondent.

HAYNE, C. This was a suit to have a trust declared as to real property, and for a conveyance. The complaint shows substantially the following facts: The plaintiff and the defendant were husband and wife. The plaintiff was the owner of the property in controversy, upon which there was a mortgage. In order to raise money to pay off the mortgage, the plaintiff determined to go to Arizona, and engage in business there, and was desirous of making a will before his departure, so that the property should go to his wife. But being influenced by the wish to save her the expense of probate proceedings in case of his death, and having confidence in her, and relying on her parol promise that she would reconvey to him upon his request, he made a deed to her absolute in form, and took no written acknowledgment from her. The deed recited that it was made in consideration of love and affection, and of the sum

of \$1, the receipt of which was acknowledged. But it is averred that, "though said deed recites a consideration, yet in truth and in fact there was no consideration therefor, and no money was paid or intended to be paid as a consideration for said deed." It is also averred that the promise by which plaintiff was induced to make the deed was in bad faith and false, and "made with intent on her part to deceive, and did deceive, the plaintiff." The defendant having refused to reconvey the property, the plaintiff brought this suit to compel a reconveyance. The court below gave final judgment for the defendant upon demurrer, and the plaintiff appeals. The argument for the respondent is based upon the statute of frauds, and upon the rule that a writing shall not be contradicted or added to by parol evidence.

The statute of frauds expressly provides that a contract to convey land shall be void unless in writing (Civil Code, § 1624, subd. 4,) and that no trust in real property shall be valid unless created by writing or by operation of law. Civil Code, § 852. Under these provisions there can be no doubt but that the defendant's promise to convey was invalid, and could not be enforced. It is to be observed, however, that the statute excepts from its operations such trusts as arise "by operation of law." Substantially the same exception is in the English statute of frauds, and in the statutes of most of the United States. And the universal construction given to it is that it excepts from the operation of the statute, among other things, trusts which arise from fraud, actual or constructive, or, as they are termed, constructive trusts. It is no longer worth while for any counsel to argue against this construction of the statute. The only point which is open to debate in cases of this character is whether the facts show such a case of fraud as falls within the exception. Such fraud may be either actual or constructive; and, in our opinion, both exist in the case before us.

1. We think there was actual fraud. As above stated, the complaint shows that the parol promise upon which plaintiff relied was false and "in bad faith," and "made with intent to deceive." The construction which we think must be given to this averment is that the promise was made without any intention of performing it. This is a well-recognized species of fraud. See *Bigelow, Fraud*, (Ed. 1888,) 483, 484; *Sandfoss v. Jones*, 35 Cal. 481, 482. And the Civil Code expressly provides that "actual fraud * * * consists in any of the following acts committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: * * * A promise made without any intention of performing it." Civil Code, § 1572. Now, inasmuch as it is admitted by the demurrer that the promise was made without any intention of performing it, we think the case falls directly within the provision. An instance of the application of the principle to facts similar to those of the case before us is *Newell v. Newell*, 14 Kan. 202. It is to be observed of this ground that the essence of the fraud is the existence of an intent, at the time of the promise, not to perform it. But for such intent there would be no actual fraud; for it is well settled that the mere failure to fulfill a promise is not fraud. *Perry v. McHenry*, 13 Ill. 236; *Wheeler v. Reynolds*, 66 N. Y. 234; *Levy v. Brush*, 45 N. Y. 589; *Burden v. Sheridan*, 86 Iowa, 125; *Cowan v. Wheeler*, 43 Amer. Dec. 283; *Boyd v. Stone*, 11 Mass. 348. But, if the evil intent existed, there was actual fraud; and, so far as this ground is concerned, it is immaterial whether there was a confidential relation or not. *Christy v. Sill*, 95 Pa. St. 387. If actual fraud existed, the statute of frauds is no defense. And it does not need any citation of authorities to prove that in cases of such fraud the rule as to contradicting or adding to a writing by parol evidence has no application.

2. But if the intent not to perform, above referred to, had not been averred, we think the plaintiff is nevertheless entitled to relief upon the other facts alleged, on the ground of the confidential relation existing between the par-

ties. It is not every case where parties trust each other that the law recognizes as confidential, (*Doyle v. Murphy*, 22 Ill. 508; *Steele v. Clark*, 77 Ill. 474; *Weer v. Gand*, 88 Ill. 493, 494;) but the relation of husband and wife is expressly declared by statute to be of that character. The provision of the Civil Code is as follows: "Sec. 158. Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on 'Trusts.'" It is not surprising that, in taking away the wife's common law incapacity to contract, the legislature should have thought it prudent to throw around her the safeguards which arise from the trust relation. Possibly, at first view, it might seem strange that it should have been thought necessary to accord the same protection to the husband. Perhaps this is to be regarded as an acknowledgment of woman's position in modern society. But, at any rate, the provision is in positive and direct language; and, where such is the case, the courts are not at liberty to disregard it. Nor is it necessary to consider what would be the rule in cases where it appears that there was in fact no actual confidence between the parties; that is to say, where the wife is living in independence of or hostility to the husband, (see *Falk v. Turner*, 101 Mass. 496;) for it is averred that the plaintiff "had at all times confidence in his said wife and her devotion and fidelity to him," and that he made the deed "having confidence in his said wife, and in her said representation and promises, and relying upon the same." The relation of the parties to each other, therefore, was confidential in fact as well as in law. The plaintiff was induced to make the deed by the confidence which he had in his wife, and the belief thereby engendered that she would perform her promise. But for that he would not have made it. The betrayal of such confidence is constructively fraudulent, and gives rise to a constructive trust. This is independent of any element of actual fraud. 1 Story, Eq. Jur. §§ 258, 307. The law, from considerations of public policy, presumes such transactions to have been induced by undue influence. Civil Code, § 2235; Bigelow, Fraud, (Ed. 1888,) 261, 262; Kerr, Fraud & M. (Bump's Amer. Ed.) 151; Hov. Fraud, 18. The extent and variety of the application of this principle to persons in confidential relations with each other may be seen from the notes to the leading case of *Huguenin v. Baseley*, 2 Lead. Cas. Eq. pt. 2, p. 1156. From the cases there cited it will abundantly appear that, while it is not impossible that a gift between persons in such relations may be valid, yet that all such transactions are constructively fraudulent, and are only to be upheld upon a showing of special circumstances. See, also, *Hatch v. Hatch*, 9 Ves. 296. Now, if this be so,—if the law does not permit such transactions to stand even where there was an intention that the donee should have the property,—how much more should it interpose where, as here, there was no such intention, but only an intention that she should retain the semblance of ownership for a time.

We think the authorities fully bear out the assertion that in such cases a constructive trust arises, and that the statute of frauds has no application. In *Wood v. Rabe*, 96 N. Y. 426, a son was induced by the parol promise of his mother to confess a judgment in her favor, and allow her to purchase under it a piece of his real property. It was held that a constructive trust arose; and the court, per ANDREWS, J., said: "It was, on the part of the son, the case of a confidence induced, not by the bare promise of another, but by the promise and the confidential relations conjoined. The confidence, in fact, has its spring and origin in the relation, and that relation was a controlling ingredient moving his action. It would be a gross wrong to permit that confidence to be betrayed, and we are of opinion that the statute of frauds cannot be invoked as a bar to relief. The principle that, when one uses a confidential relation to acquire an advantage which he ought not in equity and good

conscience to retain, the court will convert him into a trustee, and compel him to restore what he has unjustly acquired, or seeks unjustly to retain, has frequently been applied to transactions within the statute of frauds." So, where a devise is made to one upon his parol promise to hold it in trust for another, a trust arises, and the statute of frauds is not allowed as a defense. *Church v. Ruland*, 64 Pa. St. 442; *Barrell v. Hanrick*, 42 Ala. 71, 72; *Hoge v. Hoge*, 1 Watts, 163. So it has been held, although there is some conflict in the authorities, that where one is allowed to purchase at an execution sale, upon his parol promise to hold for the judgment debtor, a trust arises. *Wolford v. Herrington*, 86 Pa. St. 39; *Arnold v. Cord*, 16 Ind. 177. But the case which we think is most directly in point is *Young v. Peachy*, 2 Atk. 254. There a father obtained from his daughter, without consideration, a conveyance of real property, upon his parol promise to hold it for a particular purpose, viz., "as a trustee only for her and her heirs, * * *" and that he would not claim or insist upon any benefit or advantage thereof." No actual fraud was shown. The father died bankrupt; and on a bill against the assignees it was decreed that the conveyance should be set aside, not upon the ground of an implied or resulting trust, but upon the ground of constructive fraud, which would now be said to give rise to a constructive trust. Lord HARDWICKE said: "There have been a great many cases even since the statute of frauds where a person has obtained an absolute conveyance from another, in order to answer one particular purpose, but has afterwards made use of it for another, that this court has relieved under the head of fraud; for a practice of this sort is a deceit and fraud, which this court ought to relieve against. The doing it is *dolus malus*, and that appears to be the present case." See, also, *Haigh v. Kays*, 7 Ch. App. 469. The principle of this case was extended, in *Murray v. Dake*, 46 Cal. 648, 649, to a transaction between parties who did not stand in confidential relations to each other. Whether that was a proper extension of the principle need not be considered here. It must be admitted that there are cases in which the relief has been denied. But it will generally be found that in such cases the confidential relation has been overlooked; and we think the cases we have cited are in accordance with sound principle. For, if the relief cannot be granted in this case, we do not see how it could be granted if an attorney should, by his parol promise, induce his client to put the property in his name for some temporary purpose, and then refuse to reconvey on the ground of the absence of a written acknowledgment; and so of principal and agent, parent and child, trustee and *cestui que trust*, etc. It is to be observed that the trust is not a resulting trust, properly so called. The relief is not granted merely on the ground of want of consideration. The fact that a deed is without consideration, or is, as is sometimes said, voluntary, is not of itself sufficient to avoid the deed. *Viney v. Abbott*, 109 Mass. 300; *Jackson v. Garnsey*, 16 Johns. 189; *Green v. Thomas*, 11 Me. 321; *Laberee v. Carleton*, 53 Me. 212; *Poe v. Domec*, 48 Mo. 443. This is at least one of the things designed to be expressed by section 1040 of the Civil Code, which provides that "a voluntary transfer is an executed contract, subject to all the rules of law concerning contracts in general, except that a consideration is not necessary to its validity." The want of consideration, however, is a fact proper to be proved in connection with and as a part of the constructive fraud. *Shotwell v. Shotwell*, 24 N. J. Eq. 385. Nor does the recital of a consideration stand in the way of the relief. As is well known, it was a settled rule of the early law that, if no consideration was expressed or proved, a use resulted to the grantor. To prevent this it became common to make the deed recite a consideration; and, while such recital could be contradicted for collateral purposes, it could not be contradicted for the purpose of avoiding the deed, (*Farlington v. Barr*, 36 N. H. 89; *Coles v. Soulsby*, 21 Cal. 47; *Rhine v. Ellen*, 36 Cal. 362; *Martin v. Splivalo*, 69 Cal. 614, 11 Pac. Rep. 484,) or for the purpose of raising a resulting trust, (*Russ v. Mebius*, 16 Cal. 356; *Graves v.*

Graves, 29 N. H. 129; *Philbrook v. Delano*, 29 Me. 412, 413.) But this only means that the recital could not be contradicted for the mere purpose of showing a want of consideration. Where fraud is charged, the want of consideration may be shown in connection with and as part of the fraud. In cases like the present, the confidential relation is one circumstance, the parol promise is another, and the want of consideration is a third. In cases of fraud, actual or constructive, no mere form of words which the parties have made use of can shut out inquiry as to the real facts; and this, from the necessity of the case. For, as has been pertinently asked, if parol evidence be not admissible, how else can the fraud be shown?

The objection that parol evidence is not admissible to contradict or to add to the deed is a distinct ground from the statute of frauds. 1 Story, Eq. Jur. § 158. The admissibility of such evidence is sometimes put upon the ground that it does not contradict or add to the deed. In *Hall v. Livingston*, 3 Del. Ch. 373, the chancellor said in reference to this subject: "There is a well-recognized distinction between contradicting a deed or impairing its legal operation, and raising out of the transaction an equity *de hors* the deed, binding the grantee's conscience to hold the land for the real purposes of the conveyance, and not according to its legal operation, when the latter use of it would, under the circumstances, work fraud. Such an equity is held to be independent of the deed, and not excluded by it as a mere conveyance of the legal estate, unless there be in it some terms or implication to that effect. To support such an equity parol evidence is admissible, not as contradicting the deed, but as explanatory of the transactions out of which the equity arises." Perhaps the most comprehensive and philosophical expression of the rule is that parol evidence is admissible to raise a trust in cases of actual or constructive fraud. But, whatever may be thought of the terms in which it is expressed, the rule itself is well settled. 2 Whart. Ev. § 1038; Bigelow, Fraud, (Ed. 1888,) c. 10, § 8; *Reeves v. Bass*, 39 Tex. 631; *Church v. Ruland*, 64 Pa. St. 442; *Isenhoot v. Chamberlain*, 59 Cal. 637. If we are right in the foregoing, the point as to the necessity of an acknowledgment by the wife before a notary does not require serious consideration. The statute has no relation to trusts raised by parol evidence.

We therefore advise that the judgment be reversed, with directions to overrule the demurrer to the complaint, with leave to defendant to answer.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, with directions to overrule the demurrer to the complaint, with leave to defendant to answer.

75 Cal. 570

PEOPLE v. STITES. (No. 20,377.)

(Supreme Court of California. April 20, 1883.)

CRIMINAL LAW—ATTEMPT TO COMMIT CRIME—WHAT CONSTITUTES.

Proof that defendant had prepared a dynamite bomb to place upon a railroad track, and that, with the bomb in his possession, defendant was on his way to a previously appointed rendezvous with his confederate, whence the two intended to proceed to the track, and place the bomb thereon, but was prevented from accomplishing his purpose by the presence of officers, clearly establishes an attempt to place the bomb upon the track.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; JOHN HUNT and W. T. WALLACE, Judges.

Indictment of John E. Stites for attempting to obstruct a railroad track. Defendant was convicted, and appeals.

Robert Ferral and Walter Gallagher, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

BELCHER, C. C. The defendant was charged with the crime of attempting to place an obstruction upon the track of the Sutter-Street Railroad in the city and county of San Francisco, and was convicted. He moved for a new trial, and has appealed from the judgment and order denying his motion. The motion was made upon the ground that errors of law were committed by the court during the trial, and that the verdict was contrary to the evidence. In the brief filed for appellant here it is distinctly stated that "the appellant does not desire a new trial upon any other ground than that the evidence fails to prove the commission of the crime for which he was convicted." We shall therefore assume that all of the supposed errors of law are waived. In denying the motion for new trial, the court below, by WALLACE, J., (HUNT, J., concurring,) filed an opinion which fully meets and answers all the points made in support of the motion. We quote and adopt so much of that opinion as relates to the question of the sufficiency of the evidence to justify the verdict. It is as follows:

"The information against the prisoner is founded upon the statute, (Pen. Code, § 587,) which provides that any person who maliciously places an obstruction upon the track of any railroad shall suffer imprisonment in the state prison not exceeding five years, etc., (Id. § 664.) 'Any person who attempts to do so shall be imprisoned not exceeding two and a half years,' etc. The prisoner was found guilty of such an attempt, committed by him on the 16th day of February last, upon the track of the Sutter-Street Railroad Company, and asked for a new trial upon four several grounds now to be considered: *First*. It is insisted that the entire evidence given at the trial is insufficient to establish the attempt of which the prisoner was convicted. The principal facts made to appear at the trial are substantially as follows: On the 15th day of February last, the day preceding that on which the alleged attempt was made, the prisoner and a confederate of his were in consultation as to how they could most advantageously and effectively,—that is to say, how they might, with the most assured degree of personal safety to themselves, and the greatest attainable hazard to the lives and property of others,—place an explosive upon the track operated by the company mentioned, to which company and the railway it operated the prisoner appears to have been actuated by feelings of intense and bitter hostility. The confederate was already possessed of the explosives proposed to be employed, or rather of the dynamite cartridges which could be wrought into a bomb suitable for the purpose in hand, and which, with the addition of the necessary gun caps and other fulminating agencies, would make up an explosive, proven at the trial to be of the highest known power. It was deemed important to determine in advance at what particular point on the track of the road the explosive could be used with the most destructive effect, and, as the prisoner had then recently and for several consecutive months been in the employ of the company as a conductor on the road, and had in that way gained intimate personal knowledge of the railway property, his confederate asked him if he 'knew of a good place to put dynamite on the car track.' To this inquiry the prisoner responded that it was 'immaterial where he put it, if he did not get caught.' After some further consultation the parties separated, with the understanding that on the next morning, at 4:30 o'clock, they would meet at the junction of Turk and Hyde streets, near the dwelling-house of the prisoner, for the purpose of immediately proceeding to put in execution the project in hand. The cartridges were delivered to the prisoner, who, at the dwelling-house in which he and his family resided, and by the use of the sewing-machine employed in

that house, prepared, or caused to be prepared, the cloth and bomb in which two dynamite cartridges with a large number of fulminate caps were inclosed; the whole constituting an agency of terrible destructive power, and which, being laid upon the track of the road, would be readily exploded by the contact of a passing team or passenger car. The building or house of the prisoner was situated on the eastern line of Larkin street, and its front, looking to the west, is within a few feet of the track of the railway running in a northerly and southerly direction along the street. The rear of the house is bounded by an alley-way or *cul-de-sac*, called 'Dodge Place,' which runs northwardly to the southern line of Turk street, into which it opens, at a short distance east of Larkin street. The place at which the prisoner and his confederate had agreed to meet—the junction of Hyde and Turk streets—was to the eastward of the point where Dodge alley intersects the southern line of Turk street. About a quarter past 4 o'clock on the morning of the 16th of February, the prisoner left his dwelling to join his confederate, pursuant to the appointment they had made on the preceding day. He passed to the rear of the dwelling-house, walking on the western side of Dodge alley in a northerly direction, and approached the southern line of Turk street. He had at that time in his possession, in the right-hand pocket of the overcoat he wore, the dynamite bomb prepared in his dwelling-house, weighing some three pounds, and being about twelve or fourteen inches long, by some two or two and a half inches in width. As the prisoner approached the southern line of Turk street, on his way to meet his confederate, he was surprised at the sight of several police officers who, as he then discovered, were intently observing him, and who had been in fact, and without his suspecting it, for several hours on the watch for his appearance. Upon observing this state of things the prisoner immediately turned towards the east, and passing upon the southerly line of Turk street, walked rapidly to the junction of Turk and Hyde streets, and continued thence down the latter street, on its westerly side, until having arrived opposite the house, 178, and observing that he was being followed by the officers, he surreptitiously deposited the bomb in the flower garden in front of that house, by dropping it over the fence as he passed along. From this point he moved over and immediately down Hyde street, striking soon into a run, and after having been hotly pursued by the officers, who fired several times, he was finally captured on McAllister street. It should be here observed that nearly all of the matters stated in the foregoing outline of the evidence are absolutely admitted by the prisoner to be true in point and fact. The fact of the consultation between himself and his confederate on the 15th of February; the appointment to meet next morning; the endeavor by the prisoner to keep that appointment; his detection, flight, and capture,—are not any of them denied by him. He denies, however, that he had the dynamite bomb in his possession at the time. In his statement of his connection with this affair, made by him to the officers immediately upon his arrest, he at first denied that he had the dynamite bomb in his possession, and that he threw it away in his flight. But at a subsequent time, upon being informed that he had been distinctly seen by some of the pursuing officers to do so, he at last replied, 'I might as well give it up, if those officers are against me, or saw me do it.' Again, at a later period, he testified at the trial as a witness in his own behalf, and did not then deny his possession of the dynamite bomb on the morning of the 16th of February, although he testified upon other points made against him upon the part of the prosecution. Further, immediately after his arrest, his dwelling-house was searched by the officers, and they there discovered in the sewing-machine found there pieces of cloth, thread, and other material exactly corresponding with the cloth, thread, and some of the other material of which the bomb had been fabricated. In short, the truth of the facts stated are made morally certain; established beyond a reasonable doubt, by a variety of evidence of the most persuasive character.

"It is remarked by a distinguished writer upon criminal law that the definition of an 'attempt,' as the word is understood in criminal jurisprudence, is intricate, and, as he says, 'but imperfectly understood by the courts.' 1 Bish. Crim. Law, § 725. Indeed, an experiment made will probably satisfy any one that it is hardly within the compass of our language to frame any universal definition which, precisely indicating the lines of inclusion and exclusion, will prove to be both positively and negatively accurate, when applied to the facts of a particular case. Mere intention to commit a specific crime does not itself amount to an 'attempt' as that word is employed in the criminal law. There must in addition to the wicked intent—the *mens rea*—be some act done towards the ultimate accomplishment of the purposed crime. But even such acts do not always of themselves amount to an 'attempt,' or to an offense of which human laws will take cognizance, for if they be but acts of preparation, however elaborate, our municipal law (at least as it existed February last) would not assume to deal with them. For instance, the construction of the dynamite bomb by the prisoner at his home on the night of the 15th of February, with the deliberate intention on his part to employ it the next morning in destroying the lives and property of others, atrocious as it was, and indefensible *in foro conscientia*, was but an act of preparation, and when perfected did not render him amenable to the municipal law as then existing, or punishable by its rules. But when the prisoner left his house on the morning of the 16th day of February and went to Turk street, pursuant to the antecedent arrangement between his confederate and himself, it amounted to an overt act done by him for the purpose of effecting the crime intended, and was in law and fact a criminal attempt. Before he left his house he was already fully prepared, and carried with him the instrument he was to use in effecting the crime he intended. Nothing, in fact, remained for him to do but deposit it on the railway at the time easily within his reach. In considering whether a particular act done amounts to an attempt in a criminal sense, the proximity or remoteness of the person or thing intended to be injured is generally an important element, as the adjudicated cases will show. The learned argument of counsel delivered in 1862 in the case of *Reg. v. Cheeseman*, and often referred to by courts and text writers, illustrates this idea. He observed as follows: 'A man may do an act with intent to commit some crime anywhere; for example, a man may buy a rifle in America with intent to shoot a man in England, but the buying of the rifle could not be construed into an attempt to shoot the man. If a notorious burglar is seen to put a picklock key into a door the jury may assume that he is attempting to break into the house, but if he were found purchasing a picklock key ten miles from the house in question it would be impossible, without other evidence, to say that it was bought with intent to break into that house.' — Leigh & C. 140. The observations of BLACKBURN, J., in the same case, are suggestive: 'There is no doubt a difference between the preparation antecedent to the offense and the actual attempt, but if the actual transaction has commenced, which would have ended the crime if not interrupted, there is clearly an attempt to commit the crime.' The proximity on the one hand, and remoteness on the other, of the intended subject of the injury enter largely into the question of whether the actual transaction has commenced. The circumstances of the case in hand satisfy all known requirements of mere proximity. The track of the railway runs but a few feet from the doorway of the dwelling-house of the prisoner, and it is apparent, therefore, that, if in that house he performed an overt act towards presently executing his intended crime, or if he there commenced the doing of such an act which was continuous in its nature, and intended to be forthwith completed elsewhere, he committed the offense charged, if, while so attempting the perpetration of the crime, he was interrupted by extraneous causes preventing him from proceeding further in the execution of his purpose. We do not in this connection overlook the fact

pointed out in the argument for the defense that the movements of the prisoner at the time he was interrupted by the officers had carried him not nearer to, but further from, the track of the road upon which it was his intention to place the explosive he carried; or, to quote the language of the learned counsel, 'every step the defendant took, from the time he left his own door until his arrest, was a step away from, and in an opposite direction to, the line or lines of the Sutter-Street cable cars.' In our judgment, however, there is no significance whatever in this circumstance. If, indeed, there was any doubt of the intent with which the prisoner began his movement on the morning in question, the direction in which he traveled with reference to the location of the road might have been of importance. If the criminal intent here were to be inferred only from the precise act then done, it might with much plausibility be argued that a man really intending to presently fire a house, or blow up a roadway, would be found approaching and not receding from the object he intended to destroy. But, as observed already, we know the criminal intent of the prisoner here, as an independent fact; he admits it; his counsel did not deny it; and, therefore, if the prisoner, armed for the purpose, and within a few steps of the line of the road, was, when interrupted, in motion, and actively maneuvering to accomplish the crime intended, it is of no practical importance that at the exact moment of interruption he had reached a point further (by a distance equal to the width of his dwelling-house) from the track than he was when he actually started out on his criminal endeavor. It should not be forgotten in this connection that the plan agreed upon between the prisoner and his confederate, on the day before, necessarily required as part of the means of executing it, that the first movement of the prisoner should be towards the east,—in a direction from and not towards the track of the road. The dwelling-house of the prisoner is to the east of the railroad; and the conjunction of Hyde and Turk streets, where the confederates had agreed to meet, is at a point still further to the east. From that place they were to reach the roadway; not necessarily at the nearest point, but at the one deemed safest for them,—the point where they would be least likely to 'get caught;' and it was while pursuing the prearranged details of the enterprise that the prisoner reached the southern line of Turk street, where he discovered the presence of the officers on the watch there for his appearance. This was an interruption which practically put an end to his criminal endeavor, and but for that interruption, so far as appears, he would have effected the crime he was then attempting to consummate. He was engaged at that moment in an active endeavor to reach the road at a point deemed by him most eligible for the purpose in hand, and in all probability already actually selected in his own mind. He was armed with the necessary explosive, and all this occurred within but a few steps of the railroad which was the immediate subject of the injury intended. We have carefully examined all the authorities upon the subject of criminal attempts within our reach. Of course, the circumstances of each case differ in a greater or less degree from those of all other cases; the nature of the crime proposed as being one of actual violence or otherwise, the particular agencies by which it was intended to be committed, the actual or supposed adaptation of those agencies to the purpose in hand as being likely to effect the object intended, and a variety of other details, varying from time to time as the discoveries of science and the progress of invention have produced novel instrumentalities of destruction, while they have not disturbed the rules of decision, have constantly called for new applications of those rules by the courts to the improved agencies employed in the perpetration of crime. It would be unprofitable to cite the authorities here. The question before us involves the mere application of recognized rules to the particular facts of the case in hand, and, as observed by the learned commentator to whom we have already referred, 'perhaps the only practicable method is for the judge in each case to consider the special facts in determining whether or not a criminal at-

tempt has been proven.' We are of the opinion that upon the facts in evidence, tested by the rules referred to, the prisoner is guilty as charged in the information."

We advise that the judgment and order be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

75 Cal. 595

MOYLE et al. v. LANDERS et al. (No. 11,906.)

(*Supreme Court of California.* April 21, 1888.)

APPEAL—REQUISITES—NOTICE—SERVICE ON ATTORNEY—DEATH OF CLIENT.

Where the record on appeal shows there were several defendants, all represented by the same attorney of record, and the attorney of record accepted service, for all the defendants, of a notice of appeal, and it appears that one of the defendants died between the date of the judgment and the service of the notice,—a fact unknown to plaintiff or his attorney,—a motion to dismiss the appeal as to the legal representatives of the deceased, on the ground that the service of the notice as to the deceased was void, made by the same attorney who accepted the service, will be denied without prejudice.

In bank. Appeal from superior court, city and county of San Francisco; T. H. RIORDAN, Judge.

Motion to dismiss an appeal.

L. E. Bulkely, for appellants. *H. Sieberst*, for respondents.

McFARLAND, J. This case is now before us upon a motion to dismiss the appeal as to the respondent Michael Landers, and his legal representatives. Upon an examination of the papers, we find that there were several defendants in the court below, and that they all appeared by the same attorney of record. Judgment went for defendants; and in due time plaintiffs filed their notice of appeal, and served it on the said attorney of record, who accepted service for all the defendants. As a matter of fact, however, the defendant Michael Landers had died between the entry of the judgment and the service of the notice of appeal; this fact being unknown to plaintiffs or their attorney. And this motion is based on the ground that the service of the notice of appeal was void, because, at the time of the service, the said Landers was dead; and it is made by the same attorney who accepted the service. In such a case this court will not entertain a motion to dismiss the appeal, made by the attorney who accepted service for the dead man. The motion to dismiss is denied without prejudice.

We concur: SEARLS, C. J.; PATERSON, J.; SHARPSTEIN, J.

75 Cal. 580

In re WILSON. (No. 12,496.)

(*Supreme Court of California.* April 20, 1888.)

1. POOR DEBTORS—EXAMINATION AND DISCHARGE—CONFINEMENT FOR CONTEMPT—FAILURE TO PAY ALIMONY.

Code Civil Proc. Cal. § 1143 *et seq.*, entitling persons confined in jail under executions issued in civil actions to a hearing as to their property and effects, with reference to a discharge, before the judge of a superior court, extends to a person confined in jail for non-compliance with an order of court for the payment of alimony.

2. SAME—HABEAS CORPUS—ISSUE OF MANDATE.

Where, on an application for mandate on the ground that petitioner had applied to respondent, a judge of the superior court, for an examination under Code Civil Proc. Cal. § 1143, entitling those in jail under execution to an examination as to their property, etc., with reference to a discharge, the answer of respondent denies petitioner's right to such examination under the Code, but avers that he was accorded the examination, and that his discharge was refused on the ground that, in

the judgment of respondent, he was not entitled to it, the case being submitted on the answer as true, though the prisoner is entitled to such examination, the appellate court will not assume that the decision was not on the merits of the evidence in the examination, and the writ will be refused.

In bank. Application for writ of mandate to superior court, Alameda county.

Craig & Meredith, for petitioner. *Fred. E. Whitney*, for respondent.

McFARLAND, J. In a certain action for divorce brought against petitioner, William I. Wilson, by his wife, in the superior court of Alameda county, the said court on February 1, 1887, made an order requiring petitioner to pay plaintiff therein \$200 per month alimony, and \$800 counsel fees. On April 25, 1887, the said court committed petitioner to the custody of the sheriff until said money should be paid, and since that date petitioner has been in jail under said orders. The petition states that on December 8, 1887, the petitioner, after due notice, applied to the respondent, Hon. NOBLE HAMILTON, judge of the superior court of said county, to be discharged, under sections 1143 *et seq.*, Code Civil Proc.; and that the respondent refused, and still refuses, to allow petitioner "to be examined, or to take the oath prescribed by, or in any manner to receive any of the benefits or privileges provided for by, said sections of said Code." The answer of respondent first sets forth that petitioner "was not confined in jail on an execution issued on a judgment rendered in a civil action;" that he was so confined by virtue of "a commitment for contempt of court," and that he "was not, and still is not, entitled to be examined, or to be discharged from custody, under the provisions of said sections" of the Code. If these were the only statements contained in the answer, it would be clear that respondent refused to allow petitioner to be examined, and to consider his application to be discharged, on the ground that his case did not come within the provisions of said sections of the Code. But the respondent in his answer denies that he refused to hear petitioner's application for discharge, and, "on the contrary, alleges that defendant, as superior judge of Alameda county, did, on the 8th day of December, 1887, hear the said application of said William I. Wilson, and all evidence, matters, and things produced in behalf of said application, and then and there listened patiently to the argument of counsel for said William I. Wilson," etc.; and "that afterwards, on the 9th day of January, 1888, defendant rendered his decision, and denied the application of said William I. Wilson for discharge," on the ground that "he was not, in the judgment of defendant, entitled thereto." It is probable that the respondent refused to discharge the petitioner, and to consider the merits of the case, upon the ground that, having been committed for contempt, he could not under any circumstances be discharged under the sections of the Code referred to. But as the case was submitted on the answer taken as true, and as it avers that respondent did hear the application, "and all evidence, matters, and things produced in behalf of said application," and denied the discharge because the petitioner "was not in the judgment of respondent entitled thereto," we cannot take the fact to be that respondent refused to act in the premises, or to hear and determine the application. The writ of mandate must, therefore, be dismissed.

As, however, the petitioner may make another application for discharge before the respondent, or some other superior judge, and may renew it every 10 days, it may be well here to correct an error into which the respondent evidently fell. Section 1143, Code Civil Proc., is as follows: "Any person confined in jail on an execution issued on a judgment rendered in a civil action must be discharged therefrom upon the conditions in this chapter specified." The succeeding sections of the chapter provide that such person, upon notice, may apply to a judge of a superior court of the county for his discharge; that the judge must examine him under oath as to his property and effects, and

his ability to pay, etc., and hear such other legal and pertinent evidence as may be produced by him or the creditor; and that if, upon the examination, the judge is satisfied that the prisoner should be discharged, he must, after administering a certain prescribed oath, order his discharge. But in the case at bar the respondent seems to have considered that a person in jail for contempt for non-compliance with a general order for the payment of money to a party to an action is not a person included in said section 1143, and may be confined for a life-time, although his inability to pay be clearly established. There is a well-settled distinction between a civil and a criminal contempt. The former consists, generally, in failing to do something ordered to be done by a court, in a civil action, for the benefit of the opposing party therein; the latter consists in acts of disrespect of the court, such as disorderly or violent conduct in its presence or immediate vicinity, or in the doing of a forbidden act, resistance to process, etc. *Rap. Contempt*, § 21 *et seq.*; *Phillips v. Welch*, 11 Nev. 187; *People v. Spalding*, 10 Paige, 284. There might be instances, of course, where the character of the contempt would be of difficult determination, but there is no doubt that in the case before us the failure to comply with an order for the payment of money generally was a civil contempt. And the authorities seem to be clear that in a case of civil contempt, that is, when a defendant in a civil action is ordered by the court to pay money generally to the plaintiff, and is committed until he shall have paid it, the prisoner is in custody as under an execution. It was so held in England under the "Lords Act." *Reax v. Stokes*, Cowp. 136. In *Van Wezel v. Van Wezel*, 3 Paige, 43, which, like the case at bar, was contempt for not paying alimony, McCoun, vice-chancellor, says: "It is, to all intents and purposes, an execution. The order is a judgment rendered in favor of one party against the other for the payment of a sum certain, or which may be reduced to a certainty if it be for costs, by taxation. The object of the precept is to execute the order, to give it effect, and to enforce its performance; and, when the party is imprisoned upon it, he is, within the letter and meaning of the law, imprisoned by virtue of an execution." See, also, *People v. Spalding*, 10 Paige, 284, 7 Hill, 301; *Case of Watson*, 3 Lans. 413; *People v. Cowles*, *43 N. Y. 49; *Jackson v. Billings*, 1 Caines, 252. We think, therefore, that if the petitioner shall make another application for discharge, under the sections of the Code above mentioned, it will be the duty of the superior judge to whom it shall be made to consider the case as coming within the provisions of those sections; to hear evidence touching his property and effects; to discharge the petitioner if he be satisfied, from the evidence, of his inability to pay; and to remand him, if he be not so satisfied. To hold that the petitioner, though utterly penniless, must suffer a life imprisonment for debt because of the particular form in which the imprisonment was imposed, would be a gross violation of the plain intent of the Code. Writ dismissed.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.

I concur in the judgment: MCKINSTRY, J.

75 Cal. 542

TOY v. SAN FRANCISCO & S. R. R. Co. (No. 9,957.)

(Supreme Court of California. April 20, 1888.)

APPEAL—PRACTICE—PARTIES—CODE CIVIL PROC. CAL. § 940.

Defendant moved to have certain persons substituted as defendants in his stead, and made them parties to such motion. The motion was denied, and judgment entered against defendant. *Held* that, on appeal from such judgment by defendant, such persons are adverse parties within the meaning of Code Civil Proc. Cal. § 940, providing that notice of appeal shall be served on the adverse party.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Assumpsit by George D. Toy against San Francisco & San Rafael Railroad Company. Judgment for plaintiff, and defendant appeals.

Lloyd & Wood, for appellant. *Olney, Chickering & Thomas*, for appellee. *H. A. Powell*, for S. H. Harmon.

FOOTE, C. This action was brought to recover a certain sum of money alleged to be due the plaintiff. Before any answer was filed to the complaint, the defendant moved, upon affidavit, that an order of the trial court should be made substituting S. H. Harmon and the Gordon Hardware Company in place of the defendant, and discharge it "from liability to any party, upon its depositing in court the amount claimed in the contract mentioned in the complaint." Upon the hearing of this motion it was refused, and, the defendant failing to answer, judgment by default was given, and made in favor of the plaintiff as prayed for. From that judgment this appeal is taken. It is claimed that the court, upon the proof made, should have substituted S. H. Harmon and the Gordon Hardware Company in place of the defendant; and it is perfectly plain that, if the judgment is reversed, it must be because this substitution was not made; and it must result from such reversal that Harmon and the Gordon Hardware Company will become the defendants in the action, and the present defendant be "discharged from liability to any party." Although not named as parties to the judgment as it stands, Harmon and that company were served with notice of the motion, under the provisions of section 386, Code Civil Proc., and appeared in the court below, and became *quasi* parties to the action, so far as their rights were affected by the granting or refusal of that motion. The order of the court below absolved them from all connection with the cause from that time, and the effort now is to reverse the action of the trial court in that respect, and to make them parties defendant.

A motion is made to dismiss the appeal because Harmon and the Gordon Hardware Company, nor their attorneys, were not served with notice thereof. And the question to be determined upon that motion is whether or not they are "adverse parties" in the sense in which that term is to be taken under section 940, Code Civil Proc. Harmon and the Gordon Hardware Company, certainly became *quasi* parties to the action when they were served with notice of the motion to substitute them for the defendant in the court below. By the action of that court their rights were affected and determined. If the contention of the appellant is to prevail, it seems plain to us that *quasi* parties to the action, whose rights were passed upon in the trial court, will be affected to such an extent as that they will have put upon them as defendants a burden which the court below refused to impose. Therefore, their interests in relation to the subject-matter of the appeal is in conflict with the reversal of the judgment appealed from, and they were entitled to notice of the appeal. *Williams v. Mining Ass'n*, 66 Cal. 193, 5 Pac. Rep. 85, and cases cited; *In re Medbury*, 48 Cal. 83. At the appellant's instance they were made parties to the motion to substitute in the court below. By the appeal it is sought to allow the appellants to effect that in the supreme court which was denied them in the trial court, the result of which would be that *quasi* parties to the action would be concluded of their rights to be heard in the appellate court upon a matter in which they were heard and their rights determined in the lower court. The appeal should be dismissed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the appeal is dismissed.

75 Cal. 566

HENDY v. MARCH. (No. 9,714.)

(Supreme Court of California. April 20, 1888.)

1. ACCOUNT STATED—WHAT CONSTITUTES.

Where it appears that an account against defendant has been presented and examined by him, and no objections made thereto for several months, it becomes an account stated.¹

2. SAME—MISTAKES—PLEADING.

A party seeking to take advantage of a mistake in an account stated must put such mistake in issue by his pleadings.

3. PARTNERSHIP—WHAT CONSTITUTES—AGREEMENT FOR USE OF SHIP.

Under Civil Code Cal. § 2395, declaring that a partnership is an association of persons for the purpose of carrying on business together, and dividing the profits, two persons having agreed that one should furnish money to keep a ship in repairs, collect the earnings, divide the surplus with the other, and, in case the earnings were not sufficient to pay the advances, such other was to pay a portion of the deficiency, are partners, and the statute of limitations will not commence to run against the party making the advances until the affairs of the firm are closed.²

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Action on an account stated, by Joshua Hendy against W. F. March. Judgment for plaintiff, and defendant appeals.

J. H. Skirm and *John C. Hall*, for appellants. *W. H. Hart*, for respondent.

HAYNE, C. Action on an account stated. The court found that the account was stated as alleged. The defendant contends that the finding is not sustained by the evidence.

There being a substantial conflict, it must be assumed at this stage of the case that the version of the plaintiff's witnesses is the true one. According to them, the account was made up and presented to the defendant, who went over it with the expert, and "made no objections whatever to the account," from the time it was presented to him in August, 1881, "until after this suit was brought," which was on November 25 of the same year. This was a sufficient acquiescence from which to imply an assent. It seems to be well settled that the assent may be implied. In *Terry v. Sickles*, 13 Cal. 427, the court, per COPE, J., said: "If the account be sent to the debtor, and he does not object to it within a reasonable time, his acquiescence will be taken as an admission that the account is truly stated." In relation to this subject, Judge STORY says: "It is sufficient if it has been examined and accepted by both parties, and this acceptance need not be express, but may be implied from circumstances. Between merchants at home an account which has been presented, and no objection made thereto, after the lapse of several posts is treated, under ordinary circumstances, as being by acquiescence a stated account. Between merchants in different countries a rule founded in similar considerations prevails. If an account has been transmitted from the one to the other, and no objection is made after several opportunities of writing have occurred, it is treated as an acquiescence in the correctness of the account transmitted, and therefore it is deemed a stated account." 1 Eq. Jur. § 526. The same rule is laid down by GREENLEAF. 2 Greenl. Ev. § 126. The evidence above referred to brings the case fairly within this rule. And the account was undoubtedly final in character, and showed an indebtedness against defendant of a specific amount, and was sufficient in all respects to serve as the basis of an account stated.

¹See, also, as to what constitutes an account stated, *Heidenheimer v. Ellis*, (Tex.) 3 S. W. Rep. 666; *Walker v. Steele*, (Colo.) 12 Pac. Rep. 423; *Whitehead v. Darling*, (Ky.) 5 S. W. Rep. 356; *Rehill v. McTague*, (Pa.) 7 Atl. Rep. 224; *Rhyne v. Love*, (N. C.) 4 S. E. Rep. 536.

²See *Clift v. Barrow*, (N. H.) 15 N. E. Rep. 327, and note.

The defendant contends, however, that, even if this be so, he is entitled to show mistakes in the account. But an account stated becomes a contract. As was said by the court, per SHAFER, J., in *Carey v. Petroleum Co.*, 33 Cal. 697: "An account stated alters the nature of the original indebtedness, and is itself in the nature of a new promise or undertaking. *Foster v. Al-lanson*, 2 Term R. 479; *Holmes v. D'Camp*, 1 Johns. 36. Therefore, an account stated with a new firm may include debts due to a former firm, or to one of the partners. *David v. Ellice*, 5 Barn. & C. 196; *Gough v. Davies*, 4 Price, 200. An action upon an account stated is not founded upon the original items, but upon the balance ascertained by the mutual consent of parties." It follows that, as is the case with other contracts, the mistake must be put in issue by the pleadings. *Auzerais v. Naglee*, 15 Pac. Rep. 372; *Terry v. Sickles*, 13 Cal. 427. The pleadings here did not present any such question. Furthermore, we cannot say from the evidence that there was any mistake.

Nor is the statute of limitations a bar to any part of the plaintiff's demand. The plaintiff and the defendant were partners in the use and earnings of the vessel. The finding is that, being each the owner of an interest in the vessel, it was agreed that the plaintiff "should take the charge and management of said schooner, W. F. March, and that the plaintiff should advance money to keep said schooner in repair and equipped for use, and to advance all necessary running expenses of said schooner, and to collect all earnings of said schooner, and apply said earnings to his advances, and the surplus, if any, to be divided as follows: three-quarters to the plaintiff, and one-quarter to defendant; and, if the earnings were not sufficient to pay the advances, then defendant was to pay plaintiff one-fourth of the deficiency." Here is a distinct agreement to share in the profits and loss arising from the use of the vessel, and such an agreement constitutes a partnership. Civil Code, § 2395. It is not necessary to say that the partnership extended to the ship itself as contradistinguished from its use. "Part owners of a ship do not, by simply using it in a joint enterprise, become partners as to the ship." Civil Code, § 2396. But the use of a ship is distinct from the ship itself, and there may be a partnership in the use or earnings, although as to the vessel itself the parties are tenants in common. *Merritt v. Walsh*, 32 N. Y. 689; *Bulfinch v. Winchenbach*, 3 Allen, 161; *Mumford v. Nicoll*, 20 Johns. 633; *Hinton v. Law*, 10 Mo. 701. The above finding is within the issues; for the defendant pleaded the statute of limitations, and, this being denied by force of the provision of the Code, anything which related to the issue so raised was proper to be examined. The evidence, in our judgment, sustains the finding. Indeed, it seems to have been the understanding of the defendant that he was the partner of the plaintiff, for he says: "I never was satisfied with the account, nor were either of the partners." If such was the relation of the parties, it is manifest that the statute of limitations did not begin to run until the affairs were wound up, and the balance due agreed upon between the parties, which was the result of the account stated.

We see no error in the admission of evidence. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

75 Cal. 601

MECHANICS' FOUNDRY OF SAN FRANCISCO v. RYALL. (No. 11,209.)

(Supreme Court of California. April 24, 1888.)

INJUNCTION—AGAINST TRESPASS—PLEADING—SUFFICIENCY OF ALLEGATION.

Complainant, praying an injunction against trespass by a former employe intruding into his workshop, alleged that the law afforded no adequate protection; that a

continuance of the trespass would result in irreparable injury to him; that defendant was unable to respond in damages; that pecuniary compensation for the actual damages would not be adequate relief; and that restraint was necessary to prevent continuance of the intrusions, and multiplicity of suits. *Held*, that neither the naked allegation of irreparable injury, nor the insolvency of the trespasser, were sufficient to warrant an injunction against a trespass.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

Action for injunction by Mechanics' Foundry of San Francisco, against Joseph E. Ryall. At first trial, plaintiff obtained damages and an injunction. Defendant appealed. Judgment was reversed, and the case remanded. At the second trial, on an amended complaint, defendant entered a general demurrer, which was sustained, and the action was dismissed. Plaintiff appeals.

Manuel Eyre, for appellant. *R. Percy Wright*, for respondent.

BELCHER, C. C. This action was brought to obtain an injunction restraining the defendant from doing certain acts complained of by plaintiff. The case was before this court on a former appeal, and it was held that the complaint, as then framed, did not state facts sufficient to constitute a cause of action. 62 Cal. 416. The allegations of the complaint are set out in the opinion. When the case went back to the superior court, an amended complaint was filed, and to that a general demurrer was interposed and sustained. Plaintiff declined to further amend its complaint, and thereupon judgment was entered dismissing the action. The additional allegations in the amended complaint are: "That an action at law will be wholly inadequate to protect this plaintiff; that a continuance of such acts,—and defendant announces his positive determination so to continue them each day,—will work irreparable injury to this plaintiff; that, if not restrained, such acts will, before it will be possible to obtain a decision in an action at law, work irreparable injury to this plaintiff, and utterly ruin its business; that said defendant is utterly unable to respond in damages; that he is impecunious and totally without means; that pecuniary compensation for the actual damages from day to day will not afford adequate relief, nor prevent the continuance of said intrusions; and restraint is necessary to prevent multiplicity of suits."

It was alleged in the original complaint that defendant was a stockholder in the corporation plaintiff, and in the amended complaint that he was a stockholder and director of the corporation. This allegation was stricken out of the amended complaint; but on whose motion or for what reason it was done does not appear. If defendant was in fact a stockholder and director of the corporation, it is not easy to see how he could be called a trespasser for doing the acts complained of. But, however this may be, before a court of equity will interfere to restrain a trespass, it must appear that the injury to result from the trespass will be irreparable in its nature; and it is not sufficient simply to allege that fact, but it must be shown to the court how and why it will be so. "The mere allegation that irreparable injury will result to the complainant unless protection is extended to him is not sufficient. The facts must be stated, that the court may see that the apprehensions of irreparable mischief are well founded." *Carlisle v. Stevenson*, 3 Md. Ch. 499; *Waldron v. Marsh*, 5 Cal. 120; *Turnpike Co. v. Supervisors of Yuba*, 13 Cal. 190; High, Inj. (2d Ed.) § 722. Nor will equity interpose to restrain a trespasser simply because he is a trespasser and is insolvent. Other facts and circumstances must be shown before the extraordinary remedy of injunction can be invoked. "The fact that a trespasser is insolvent will not give chancery jurisdiction to enjoin his acts, where the other circumstances of the case preclude it." *Turnpike Co. v. Barnett*, 2 Cart. (Ind.) 536; 1 High, Inj. (2d Ed.) § 701. There may be other efficient means of preventing the commission of the threatened trespass which can be availed of without any violation of law; and,

if so, such means should first be resorted to. In the case last above cited, where an injunction was asked to restrain trespassers, it was said: "If these men are not responsible for their acts in damages, we should suppose they might be crowded out of the way by a *molliter manus imposuit*." Many cases might be mentioned where this rule would be applicable. For example, if one should discharge his cook or a clerk in his store, and the cook or clerk should return and insist upon his right to occupy his former place in the kitchen or at the counter, and should threaten to continue to do so every day, to the exclusion of any other cook or clerk, no one would think it necessary to ask for an injunction to stop the intrusions, or that a court of equity would grant the relief if it were asked for. We see no reason why the same rule should not be applied here. If the defendant had no right to enter and occupy a place in the plaintiff's foundry, it would seem that he might easily have been stopped at the door, or, having entered, have been put out by calling in a policeman if necessary.

In our opinion, the demurrer was properly sustained, and the judgment should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

75 Cal. 584

GOODWIN v. McCABE. (No. 11,293.)

(Supreme Court of California. April 21, 1888.)

1. LIMITATION OF ACTIONS—ADVERSE POSSESSION—CONSTRUCTIVE POSSESSION—NATURAL BOUNDARIES.

Where plaintiff claimed by prior possession land bounded partly by fences and partly by a lake and slough, the court instructed the jury that it was sufficient to constitute possession if plaintiff had a substantial inclosure, such as would protect crops, turn cattle, etc., without mentioning the natural barriers. *Held*, that plaintiff was entitled upon specific request to have the jury also instructed as to the effect of such natural barriers.¹

2. SAME—COLOR OF TITLE—SWAMP-LAND CERTIFICATES.

A certificate of purchase of swamp-land constitutes color of title; Code Civil Proc. Cal. § 1925, declaring it "evidence that the holder * * * is the owner of the tract described therein;" and entry thereunder in good faith, and using for grazing purposes, constitutes constructive possession, even if the land is not inclosed.²

3. PUBLIC LANDS—HOMESTEAD ENTRY—ADVERSE CLAIMANTS—CONSTRUCTIVE POSSESSION.

Taking possession either with or without force, under a United States homestead entry, is invalid where the land is in the actual possession of one who has no title, but a mere possession; but valid, if without force, and the possession of the adverse claimant is constructive only.

4. EVIDENCE—DOCUMENTS—MAPS FROM LAND-OFFICE.

A copy of a map of land on file in the office of the register of the land-office, and certified by him, is admissible in evidence.

Commissioners' decision. Department 2. Appeal from superior court, Lake county; RODNEY J. HUDSON, Judge.

Ejectment by Charles Goodwin against William B. McCabe. Judgment for defendant, and plaintiff appeals.

Fox & Kellog and *Eug. W. Britt*, for appellant. *R. W. Crump* and *S. K. Welch*, for respondent.

HAYNE, C. Ejectment. The plaintiff relies on prior possession. The defendant relies on a homestead entry under the laws of the United States.

¹ On the subject of adverse possession, see *McLaughlin v. Del Re*, (Cal.) 16 Pac. Rep. 881, and note.

² On the subject of color of title, see *Hickman v. Link*, (Mo.) 7 S. W. Rep. 12, and note. v.17p.no.8—45

Verdict and judgment for defendant. Plaintiff appeals from the judgment, and from an order denying his motion for a new trial.

We think that the judgment and order must be reversed for the refusal of certain instructions requested by plaintiff. The land in controversy is public land. The plaintiff resided upon an adjoining piece, to which the title is undisputed. In order to make out his possession, he proved that the whole tract, including that upon which he resided, had on one side a body of water known as "Clear Lake," on another a slough which emptied into the lake, and on the remaining sides a fence built partly by himself and partly by his neighbors; and he gave evidence tending to show the pasturing of his cattle there. The greater part of the evidence related to the character of the slough; that is to say, whether it was of sufficient depth and firmness of bottom to turn cattle. In its charge the court made no mention of the natural boundaries, but simply told the jury that it was sufficient for the plaintiff to have a substantial inclosure, and that "a substantial inclosure is such a one as a prudent farmer would have to protect a growing crop, and sufficient to protect the land from cattle, horses, and hogs; the character of the land and the crops growing upon the same being considered." This was all which was said upon the subject. No reference to natural barriers was made. Thereupon the plaintiff requested the court to give the following instruction: "If plaintiff, at any time before the defendant entered upon the land in controversy, built a fence of any kind in such a manner that, together with natural barriers, it formed a complete inclosure sufficient to turn cattle, which inclosure included within it the land in controversy; and if said land was suitable for pasturage, and was used by plaintiff for that purpose up to the time of the entry of the defendant,—then there was established in plaintiff such possession of said lands as to entitle him to recover, and your verdict will be for the plaintiff." The court refused to give the instruction, and the plaintiff excepted. We think the instruction should have been given. Natural barriers may or may not be of such a character as to serve as part of an inclosure by which a party subjects land to his dominion and control, and so acquires possession of it. Whether they are of such a character in any given case is a question for the jury, under proper instructions from the court. *Brumagim v. Bradshaw*, 39 Cal. 41, 51. In this case, if the natural barriers were of such a character as, in connection with the fences, to make a sufficient inclosure, and the plaintiff pastured his cattle there, he certainly had actual possession of the tract in controversy. *Id.*; *Southmayd v. Henley*, 45 Cal. 102; *Pierce v. Stuart*, *Id.* 280. The plaintiff had a right to have the jury instructed as to the effect of natural barriers. For aught we can see the jury may have supposed that the substantial inclosure referred to by the court meant an inclosure erected by man. If no request had been made, the charge, although meager, might be sufficient. But, in view of the specific request, we think there was error.

We think also that the fourth, fifth, and eighth instructions requested by plaintiff should have been given.

The foregoing is sufficient to dispose of the appeal. But inasmuch as the other questions argued will arise upon a retrial, we think they should be passed upon. The plaintiff at the trial put in evidence two swamp-land certificates, the amounts due upon which had been fully paid up. These, the counsel expressly stated, were not introduced to show title, but to show color of title,—to define the extent of his possession. These certificates seem to be regular on their face, and we think they constituted color of title. Such a certificate is "evidence that the holder * * * is the owner of the tract described therein." Code Civil Proc. § 1925; *Laugenour v. Hennagin*, 59 Cal. 625. And if the plaintiff entered under it, believing in good faith that it conferred upon him a right to the land, and pastured his cattle there, he had constructive possession of the tract, even if it was not inclosed. *Webber*

v. *Clarke*, 15 Pac. Rep. 431. Such a constructive possession would enable him to maintain ejectment against a mere intruder. But the defendant was not a mere intruder. He had made his homestead entry under the laws of the United States, and had paid the sums which such laws required him to pay, and he produced the receipts for such payments from the proper officer. By so doing he had connected himself, as far as was then possible, with the government title. No final certificate could at that time have been issued. Rev. St. § 2291. He had done all that he could do up to that time. And if his proceedings were valid, he had done enough to enable him to defeat an action of ejectment by one who had no title but a mere possession. See *McDonald v. Edmonds*, 44 Cal. 330. The cases of *Pulliam v. Gravel Co.*, 52 Cal. 605, and *Pickard v. Kelley*, Id. 89, are not at all in conflict with this. Those cases simply decided that the papers did not tend to show possession. As a matter of course they did not. Possession was to be proved by other evidence. It is contended, however, that the defendant's proceedings were not valid for the reason that the land was then in the actual possession of the plaintiff. If the plaintiff was in the actual possession of the land, we think the defendant's proceedings were invalid, although his entry was accomplished without the use of force. This seems to be the result of the authorities. In *Atherton v. Fowler*, 96 U. S. 513, the land was in the actual possession of the plaintiff's testator, and the entry of the defendant was forcible. The opinion does not seem to have in view the case of an entry upon actual possession without the use of force. In *Durand v. Martin*, 120 U. S. 369, 7 Sup. Ct. Rep. 587, Martin "was in actual possession under color of title." The report does not show whether the entry of Durand was with force. In *Quinby v. Conlan*, 104 U. S. 423, the rule was stated to be that "a settlement cannot be made upon public land already occupied." The element of force was not adverted to. In *Mower v. Fletcher*, 116 U. S. 381, 6 Sup. Ct. Rep. 409, the court said that if a party "enters into possession of the land, and improves and cultivates and holds it, no one, by forcibly or surreptitiously getting into possession, can make a pre-emption settlement," etc. And the reasoning of the court in all cases seems to us to forbid the invasion of the actual possession of another, whether such invasion is accomplished by the use of force or not. See, also, *McBrown v. Morris*, 59 Cal. 68. But we do not think the rule applies where the first party has a mere constructive possession. The reasoning of the court in the cases above mentioned does not seem to cover such a case. And in *Belk v. Meagher*, 104 U. S. 287, the court, per WAITE, C. J., said: "We also all agree that if a peaceable entry had been made on lands which had not been inclosed or improved, a good right might have been secured." The ultimate question to be submitted to the jury, under proper instructions, therefore, is whether the plaintiff had actual possession of the land at the time of the defendant's entry. If he had, the defendant's proceedings were invalid, and the plaintiff must recover; if he had not, the defendant's proceedings were a good defense.

Certain objections were taken to the admissibility of evidence, which we will notice briefly. We think the receipts of the receiver of the land-office were properly admitted. Whether the affidavit required by section 2290, Rev. St., ought to have been introduced need not be decided, as upon a retrial the defendant will doubtless introduce the affidavit. The certified copy of the map was also properly admitted. Section 2224, Rev. St., does not apply to the case. That section has reference to papers on file in the office of the surveyor general of certain states. The map in question was not in the office mentioned, but in that of the register; and he, as the custodian of the record, was the proper person to give a certified copy of it. In *Murphy v. Sumner*, cited by appellant, the register attempted to certify to the fact that certain land had been listed. The court said that he ought to have given a certified copy of the list. If in this case the register had attempted to certify that the

land was of a certain character the case would have been in point. In giving a certified copy of the document, showing its character, he followed the course pointed out in the case. We advise that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and cause remanded for a new trial.

75 Cal. 590

ALPERS v. SCHAMMEL *et al.* (No. 9,697.)

(Supreme Court of California. April 21, 1888.)

1. PARTNERSHIP—ACTIONS AGAINST—ALLEGATION OF PARTNERSHIP.

The following complaint: "Plaintiff * * * avers that said defendants are * * * copartners * * * under the firm name of S., R. & Co.; that said defendants, copartners as aforesaid, * * * being indebted to plaintiff, * * * executed their promissory note in words following: 'On demand, after date, without grace, we promise to pay ourselves, or order. * * * S., R. & Co.,'—substantially avers the execution of the note by defendants as copartners.

2. ABATEMENT AND REVIVAL—DEATH OF PARTY BEFORE SERVICE—EFFECT ON JUDGMENT.

In an action against three copartners, two of whom appeared and answered, but there was no appearance for the third, nor default taken against him, and he died two days after the action was begun, and it did not appear that notice was served on him. Afterwards a verdict was returned for plaintiff. *Held*, that the verdict should be held to be against the two only who were served and answered, and a judgment against all the defendants should be modified by dropping the deceased defendant.

3. JUDGMENT—RENDITION AND ENTRY—EXCESS OF VERDICT.

Where the clerk, without authority, enters judgment in excess of the verdict, with interest from the time the entry was made, the judgment should be modified as of the amount of the verdict, with interest from the date of the verdict, in accordance with the statutory form.

4. APPEAL—REVIEW—WEIGHT OF EVIDENCE.

Where there is, on the record, no specification of the particulars in which the evidence is insufficient to sustain the verdict, the question cannot be considered on appeal.

5. SAME—MATTERS NOT APPARENT ON RECORD.

Alleged error by the court in denying a new trial, in that the verdict was against the law, cannot be considered, where the notice of intention to move for a new trial is not made a part of the statement or bill of exceptions.

Department 2. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Charles Alpers brought an action on two promissory notes against Henry Schammel, Frank B. Reynolds, and William L. Bolte, averring in his complaint as follows: "That the said defendants are, and were at all times herein mentioned, copartners, and as such carrying on business in the said city and county of San Francisco, under the firm name and style of Schammel, Reynolds & Company; that on the 23d day of December, A. D. 1862, at said city and county, the said defendants, copartners as aforesaid, became and were justly indebted to plaintiff in the full sum of fifteen hundred dollars gold coin of the United States, and, being so indebted, then and there made, executed, indorsed over, and delivered to plaintiff their certain promissory note in writing, in the words and figures following, viz.: 'On demand, after date, without grace, we promise to ourselves, or order, the sum of fifteen hundred dollars, payable only in gold coin of the government of the United States, for value received, with interest thereon, in like gold coin, at the rate of two per cent. per month from date until paid. SCHAMMEL, REYNOLDS & Co.' That plaintiff is now the owner and holder of said promissory note, and no part thereof has been paid, although demanded." Dated February 26, 1883. Feb-

ruary 20, 1884, a jury returned a verdict of \$3,686.35 for plaintiff. On this verdict a judgment purporting to be dated February 20, 1884, was entered, against all the defendants, for \$3,772.35, (\$86 more than the verdict;) the excess being the interest from February 20, 1884, to June 19, 1884, the date the judgment purports to have been recorded, and from which date it drew interest as recorded. Defendants appeal.

Fisher Ames and *Geo. D. Collins*, for appellants. *R. Percy Wright*, for respondent.

THORNTON, J. Action on two promissory notes. It is urged that the complaint does not show that the notes in suit were executed by the defendants as copartners. We cannot concur with counsel in this contention. We are of opinion that it is substantially averred that the notes were executed by defendants as copartners. This being so, there is no variance between the proof and the allegations of the complaint. Further, there was no objection made to the notes, when offered in evidence, on the ground that they varied from the averments of the complaint. If such objection had been made, it might have been obviated by amendment. And, as the cause was tried, as it clearly appears it was, as if the notes had been averred to have been the notes of the copartnership, we deem it unnecessary to say anything further on this point.

It is contended that the delivery of the notes is not shown by the evidence, but the verdict is not attacked on any such ground, as there are on the record no specifications of the particulars in which the evidence is insufficient to sustain the verdict. The point urged cannot, therefore, be considered.

The further contention is made that the verdict is against law, for the reason that there is no evidence that there was a delivery to the plaintiff of the notes sued on, and the court therefore erred in refusing a new trial. The notice of intention to move for a new trial is no part of the record herein, unless made so by a statement or bill of exceptions, (*Hook v. Hall*, 68 Cal. 22, 8 Pac. Rep. 596;) and, as the notice does not appear in the statement herein, the point is not before us for consideration.

It is averred in the complaint that Henry Schammel, Frank B. Reynolds, and William L. Bolte, constituted the firm of Schammel, Reynolds & Co. The two first mentioned appeared and answered. There was no appearance by Bolte, and no entry of default against him for not answering. There is uncontradicted evidence in the record that Bolte committed suicide within two days after the action was begun; and, as his default was not entered, it may well be inferred that he was not served. The cause came on for trial on the 20th day of February, 1884, and on the same day a verdict was entered in the following words: "We, the jury in the above-entitled action, find for the plaintiff, and assess the damages in the sum of thirty-six hundred and eighty-six and 35-100 dollars, (\$3,686.35)." This verdict could only regularly have been against the defendants who appeared and answered. It could not have been against Bolte if he was served and had lived until the trial, unless he had answered. If he was served and failed to answer, then his default should regularly have been entered. If he was not served, then the action should regularly have proceeded against the defendants who were served, (Code Civil Proc. § 414,) or who appeared and answered. In no event, in a regular course of procedure, could there have been a verdict against him. We think, therefore, that this verdict should be held to be a verdict only against Schammel and Reynolds, who answered.

On this verdict a judgment was entered against Schammel, Reynolds and Bolte. This clearly appears from the judgment entry. Further, judgment was entered by the clerk on the verdict for \$3,772.35, (\$86 more than the amount of the verdict returned,) with interest at the legal rate from the time it was made. This was in excess of the authority vested in the clerk by the statute. The judgment should have been entered for the amount of the ver-

dict, with interest at the legal rate from the day on which it was returned by the jury. The respondents' mode of accounting for the insertion of a sum greater than the verdict on the judgment is not sustained by the record; and, if it was, it would not be in accordance with the mode pointed out by statute.

The judgment should be modified, in accordance with the proceeding, by striking out the name of William L. Bolte, and by inserting in it the amount stated in the verdict as returned, viz., \$3,686.35. We find no other errors than the above in the record.

The judgment and order are reversed, and the cause remanded to the court below, with directions to modify the judgment in the manner above pointed out. But, as this modification might have been made in the court below without appeal to this court, the appellants will recover no costs on this appeal. Ordered as above.

We concur: McFARLAND, J.; SHARPSTEIN, J.

MODIFIED OPINION.

(April 23, 1888.)

PER CURIAM. By inadvertence herein, the judgment as entered does not express the views of the court. The court did not intend to order a new trial. Its intention was to modify the judgment in the particulars indicated in the opinion. The following, which is in accordance with what the court intended to express, will be substituted for that part of the opinion (the last clause) which states the judgment: "The order denying a new trial is affirmed. The judgment is reversed, and the cause remanded to the court below, with directions to modify the judgment in the manner pointed out, and, as so modified, is affirmed. But as this modification might have been made in the court below without an appeal to this court, the appellant will recover no costs on this appeal." Ordered accordingly.

75 Cal. 604

HUMBOLDT COUNTY v. DINSMORE. (No. 11,342.)

(*Supreme Court of California.* April 26, 1888.)

1. HIGHWAYS—STATUTORY ESTABLISHMENT—COLLATERAL ATTACK—QUALIFICATION OF PETITIONERS.

In an action instituted under Code Civil Proc. Cal. pt. 3, tit. 7, for the condemnation of lands alleged to be necessary for a public highway, it appeared that the petition to establish the highway did not show that the proposed road was in the road-district where the petitioners resided, or that it was in the state of California. *Held*, that it was not error to admit the petition in evidence, as Pol. Code Cal. § 2682, relating to the requirements of a proper petition, does not include an allegation that the signing petitioners are 10 freeholders of the road-district, and taxable therein for road purposes, wherein the proposed road is to be constructed; that being something which the board had jurisdiction to determine as a fact on the evidence before it on the hearing of the matter.

2. SAME.

In an action for the condemnation of a strip of land belonging to defendant, alleged to be necessary in the establishing of a highway, the introduction in evidence of the order of the board of supervisors cannot be objected to on the ground that the board did not possess the power to act on the petition before determining the fact that it was signed by at least 10 freeholders of the road-district, taxable therein for road purposes, as it must be presumed that the order was made on a sufficient finding unless the contrary appears on the record.

3. SAME—APPROVAL OF BOND.

Pol. Code Cal. § 2683, requires that the bond that accompanies a petition to establish a highway be approved by the board of supervisors, but the bond must be considered as sufficiently approved where the board, recognizing the petition and bond to be such as required by law, orders viewfers to be appointed; and no objection to its introduction in evidence, in an action to condemn land for such road, can be sustained on the ground of want of approval.

4. SAME—NOTICE TO OWNERS.

Under Pol. Code Cal. § 2685, providing that viewfers on the establishing of public highways must, *inter alia*, "notify the resident owner or agent of land over which

it passes, of the proposed route," the notice need not be in writing; and where the owner was notified personally, and attended the survey, he cannot object to the introduction in evidence, in an action to condemn land for such road, of the viewer's report, on the ground of want of notice.

5. SAME—NECESSITY OF ROAD.

Pol. Code Cal. § 2686, which provides what the report of viewers on the establishing of highways shall contain, does not require them to specify as a fact that they had ascertained the necessity for the road, or that the same should be opened. Therefore the fact that the report did not contain a finding thereon does not deprive the board of supervisors of the power to adjudicate in the premises.

6. SAME—DESCRIPTION OF PROPOSED ROAD.

In an action for the condemnation of a strip of land belonging to defendant, alleged to be necessary for a public highway, objection to the admissibility in evidence of the records of the board of supervisors, on the ground of insufficient description, cannot be sustained, where, from the viewers' report, the map of survey, and the petition, the *termini* and description of the road can easily be determined.

7. SAME—WIDTH OF ROAD—VARIANCE BETWEEN PETITION AND REPORT OF VIEWERS.

Since Pol. Code Cal. § 2681, enumerating the requisites of a petition to establish a highway, enacts "that all such highways shall be at least 40 feet wide," the order of the board of supervisors cannot be considered void where, having the power, it approved the report of the viewers containing a declaration that the road shall be 60 feet wide.

8. SAME—CONFIRMATION OF VIEWERS' REPORT—WAIVER OF OBJECTION.

In an action for the condemnation of a strip of land belonging to defendant, alleged to be necessary for a public highway, it appeared that defendant, the only complainant, although present when the order was made, and represented by counsel, made no offer of any evidence against the new road, and the board, on such information as was afforded them by the report of the viewers under oath, and by papers attached to their report, acted upon the matters of fact within their jurisdiction to determine. *Held*, that the complainant was estopped from contesting the sufficiency of such evidence.

Commissioners' decision. Department 1. Appeal from the superior court, Humboldt county; JOHN J. DE HAVEN, Judge.

Humboldt county instituted an action under Code Civil Proc. Cal. pt. 3, tit. 7, for the condemnation of a strip of land belonging to J. O. Dinsmore, the defendant, alleged to be necessary for the establishing of a highway. Judgment for the plaintiff. Defendant appeals.

E. W. Wilson and *Wallace Dinsmore*, for appellant. *J. D. Chamberlain* and *Geo. W. Hunter*, Dist. Atty., for respondent.

FOOTE, C. This action was instituted under title 7 of part 3 of the Code of Civil Procedure, for the condemnation of a strip of land belonging to Dinsmore, the appellant, alleged to be necessary for and to be used as a public highway. Judgment was made and entered for the plaintiff, and from that and an order refusing him a new trial the defendant has appealed, the case coming here upon the judgment roll and a bill of exceptions.

It is claimed that the trial court erred in admitting in evidence the petition for the road, (1) because it did not show that the proposed road was in the road-district in which the petitioners reside, or that it was in the state of California; (2) that it did not describe particularly the road to be constructed, but only a surveyed line over the general route thereof; (3) that the petition does not show over what land the proposed road will run. In this connection it may be stated that on the trial it was admitted by the appellant that the persons who signed the petition were freeholders within road-district No. 6. Section 2682 of the Political Code, which defines what must be the character of such a petition, is in this language: "Petition must set forth and describe particularly the road to be abandoned, discontinued, altered, or constructed; and, if the road is to be altered, laid out, or constructed, the general route thereof, over what lands, who the owners thereof are, whether such of them as can be found consent thereto, and, if not, the probable cost of the right of way where such consent is not had, the necessity for and the advantage of the proposed road." It will be perceived at a glance that the requirements for a proper petition under the statute does not include an allegation that the

signing petitioners are 10 freeholders of the road-district, and taxable therein for road purposes, wherein the proposed road is to be constructed. This was something, therefore, which the board had the jurisdiction to determine as a fact, on the hearing of the matter, from the evidence before them, irrespective of the question as to what the petition may have averred. For this reason the first objection to the introduction of the petition is untenable. It is plain that the road-district was in Humboldt county, and that is a county in the state of California, of which judicial notice is taken. We think the petition sufficiently describes the road to be constructed, and over whose land it was to run.

An objection was made to the introduction in evidence of the bond which the statute requires to accompany the petition, (section 2683, Pol. Code,) that it was never approved by the board of supervisors. The order of the board recognizing the petition and bond as being such as is required by law, and ordering viewers to be appointed, is sufficient evidence of an approval of the bond.

It was also objected to the introduction in evidence of the order last named that the board did not possess the power to act on the petition before determining the fact that it was signed by 10 freeholders of the road-district taxable therein for road purposes; and that the order was void because neither it, nor any of the other proceedings of the board, show that one of the viewers was a surveyor, and because it is not anywhere shown that the viewers were disinterested citizens, but not petitioners. These objections were overruled, and an exception taken. It is undoubtedly true that the board, in order to acquire the right to cause a view and survey of a proposed public road, must first be satisfied that the petition is presented and signed by at least 10 freeholders of the road-district, taxable therein for road purposes, in which the road is to be constructed, and that a valid order for such view and survey must include in the number of viewers a surveyor, and that all such viewers must be disinterested citizens of the county, and not petitioners. But does it follow, in the absence of affirmative proof to the contrary, that all these matters were not rightfully determined by the board of supervisors when they made the order appointing the viewers? Is not their order in the premises conclusive upon the matter, unless the contrary appears by the record? It has been held that the board of supervisors, in determining matters of this kind, exercise judicial functions. *Damrell v. San Joaquin Co.*, 40 Cal. 158. "An inferior board may determine conclusively its own jurisdiction or power by adjudicating the existence of facts upon the existence of which its jurisdiction or power depends." *In re Grove St.*, 61 Cal. 453. In *Tehama Co. v. Bryan*, 68 Cal. 57, 8 Pac. Rep. 673, and *Butte Co. v. Boydston*, 11 Pac. Rep. 781, it seems to have been settled as to those matters of fact which the board of supervisors have jurisdiction to determine that their judgment is final and conclusive. Hence we perceive no error in allowing the order of the board appointing the viewers from being introduced in evidence. Besides, upon the point that no surveyor was appointed among the viewers, it affirmatively appears from the record that one was appointed.

It is next objected that the viewers' report was inadmissible upon various grounds, which we will examine. The viewers did notify the defendant of the proposed road, and he was present when the survey was made, and the statute (section 2685, Pol. Code) does not require that notice to be in writing. In section 2686 of the Political Code, which specifies the particular matters which their report shall contain, we do not perceive that the viewers are required to state as a fact that they have ascertained the necessity for the road, or that the same should be opened. Therefore the fact that the report did not contain a finding upon those matters did not deprive the board of supervisors of the power to adjudicate in the premises. *Tehama Co. v. Bryan*, *supra*.

Taking the report of the viewers, and the map of the survey which is re-

turned, and the petition, which is made a part of the report, it is easy to determine with certainty the *termini* and description of the road. There is nothing in the law which requires the survey to appear upon the records of the board; hence the objection taken to its introduction in evidence was untenable. The statute (Pol. Code, § 2685) does not require that the defendant shall have notice in writing of the view; and in this case it appears, as before stated, that he was notified personally, and was present.

The order approving the report of the viewers is claimed to be void, and objected to as evidence, on grounds now to be considered. The defendant, the only complaining party in the court below and here, although present when the order was made, and represented by counsel, made no offer of any evidence against the new road, and therefore the board of supervisors, on such information as was afforded them by the report of the viewers under oath, and papers attached to their report, acted upon matters of fact within their jurisdiction to determine. The sufficiency of that evidence was concluded by the judgment, which cannot be assailed collaterally. *In re Grove St., supra.*

The order of the board of supervisors which approved the report of the viewers was not void, for the reason, as alleged, that it included a declaration that the road should be 60 feet wide. The petition, a part of the report, and the survey show the necessary description of the road and that it was 60 feet wide. Section 2681 of the Political Code declares that public highways of the kind here involved shall be at least 40 feet wide. Hence the board in this instance, if it had the power, as it had, to approve the report of the viewers, had the discretion to make the road 60 feet wide.

We perceive no prejudicial error in the record, and the judgment and order should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

75 Cal. 617

WUNDERLIN v. CADOGAN. (No. 9,928.)

(*Supreme Court of California.* April 26, 1888.)

1. TRIAL—AUTHORITY TO SET ASIDE FINDINGS—NOTICE TO PARTIES.

A court has no authority to set aside findings filed, and substitute others, without notice to the parties, on the ground that such findings "were made under a misapprehension." The remedy for erroneous findings, unless the error is a mere misprision, is by motion for new trial.

2. SAME—FAILURE OF DEFENDANT TO APPEAR.

That a defendant did not appear at the trial will not justify setting aside findings filed in the case, and substituting others, without notice to such defendant.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

W. B. Tyler, for appellant. Matt. I. Sullivan, for respondent.

HAYNE, C. This is an appeal from an order setting aside certain findings, and a judgment which had been entered thereon. It appears that the case was tried, and findings signed and filed. Upon the facts stated in these findings, all of the defendants were entitled to judgment. Subsequently, and upon the consent of certain of the defendants, but without notice to the others, the court set aside the findings first filed, and substituted others in their place. This second set of findings contained the following: "The clerk of said court will not enter judgment upon the original findings herein, filed July 31st, as the same were made under a misapprehension." Judgment was entered upon the last set of findings, in favor of the defendants who consented to the change of the findings, and against those who were not notified

of said change. These latter, after the lapse of more than a year from the entry of the judgment, moved, upon notice, to have the judgment and the second set of findings set aside. This motion was granted, and the appeal is from the order granting the motion.

It is to be observed that what the court did in the first instance was not merely to supply an omission in the findings first filed, or change the direction for judgment, but was to substitute one set of findings of fact for another. This we are inclined to think the court had no power to do. Even under the system of implied findings, where there was an express provision of statute for the supplying of omissions in findings upon exceptions taken, it was held that it was not proper to substitute one finding of fact for another. *Hidden v. Jordan*, 28 Cal. 304, 305; *Cowing v. Rogers*, 34 Cal. 652; *Prince v. Lynch*, 38 Cal. 531. And *a fortiori* would this seem to be so under the present system of findings, where there is no such provision of statute. The remedy for erroneous findings of fact is by motion for new trial; and the relief to be given upon such motion is the awarding of a new trial, to be had in regular course. It is not proper for the court, upon a motion of that kind, to immediately render a contrary decision. *Mitchell v. Hackett*, 14 Cal. 661. These rules rest upon the theory that the modes in which a decision may be reviewed are prescribed by statute, and that the court has no power to substitute other modes in their place. The rules, however, do not prevent the court from correcting mere misprisions, and orders improvidently and unintentionally entered. That a given order is of that unusual character is not to be presumed, but must be affirmatively shown. It will be observed, in this connection, that the second set of findings state that the first set were made "under a misapprehension." It does not clearly appear what the misapprehension consisted in, or whether it was not a mere misapprehension of the effect of evidence, and therefore it is a close question whether the case falls within the rule, or the exception above stated. It is not necessary to determine this question, however; for, if it be assumed that the court had power to set aside the findings as improvidently and unintentionally made, the defendants had a right to be heard upon the question. And the court had no power to proceed to annul the findings in their favor without notice to them. See, generally, *Greehn v. Marker*, 67 Cal. 365, 7 Pac. Rep. 783.

The fact that these defendants did not appear at the trial does not excuse the want of notice above referred to. As is well said by the learned judge of the court below: "The absence of defendant and his legal representatives from the trial does not entitle the plaintiff to take judgment against him as by default. Notwithstanding the failure of defendant to appear at the trial, if his answer contained a denial of any material allegation of the complaint, the plaintiff must make proof of that allegation by at least *prima facie* evidence. The defendant in such cases has a right to have the court pass upon the value of the evidence so offered; and if, in the opinion of the court, it does not amount to *prima facie* evidence of the truth of the controverted allegations, the defendant, although absent, would be entitled to have judgment entered in his favor. Such a judgment would undoubtedly be a judgment rendered in due course of law, and its force and effect would be as full and complete as if the defendant had been present at the trial in person and by counsel." The court therefore had no power to set aside the findings without notice to the parties interested; and its subsequent action was proper. We therefore advise that the order appealed from be affirmed.

We concur: BELCHER, C. C.: FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

WHITE v. SPRECKELS. (No. 9,921.)

(Supreme Court of California. April 26, 1883.)

1. BOUNDARIES—EVIDENCE—SUFFICIENCY OF.

On the trial of an issue as to the ownership of a tract of land lying between a line of stakes claimed by plaintiff as the boundary line, and a fence built by defendant and claimed by him as such line, it appeared that defendant had at one time recognized such line of stakes as the true line. It also appeared, from a diagram attached to a patent under which plaintiff claimed, and from the testimony of the county surveyor, that the line of stakes was the correct boundary line. *Held*, that a finding that plaintiff was the owner of such tract was justified by the evidence, though it appeared that a former owner, when applied to on the subject of the division fence, had told his agent to let defendant "build the fence wherever he desired to build it."

2. APPEAL—HARMLESS ERROR—ADMISSION OF INCOMPETENT EVIDENCE.

Where incompetent evidence of a fact is admitted, such fact being fully proved by other competent evidence, the admission of such evidence is harmless error.

3. SAME—REVIEW—ADMISSION OF IMPROPER EVIDENCE—WHEN NOT ERROR.

Where improper evidence is admitted against objection, the grounds of such objection not being apparent at the time, and only appearing afterwards by the testimony of other witnesses, the admission of such evidence is not error.

Department 1. Appeal from superior court, Santa Cruz county; J. H. LOGAN, Judge.

Ejectment brought by Edward White against Claus Spreckels. There was a judgment for plaintiff, and defendant appeals.

Jarboe, Harrison & Goodfellow, for appellants. *Julius Lee*, for respondent.

SEARLS, J. This is an action of ejectment to recover a strip of land about two and one-eighth miles in length, and of about one hundred feet in width, as well as a certain other piece of land containing about four acres. Plaintiff had judgment for restitution, and for \$86.62, the value of the use and occupation of the premises, and for costs. Defendant appeals from the judgment, and from an order denying a new trial. Plaintiff is the owner of the Calabasas rancho and defendant is the owner of the Aptos rancho, which lies west of and adjoins the former. The question involved relates to the division line between the two ranches. It seems that in 1875 William H. Patterson, who then owned the Calabasas rancho, and defendant, built a division fence, which plaintiff contends wrongfully included the strip of land in question. At the trial, plaintiff introduced in evidence a patent from the United States to the heirs of Felipe Hernandez for the tract of land known as the "Calabasas rancho," bearing date December 8, A. D. 1868; and it was then stipulated in open court that on the 3d day of December, A. D. 1872, William H. Patterson had become vested with the title to all of the land embraced in said patent. The plaintiff then offered in evidence a deed of conveyance of the land described in said patent from William H. Patterson to A. B. Patrick, bearing date August 8, A. D. 1879, and a deed thereof from A. B. Patrick to the plaintiff, bearing date November 1, 1882. It is also shown that the said Calabasas rancho has for its western boundary the eastern boundary of the Aptos rancho, and for its southern boundary the northern boundary of the San Andreas rancho. Accompanying the patent aforesaid, and as a part thereof, is a map of said Calabasas rancho, of which a copy is set out in the transcript. Plaintiff then called as a witness J. J. Lewis, who testified as follows: "I am a surveyor by profession and occupation. About a year ago I examined the premises, and made a map of the Calabasas rancho, including the premises in controversy. I had before me at the time, and copied, the map of said rancho, which is a part of the patent just given in evidence." This map made by the witness was then put in evidence by the plaintiff, and marked "Plaintiff's Exhibit 3," and is set out in the transcript. The witness then testified further as follows: "I found a fence at the westerly portion of said rancho, indicated on said map by the dotted black line. The westerly line of the rancho is in-

licated on the map by the solid black line. I found the southerly end of said fence by running south, 62 deg. west, 7.13 chains from post marked 'S. A. No. 2.' Said post S. A. No. 2 was a surveyor's post, that is, a large, square, redwood post, firmly set in the ground, with surveyor's marks upon it. It had apparently been there a long time,—five, ten, or more years. I also found a fence running across the corner of the Calabasas ranch from said post S. A. No. 2, as indicated in said map. This fence cut off, in a triangular shape, about 2.6 acres, upon which was a large, valuable spring of water. The plaintiff showed me this post, and pointed it out as a corner of the Calabasas ranch." Defendant's counsel objected to this statement of what the plaintiff had said or pointed out to the witness as incompetent, irrelevant, and immaterial, and asked to have the same stricken from the record. The court overruled the objection, and denied the motion, to which ruling the defendant then and there excepted. This ruling is assigned as error.

Post S. A. No. 2 is delineated and its position given upon the map, which is a part of the patent; and its position, whether in existence or not, is capable of being determined by actual survey. The witness found the post upon the ground, marked as in the map specified. The fact that the plaintiff showed him the post, and pointed it out as a corner of the Calabasas ranch, did not militate against it as a physical fact; and the further fact that plaintiff said that it was a corner, etc., was only in corroboration of what was shown by the map accompanying the patent already in evidence. There was also evidence tending to show that post S. A. No. 2 has stood in its present position for at least 10 years. The post in question is not upon the disputed line between plaintiff and defendant, which is designated by post three and four, but, as it turned out later from the testimony of another witness, is a stake on the line dividing plaintiff's ranch from the San Andreas ranch, which lies south of it. The true position of stake No. 2 is fixed by the testimony of Thomas W. Wright, the county surveyor, who explains how he took the calls from the map, and measured the distance from the government section corner, and found the stake S. A. No. 3, etc. It is true, Lewis found the same stake by measuring from stake No. 2, just as he should have done if the latter was in its correct position, but whether it was so or not was not an established fact, except as shown by the result, coupled with the testimony of other witnesses. All of these facts appeared from his cross-examination, and formed a basis upon which a motion to strike out his testimony might have been properly based; but, as these facts were not patent when the objection to his testimony was made, there was no error in the ruling of the court.

Defendant holds under a patent for the Aptos *rancho* from the United States to Rafael Castro, dated April 3, 1860, by virtue of a deed from said Castro dated July 6, 1872. The Aptos ranch lies west of and is bounded on the east by the Calabasas *rancho*, as before stated. The next contention of appellant is that the evidence was insufficient to show that the land sued for was any part of the Calabasas ranch. The evidence tending to support the finding of the court is: (1) That there was a line of stakes, say 20 in all, along what plaintiff claims to be the true line of demarkation of the two ranches, which are shown to be some 80 feet west of and parallel with an old fence. (2) That, when Spreckels and Patterson were about to have a line fence constructed between them, Parker, who was about to build it, applied to Spreckels about making the fence, and the latter "pointed up the valley, and said I would find the surveyor's stakes up the valley, a little this side of an old fence" that was there at that time. This old fence, the witness says, "was about 80 feet east of the survey line that Spreckels pointed me to;" that subsequently Spreckels objected to the new fence being placed on the line of stakes; and that it was built upon the line of the old fence, and about 80 feet from the line of stakes. (3) The witness J. J. Lewis shows by diagram, (Exhibit No. 3,) which he says is a copy of the map found in the patent under which plaintiff holds, the

western boundary of the ranch of plaintiff, and that the fence is east of such boundary, and runs substantially parallel therewith; being 1.23 chains east therefrom at the south end, and 1.37 chains east from such western boundary at the north end. (4) The testimony of Thomas W. Wright, the county surveyor, is to the effect that he ran the line of the Calabasas ranch twice, as far as the country road, once for Castro, and once for defendant. He says it is a section line. He says he took the calls from the map, and set the stake No. 3 for the south-west corner. A reference to the map shows stake No. 3 to be at the south-west corner, and upon the west line as claimed by plaintiff, and upon the section line. The strip of land between this west line and the fence constitutes one of the subjects of the controversy. There was no evidence whatever to contradict that referred to, and we think the court was fully justified in finding as it did, in effect, that the patented west line of the Calabasas ranch was at the line of the stakes spoken of. The patent was in evidence, and, although not set out in the record, must have furnished data from which to demonstrate the error, if any, in plaintiff's claim under it.

The testimony of defendant at the trial, after proving title in himself to the Aptos rancho, was confined to showing that in 1875 a fence was built upon the east line of the disputed land, which it is claimed was with the agreement and understanding that it should be so built, and constitute the boundary of their respective tracts of land, and that defendant then entered into possession of and has since as of right retained possession up to such fence. The finding of the court is against this theory, and we see nothing in the testimony to warrant such theories.

Patterson, who then owned the Calabasas ranch, when applied to on the subject of the division fence, told his agent, Ford, "to let Spreckels build the fence wherever he desired to build it." It further appears that it was, at the request of Spreckels, placed upon the line of the old fence, as far as that extended, and continued on the produced line of such old fence north. Where coterminal proprietors of land in good faith agree upon, fix, and establish a boundary line between their respective tracts of land, in which they acquiesce, and under which they occupy, for a period equal to that fixed by the statute of limitations, the line as thus established is binding upon them, and those holding under them, or either of them. *Cooper v. Vierra*, 59 Cal. 282; *Sneed v. Osborn*, 25 Cal. 619; *Moyle v. Connolly*, 50 Cal. 295; *Columbét v. Pacheco*, 48 Cal. 395. Agreements of this character are not subject to the objection that they are within the statute of frauds, because they are not considered as extending to the title. They do not operate as a conveyance so as to pass title from one to the other, but proceed upon the theory that the true line of separation is in dispute, and to some extent unknown, and in such cases the agreement serves to fix the line to which the title of each extends. *Tyler, Bound.* 254. What are boundaries is a matter of law; but where they are, is a matter of fact. *Bolton v. Lann*, 16 Tex. 96. In the case at bar the evidence failed to show that the site of the fence was fixed and agreed upon as the boundary line between the two tracts of land. Patterson seems to have been quite willing that Spreckels should place the fence where he chose, without reference to the true boundary, and his conduct is wanting in the essential element of an intent and willingness to establish a certain and definite line between his property and that of defendant. We do not find any direct evidence showing that defendant ever occupied the disputed land, or that it was by him so inclosed as to raise a constructive possession. Under such circumstances, we are not warranted in disturbing the findings of the court below. The judgment and order appealed from are affirmed.

We concur: PATERSON, J.; MCKINSTRY, J.

75 Cal. 620

HUNT v. STEESE et al. (No. 11,664.)

(Supreme Court of California. April 26, 1888.)

1. INJUNCTION—To RESTRAIN TRESPASS PENDING EJECTMENT—TITLE OF PLAINTIFF.

Plaintiff in ejectment averred that he held certain lands for agricultural purposes, under a patent excepting from the grant any mineral land which might be found on the tract; that defendants were mining on the land; also that they were insolvent, and were doing irreparable injury. Defendants, without denying plaintiff's averments, maintained that the land was known to be mineral land at the date of the patent, and therefore plaintiff had no title; and that they had filed a location thereon, and complied with the mining laws. *Held*, that defendants, not having proved with reasonable certainty that plaintiff's title was not good by showing that the land at the date of the patent was more valuable for mining than for agricultural purposes, and was known to be so at that time, an injunction against defendant should issue pending a trial on the merits.

2. APPEAL—PRACTICE—NOTICE—ORDER REFUSING INJUNCTION.

Under Code Civil Proc. Cal. § 951, providing that on appeal from an order, except an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the order appealed from, and of papers used in the hearing below, on appeal from an order refusing an injunction, the particulars in which the evidence is considered insufficient need not be set out in a bill of exceptions.

In bank. Appeal from superior court, Yuba county; PHILLIP W. KEYSER, Judge.

This was an action of ejectment for certain lands in Yuba county. Plaintiff, Francis Hunt, moved for an injunction *pendente lite* restraining the de-

defendants, B. F. Steese and others, from doing certain acts to the destruction of the inheritance. The court granted a temporary restraining order, but, on the hearing of the motion, refused to grant an injunction, and dissolved the temporary restraining order. From this order plaintiff appeals. Code Civil Proc. Cal. § 951, provides: "On appeal * * * from an order, except an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the * * * order appealed from, and of papers used on the hearing in the court below."

Forbes & Dinsmore, (W. C. Belcher, of counsel,) for appellant. *J. H. Craddock*, for respondents.

PATERSON, J. Plaintiff moved for an injunction *pendente lite*, restraining the defendants from washing away the soil for mining purposes. The court granted a temporary restraining order, but on the hearing of the motion refused to grant an injunction, and the order first made was revoked. On the hearing plaintiff introduced his verified complaint and a patent for certain lands, including the lands in controversy from the United States to the Central Pacific Railroad Company, issued under a grant to that company by act of congress passed July 1, 1862, and the amendment thereto of July 2, 1864. This patent is dated February, 1875, and contains after the granting clause the following provision: "Yet excluding and excepting from the transfer by these presents all mineral lands, should any be found to exist in the tracts described in the foregoing." Plaintiff also introduced in evidence a deed from the Central Pacific Railroad Company to himself dated June 5, 1883, conveying the lands in controversy. This deed contains, after the description, these words: "Reserving, however, all claim of the United States to the same as mineral land." It was shown by the plaintiff that he went into possession of the lands granted in 1877, and had used the lands for grazing purposes. In the winter of 1883-84 the land was inclosed by plaintiff with a fence. He testified that the defendants had deprived him of the use of the land since the fall of 1884; that the defendants were mining and digging up and washing away good soil without authority. It was shown on behalf of the defendants that they had filed a notice of location under the Revised Statutes of the United States, and had complied with the local mining laws and regulations; that they had entered upon the land for mining purposes under their claim of right. They were permitted, against the plaintiff's objection, to introduce parol testimony to show that the land was mineral land, and the court found "that at the time the patent of the United States issued to the plaintiff's grantor, the land in controversy was known, and had been for several years prior thereto, to be valuable for minerals. That being the fact, no title to said land passed by said patent to plaintiff's grantor, and of course none passed to plaintiff from the deed from said company." The court denied the application for an injunction upon the ground stated. The complaint alleged in substance that the plaintiff was the owner of the land; that the defendants were trespassing on his possession, washing away the soil and removing gold therefrom; that they were insolvent, and threatened and intended to continue their trespasses; that the land is valuable for agricultural and grazing purposes; that defendants are "stripping away from its natural places of deposit the alluvium deposits of the soil, plowing up the soil, and scraping and piling it up to make reservoirs on the land, and digging ditches on the land to carry water to wash the soil therefrom." The defendants filed no answer, but introduced affidavits and the testimony of witnesses showing that the land was valuable for mining purposes at the time of the issuance of the patent; that it had been profitably worked for gold, and was well known to be mineral in character. They did not deny that they were washing away the soil for gold, or that they were insolvent, or that they intended to continue their mining operations, or that the injury was irreparable.

We think that the injunction should have been granted. It is unnecessary for us to determine on this appeal whether we shall adhere to the rule of decision that a patent may be collaterally attacked under such circumstances. In all cases of this kind an injunction should be granted pending the determination of the issue as to ownership, unless it appear that the plaintiff's title is bad, or at least that there is no reasonable ground for the assertion of title by the plaintiff. The mere existence of a doubt as to the title does not of itself constitute a sufficient ground for refusing an injunction. *Kerr Inj.* (2d Amer. Ed.) 13; *Hess v. Winder*, 34 Cal. 270. "It is the common practice at this day for the court to issue injunctions where the title is in dispute. * * * The jurisdiction of the court in these cases is asserted for the preservation of the property pending proceedings at law for the determination of the title of the parties." *Le Roy v. Wright*, 4 Sawy. 535. "The injuries which are the subject of the complaint are of a character calculated to destroy the entire value of the land for all useful purposes. Those which consist in excavating ditches and digging up the soil are irreparable in the sense that the former condition of the property could not probably be restored without an expenditure exceeding the original value of the land. * * * A denial of the preventive remedy by injunction in such case would be tantamount to a denial of all protection." *Henshaw v. Clark*, 14 Cal. 465. Not only should there be an answer to the merits, but it should be made reasonably certain by the pleadings and the affidavits, that the attack upon the patent will be ultimately successful, or the injunction should be granted. Such is not the case here. It is not sufficient to show that the land had been profitably worked for gold prior to the issuance of the patent. It should clearly appear that the lands were at the date of the grant more valuable for mining than for agriculture, and were known to be such; that they were more valuable under the conditions existing at the time of sale for mining than for agricultural purposes. *Iron Co. v. U. S.*, 8 Sup. Ct. Rep. 131.

In the case at bar the plaintiff's patent made for him a *prima facie* case as to title, and the most that is shown by the defendants is that the land is now, and was prior to the issuance of the patent, valuable for mining purposes when water could be had to work it. It was shown that from 1864 until after the patent had been issued no mining of any importance had been done for want of water. One witness for the defendant testified that "after 1864 there was no water there to work with, except from rains, and it took very heavy rains to accumulate water sufficient to amount to anything." That water has since been secured for the purpose of working the land cannot be taken into consideration in determining the rights of the parties. Present contingencies or probabilities have no bearing upon the question. *U. S. v. Reed*, 28 Fed. Rep. 486. The issue is confined to the time when the lands were sold and patented by the government. "It is quite possible that land settled upon as suitable only for agricultural purposes entered by the settler and patented by the government under the pre-emption laws, may be found years after the patent has been issued to contain valuable minerals. Indeed, this has often happened. We, therefore, use the term known to be valuable at the time of sale to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made, and the patent issued." *Deffeback v. Hawke*, 115 U. S. 404, 6 Sup. Ct. Rep. 95. If, on account of the absence of water, and sources of water, the lands in controversy were not more valuable for mining purposes than for agricultural purposes at the time of the sale, we think that the same principle should be applied, and the fact that other sources of water supply have been discovered or become accessible and can now be used in the profitable working of the mines, should not operate to the prejudice of the plaintiff, whose rights to the land were determined upon the conditions existing at the time of the sale. If it were otherwise, "the

proprietor would never be secure in his possessions, and without security there would be little development, for the incentive to improvement would be wanting. What value would there be to a title in one man with a right of invasion in the whole world," upon a subsequent change in the conditions, contingencies or probabilities? *Boggs v. Mining Co.*, 14 Cal. 380. But however that may be, unless, under such circumstances as we find here, it be held that the plaintiff under his patent is entitled to an injunction until the question of the character of the land is determined in the action, "the spoliation of landed estates under the pretense of mining without possibility of protection or redress on the part of the owner" will follow.

This appeal is from an order revoking the temporary restraining order and refusing an injunction; it is unnecessary, therefore, to specify in the bill of exceptions the particulars in which the evidence is alleged to be insufficient. The court is not required to file findings in a matter of this kind. Motions for injunction are regularly heard upon complaint, answer, and affidavits, and and no bill of exceptions is necessary unless it be to identify the papers used on the hearing. The appeal is heard upon the papers used on the hearing in the court below. Code Civil Proc. § 951. The testimony of witnesses, which we find in the record, we treat as written affidavits, identified by the judge, and as such to be considered by this court in the same manner as if in the form of affidavits.

It follows from the views expressed above that the order refusing to grant an injunction should be reversed, and the court below be directed to issue the injunction asked for by the plaintiff until the final hearing, when the propriety of either dissolving it or of rendering it perpetual will be determined according to the merits of the case. Ordered accordingly.

We concur: SEARLS, C. J.; MCFARLAND, J.; MCKINSTREY, J.

77 Cal. 220

In re Cook's ESTATE. (No. 12,200.)

(*Supreme Court of California.* April 20, 1888.)

1. DIVORCE—ORDER FOR DECREE—FAILURE TO ENTER DECREE.

An order that a decree of divorce be entered is not such final decree as to divorce the parties, and render a subsequent marriage of one of them a legal marriage, where such decree was in fact never entered.

2. SAME—DEATH OF PARTY—ENTERING DECREE *NUNC PRO TUNC*.

Where an order for a decree of divorce was obtained, but the decree was never entered, such decree cannot, after the death of the party who obtained it, be entered *nunc pro tunc*; and thus render the divorce, and a subsequent marriage of deceased, valid as against the heirs of the defendant in the divorce proceedings.

MCFARLAND, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

Emma Cook, since deceased, obtained judgment for divorce against Theodore T. Cook. The decree, however, was not entered during her life-time. After her death, upon application of William W. Richards, who had subsequently married her, the court ordered judgment to be entered *nunc pro tunc*, which was accordingly done. Richards assigned all his interest in the estate of deceased to William E. Miller, he settling the estate. The court held that Theodore T. Cook was the surviving husband of the deceased, and from a decree of distribution issued accordingly, and from an order denying his motion for a new trial, Miller prosecutes this appeal.

Henry C. McPike and James M. Searwell, for appellant. *Tilden & Tilden, Eugene Deuprey, L. M. Hoefler, and Jas. G. Carson*, for respondents.

THORNTON, J. Emma Cook was never divorced from Theodore T. Cook. A divorce is not granted until the final decree is entered, and in the case of

Cook v. Cook there was no entry of a final decree. The order of the 23d of April, 1880, in *Cook v. Cook*, was a direction that a decree dissolving the bonds of matrimony be entered, but it does not appear that this order was ever complied with. The attempt of the court on the 7th of September, 1885, to impart validity to the alleged marriage of Emma Cook with William W. Richards, after the 23d of April, 1880, by a *nunc pro tunc* decree dissolving the bonds of matrimony between Emma Cook and Theodore T. Cook, could not have any such effect. As there was no decree dissolving the bonds of matrimony between the Cooks on the 3d of May, 1880, when it is claimed a marriage was had between Emma Cook and William W. Richards, and no such decree was ever entered during the life-time of Emma Cook, after which a marriage was celebrated between Richards and Emma Cook, it cannot be held that there was ever a valid marriage between the parties last named. The *nunc pro tunc* decree was made long after the death of Emma Cook, which took place in November, 1883. She was not divorced at the time of her death, and we cannot perceive how, after that time, the relation of Emma Cook to Theodore T. Cook could be changed by any decree of the court. The court below did not err in holding Theodore T. Cook the husband of Emma Cook at the time of her death, and in ruling out the judgment roll in *Cook v. Cook*. This appeal is prosecuted by William E. Miller, as the assignee of William W. Richards of the share of Emma Cook's estate claimed by Richards as her husband, and, as it appears that Richards was never the husband of the decedent, the appellant, Miller, can have no interest in any other question presented on this appeal.

We find no errors in the record, and the decree and order must be affirmed. So ordered.

We concur: SEARLS, C. J.; SHARPSTEIN, J.

McKINSTRY, J. I concur in the judgment. I express no opinion, however, as to what would have been the effect of a judgment dissolving the marriage between Emma Cook and Theodore T. Cook, had the same been entered in the life-time of the former.

I dissent: McFARLAND, J.

75 Cal. 631

CRYSTAL LAKE ICE CO. v. McCAULAY. (No. 11,341.)

(*Supreme Court of California*. April 27, 1888.)

APPEAL—REVIEW—WEIGHT AND SUFFICIENCY OF EVIDENCE.

An order denying a new trial, asked on the grounds of insufficiency of evidence and of newly-discovered evidence, will not be disturbed where there is a substantial conflict in the testimony, nor where the new evidence presents substantially no new facts, and is merely cumulative.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

H. A. Powell, for appellant. Van Ness & Roach, for respondent.

BELCHER, C. C. This is an action to recover the value of ice alleged to have been sold and delivered by plaintiff to defendant. The court below gave judgment for the plaintiff, from which, and from an order denying a new trial, defendant has appealed. No exceptions were taken at the trial, and no errors of law were assigned. The new trial was asked on the ground of the insufficiency of the evidence to justify the decision, and the further ground of newly-discovered evidence. It is admitted for the appellant that there was some evidence to support the findings, but it is claimed that a clear preponderance of it was against them. After carefully going over the record, we are of the opinion that there was a substantial conflict in the testimony, and that the

well-settled rule in such cases must be followed. In regard to the evidence alleged to be newly discovered, it is enough to say that it presents nothing new. It contradicts the plaintiff's testimony in some respects, and is merely cumulative. Besides, it was squarely contradicted by a counter-affidavit. Applications for new trial on this ground are addressed to the discretion of the trial court, and we are unable to see that that discretion was in any way abused. In our opinion, the judgment and order should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

75 Cal. 633

BLASINGAME v. HOME INS. CO. *et al.* (No. 9,915.)

(*Supreme Court of California.* April 27, 1888.)

1. INSURANCE—ACTIONS ON POLICIES—ALLEGATIONS OF LOSS.

In an action on a fire insurance policy which excepts loss from certain causes, it is sufficient that the complaint alleges destruction by fire, without denying that it was caused in any of the excepted ways.

2. SAME—ALLEGING PERFORMANCE OF CONDITIONS—NOTICE OF LOSS.

In an action on a fire insurance policy, it is a sufficient allegation of notice of the loss, as required by the policy, when the complaint alleges that due proof of the loss was furnished the company, and that all the conditions of said policy were duly performed, under Code Civil Proc. Cal. § 457, providing that it is only necessary to state generally that the party has performed the conditions precedent in a contract.

3. SAME—ACTION BY MORTGAGEE—ALLEGATIONS OF LOSS.

In an action on a fire insurance policy by a mortgagee, the complaint alleged that R. was the owner at the time of the insurance and the fire, the value of the property at those times, and total destruction. *Held* a sufficient allegation of loss to the owner.

4. APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW.

In an action on a fire insurance policy, the complaint alleged that plaintiff held a mortgage on the property insured, and that by the policy, "a copy of which is made a part of the complaint," the loss was made payable to plaintiff, but this fact did not appear in the copy. *Held* that, no objection having been made by defendants in the court below, the point cannot be taken advantage of under a general demurrer when the question is raised for the first time in the appellate court.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Action by J. S. Blasingame against the Home Insurance Company of the city of New York, and the Phoenix Insurance Company of the city of Hartford, upon a fire insurance policy. Judgment for defendants, and plaintiff appeals. Code Civil Proc. Cal. § 457, provides that, "in pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part."

P. D. Wiggington, for appellant. *William Barber*, for respondents.

BELCHER, C. C. This is an action upon a policy of insurance against fire executed by the two companies named as defendants. The defendants separately demurred to the complaint, upon the grounds—*First*, that there was a misjoinder of parties defendant, because no joint liability was shown; and, *second*, that the complaint did not state facts sufficient to constitute a cause of action. The court sustained the demurrers upon both grounds, holding that there was a misjoinder, and that the complaint did not state sufficient facts, because it failed to allege that the loss did not occur from any of the excepted causes specified in the policy. The plaintiff was given 10 days to amend his complaint, but neglected to make any amendment, and thereupon judgment was entered dismissing the action.

It is now admitted by counsel for respondents, that the objection of misjoinder cannot be maintained. This admission was made necessary by the provision of the Code, to the effect that parties severally liable upon the same obligation or instrument may all or any of them be included in the same action, at the option of the plaintiff. Section 383, Code Civil Proc.; and see, also, *Bernero v. Insurance Co.*, 65 Cal. 386, 4 Pac. Rep. 382.

It is, however, insisted that the complaint was bad on general demurrer for several reasons. And first, it is said that it was bad for the reason which the court below assigned in making its ruling. The ruling was rested upon the supposed authority of *Ferrer v. Insurance Co.*, 47 Cal. 416. That was an action upon a policy of fire insurance, and one of the conditions specified in the policy was that the company should not be liable "for loss caused by the falling of any building insured, or containing property insured, by this policy, or by fire ensuing therefrom." The complaint alleged that the property insured was totally destroyed by fire, and also alleged that the loss was not caused "by the falling of any building," but omitted the words "or by fire ensuing therefrom." The complaint was demurred to specially upon the ground that it failed to state that the loss was not occasioned by one of the excepted causes specified in the policy. The court, after stating that the allegation was substantially sufficient to meet the objection, added: "The averment on this point is, perhaps, not as explicit as accurate pleading would have required, but we think it is sufficient, and no good could result from reversing the case on so slight a defect in a pleading, which could be amended on another trial." We do not think that case decides the point presented here; and, if it did, in our opinion it ought not to be followed. In the policy declared on in this case it is provided that the companies shall not be liable "for any loss or damage by fire caused by means of an invasion, insurrection, riot, civil commotion, or military or usurped power; nor for any loss in buildings unprovided with good and substantial stone or brick chimneys, the absence of which has been the cause of the fire; nor in consequence of any neglect or deviation from the laws or regulations of police, where such exist; nor for any loss caused by the explosion of gunpowder, or any explosive substance." In the complaint it is alleged that all of the property insured was totally destroyed by fire, but it is not alleged that the loss did not occur in any of the excepted ways or from any of the excepted causes. In our opinion, the complaint was sufficient in the respect referred to. Every complaint must contain a statement of the facts constituting the cause of action in ordinary and concise language, but it is not necessary to insert in it allegations for the purpose of meeting or cutting off a defense. Thus one seeking to recover on an insurance policy must aver the loss, and show that it occurred by reason of a peril insured against, but he need not aver the performance of conditions subsequent, nor negative prohibited acts, nor deny that the loss occurred from the excepted risks. *Lounsbury v. Insurance Co.*, 8 Conn. 466; *Hunt v. Insurance Co.*, 2 Duer. 481; May, Ins. p. 891, § 587; 1 Estee, Pl. & Pr. (Pom. Ed.) § 740, and cases cited.

It is further claimed that the complaint states no cause of action in favor of the plaintiff, and for that reason the demurrer was properly sustained. This objection is rested upon the following ground: In the complaint it is alleged that the policy was issued to one A. J. Rhodes upon a certain building and certain personal property owned by him, and that at the time of its issuance, and at the time of the fire, the plaintiff held a mortgage, executed by Rhodes, upon all of the property insured, to secure the payment of about \$2,000, which sum of money was, at all the periods mentioned, wholly unpaid. It is also further alleged that in and by the policy, a copy of which is attached to and made a part of the complaint, the loss, if any, was made payable and is payable to the plaintiff. But, looking at the attached copy, there is nothing to show that the loss was thereby made payable to the plaintiff. It is there-

fore urged by counsel for respondent that the loss was in fact payable to Rhodes, and not to the plaintiff; that the plaintiff had consequently no interest in it or right to recover it; and that the averment that it was made payable to plaintiff is contradicted by the policy, and should be disregarded. In answer to this objection it is said by counsel for appellant, in the reply brief, that the original policy did contain the words: "Loss, if any, payable in United States gold coin to J. A. Blasingame;" and in support of this assertion a photographic copy of the policy is inserted in the brief showing those words to be a part of it. It is further said that the words "to J. A. Blasingame" were omitted from the copy attached to the complaint by inadvertence or mistake, but that the omission was never referred to in the court below, or called to the attention of appellant's counsel, until the point was made in the brief filed by respondent in this court. There can be no doubt that if the policy was made payable, in case of loss, to the plaintiff, he could sue on it in his own name. *Motley v. Insurance Co.*, 29 Me. 337; *Cone v. Insurance Co.*, 60 N. Y. 619; *Hadley v. Insurance Co.*, 55 N. H. 110. But it was necessary for him to allege and prove that it was so made payable. Was the complaint sufficient, in this respect, when tested by a general demurrer? In *Mendocino Co. v. Morris*, 32 Cal. 145, the same point was raised, and decided against the views of respondent here. That was an action against the principal and his sureties on an official bond. It was alleged in the complaint that the bond was signed by all of the defendants, but a copy of the bond was attached to the complaint, and on that copy the name of the principal did not appear. A demurrer was interposed, and overruled in the court below. Of this, SAWYER, J., delivering the opinion of this court, said: "Upon the demurrer in the form adopted in this case the direct averment of the execution of the bond in the body of the complaint must prevail, as against the omission of the signature in the copy. It may be that there is a want of correspondence between the averment in the body of the complaint and the copy annexed; but, if so, the most that can be said is that the complaint is ambiguous in this respect, and this objection was not specified as a ground of the demurrer under any head. The grounds of the demurrer relied on were all particularly specified, and this was not one of them. The objection is raised for the first time in this court. The demurrer is not general that the complaint does not state facts sufficient to constitute a cause of action in certain particulars. There was a good averment of the execution of the bond in the body of the complaint, and no objection appears to have been taken in the court below on the ground of want of correspondence between the bond set out and the averment, and we think the complaint good, at least after verdict. Had the objection been taken in the court below, the clerical omission of the signature of the principal in the copy, if it be one, might have been corrected." See, also, *Frazer v. Barlow*, 63 Cal. 71. It follows from the rule announced in the foregoing cases that the point now raised by the respondent here cannot be taken advantage of under a general demurrer.

It is also claimed by the respondent that the complaint was insufficient, because it did not allege that Rhodes sustained any damage by reason of the fire. But it did allege that Rhodes was the owner of the property insured at the time of the insurance and at the time of the fire, and its value at those times, and also that it was totally destroyed by the fire. These facts were fully stated, and from them the loss and damage must of necessity result. We think the complaint sufficient in this respect.

Finally, it is urged that the complaint was insufficient, because it did not allege that notice of the loss, in writing, was forthwith given to the general agent of the companies at San Francisco, as required by the policy. The complaint alleged that the fire occurred on the 9th of December, 1882, and that "on or about the 5th day of February, 1883, due proof of said loss by fire was presented and furnished to each of said corporations by this plaintiff and the

said Rhodes, and that all the conditions of said policy of insurance were duly performed and kept by this plaintiff and the said Rhodes." We think this averment of the performance of the conditions precedent sufficient, under the provisions of section 457 of the Code of Civil Procedure.

It results that the judgment should be reversed, and the cause remanded, with directions to the court below to overrule the demurrer.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and cause remanded, with directions to the court below to overrule the demurrer.

75 Cal. 642

HODGDON v. SOUTHERN PAC. R. CO. *et al.* (No. 11,265.)

(*Supreme Court of California.* April 27, 1888.)

1. EMINENT DOMAIN—CONVEYANCE OF WARD'S REALTY BY GUARDIAN—VALIDITY—ACT MAY 20, 1861.

General railroad act, May 20, 1861, § 23, as amended April 27, 1863, authorizing guardians of infants to convey their ward's land to railroads if it is necessary for the purposes of the road, and requiring the examination and approval of the probate judge to such conveyance before the same shall become valid, is constitutional; and a guardian's deed, accompanied by the certificate of the probate judge that he has examined the deed and the sale, has found the land necessary for the purposes of the railroad, the consideration fair and equivalent, and the sale just and proper; and that he approves and confirms the same, is a sufficient compliance with the statute.

2. JUDGMENT—APPOINTMENT OF GUARDIAN BY PROBATE COURT—COLLATERAL ATTACK. The judgment of a probate court, regular upon its face, appointing a guardian of an infant, cannot be attacked collaterally for fraud or other matter *aliunde*, in an action to quiet the title to the ward's land, which the guardian has sold.¹

In bank. Appeal from superior court, city and county of San Francisco; JAMES G. MCGUIRE, Judge.

Action in the nature of an action to quiet title brought by Alexander Lewis Hodgdon against the Southern Pacific Railroad Company, Leland Stanford, C. P. Huntington, Moses Hopkins, administrator of the estate of Mark Hopkins, deceased, and Charles Crocker. Judgment for plaintiff and defendants appeal.

McAllister & Bergin, for appellants. *D. Wm. Douthitt*, for respondent.

McFARLAND, J. Judgment in the lower court went for plaintiff, and from the judgment and an order denying a new trial defendants appeal. Plaintiff avers in the complaint substantially, and the court finds, that in April, 1862, James H. Hodgdon died seized as owner in fee of certain land in the city and county of San Francisco, described in the complaint; that plaintiff was born in lawful wedlock on June 23, 1860, and was and is the sole child of said James H. Hodgdon, deceased; that said James H. Hodgdon, on October 12, 1859, made and published his last will, by which he devised and bequeathed all his property, including said land, to his wife, Sarah A. Hodgdon, (mother of plaintiff;) that in said will plaintiff was neither provided for, nor in any manner mentioned; that said Hodgdon, deceased, never at any time, nor in any manner, provided for plaintiff by any settlement; and that it in no way appears that such omission to provide for plaintiff in said will or otherwise was intentional. It is then further averred that plaintiff is the owner in fee of the undivided one-half of said land because he succeeded to

¹ On the subject of collateral attack, see *McCarter v. Neil*, (Ark.) 6 S. W. Rep. 731, and note; *Nicholson v. Nicholson*, (Ind.) 15 N. E. Rep. 223; *Decker v. Decker*, (N. Y.) 1d. 307; *Comer v. Bray*, (Ala.) 3 South. Rep. 554; *In re Newman's Estate*, (Cal.) 16 Pac. Rep. 887; *Davis v. Robinson*, (Tex.) 7 S. W. Rep. 740.

the same as the sole child of said Hodgdon, deceased; that defendants claim an interest in said land adverse to plaintiff, and are in the actual and exclusive possession of the same; and that defendants have not any estate, right, or interest in or to plaintiff's undivided one-half interest therein. The prayer is that defendants be required to set forth the nature of their claims; that it be adjudged that they have no interest or estate in said undivided one-half; that plaintiff's title thereto is good and valid; and that he recover possession thereof. The court also found that administration of the estate of said James H. Hodgdon is still pending in the superior court of the city and county of San Francisco; no decree of distribution having yet been made therein, and, so far as it appears, no adjudication of the rightful heirship of plaintiff having yet been made in said superior court sitting as a probate court.

Counsel for defendants, by objections to evidence, by a motion for nonsuit, and by other appropriate objections and motions, made, and urge, here several points which, under our views of the case, it will not be necessary for us to determine. It may not be out of the way, however, to notice one of these points; because, if well taken, it may be of great importance in other cases. There is no doubt that, under our present law, a recognized and undoubted heir may, generally, maintain an action concerning real property, although the administration of the estate be still in progress. But it is contended that, in the case of a will and a pretermitted heir, it is the peculiar and sole province of the probate court to construe the will; to determine if there was an intentional omission of the contesting heir; if there was any provision for or advancement to the after-born child; whether the share to be assigned to the pretermitted heir shall be taken from that part of the estate (if any) not disposed of by the will; what are the debts of the estate, and what, if any, property must be sold to pay them and the expense of the administration; what amount, if any, must be taken from all of the devisees and legatees in order to make up the proportionate share of the omitted heir, etc.; and that all these matters can be ascertained only by the probate court administering the estate of the deceased. It will be noticed that the statutes in force at the death of plaintiff's decedent provided that, in the case of a pretermitted child, the necessary facts being shown, "the share of such child shall be *assigned* as provided by law." Hitt. Gen. Laws, 7341 *et seq.* Assigned by whom? Can another court, in an independent action of ejectment or to quiet title, try all these questions, and by its findings and judgment "assign" to the pretermitted child the particular part of the estate which he claims in his complaint, while these matters are still undetermined in the probate court, where the estate is being administered? Will such a judgment bind the probate court, when it comes to construe the will, to assign the share, and to distribute the estate? We allude to these questions because they are interesting and important; but, as before remarked, we do not deem it necessary here to definitely determine them.

The main defendant in this case is the Southern Pacific Railroad Company, a railroad corporation. Section 23 of the general railroad act of this state, approved May 20, 1861, and slightly amended April 27, 1863, (St. 1861, 607; St. 1863, 613,) is as follows: "Sec. 23. If it shall become necessary, for any of the purposes aforesaid, for such company to acquire any real estate, or any right, title, or interest therein, which is the property of any infant, idiot, or insane person, the guardian, executor, or administrator, as the case may be, may sell and convey the same to said company; but neither such sale nor conveyance shall be valid, for any purpose until the same shall have been approved by the judge of the proper probate court; and said judge is hereby authorized to examine such deeds and conveyances, and, if he shall deem the same just and proper, he shall approve the same, and thereupon such conveyances shall have the same force and effect, for the purposes in this section mentioned, as if the same had been executed by persons competent to convey

lands in their own names. Such company may acquire any real estate or any right, title, interest, estate, or claim therein or thereto, necessary for the purposes of said company, as hereinbefore provided, by means of the special proceedings prescribed in this act."

For the purpose of showing that, under this provision of the law, the said railroad company, defendant here, had acquired the title of plaintiff to the property in suit, the defendants, after plaintiff had closed his case in chief, and motion for nonsuit had been denied, proved by the proper record evidence that in January, 1872, Joseph S. Paxson was duly appointed guardian of the person and estate of Alexander Lewis Hodgdon, a minor, (plaintiff herein,) by the probate court of the city and county of San Francisco, Cal.; that letters of guardianship were issued to said Paxson from said court; and that he qualified and filed his bond, as required. The judgment of the court appointing said Paxson guardian was regular on its face, and the court had full jurisdiction to render it. Defendants then introduced a deed from said Alexander Lewis Hodgdon, (plaintiff herein,) by his said guardian, Joseph S. Paxson, executed immediately after his appointment as guardian, by which, for the consideration of \$10,200, the property sued for in this action was conveyed to the Southern Pacific Railroad Company, defendant herein, and proved that said \$10,200 was paid at the time by said defendant to said guardian, Paxson. The deed was accompanied by the following certificate of the judge of said probate court: "This is to certify that I, MILTON H. MYRICK, judge of the probate court in and for the city and county of San Francisco and state of California, have examined the within deed, and the sale therein made of the lands described, and I do find that the said land is necessary for the purposes of said railroad company; that the consideration paid is fair and equivalent for said land; and that said sale is just and proper; and, as such probate judge, I do hereby approve the said sale and deed, and confirm the same in as full and ample manner and form as I may or could do under the law of the said state of California in relation to the premises. M. H. MYRICK, Probate Judge of the City and County of San Francisco, Cal." The deed was duly acknowledged by Paxson as guardian, and was recorded January 27, 1872.

After close of defendant's evidence the court allowed the plaintiff, in rebuttal, against the objections and exceptions of defendants properly made and taken, to introduce evidence tending to prove that the said judgment of said probate court appointing said Paxson guardian as aforesaid was procured by fraud, collusion, etc.; and upon said evidence the court found certain facts which it held to be fraudulent, and to vitiate and render invalid the said proceedings in the said probate court. The evidence and findings on this point were, mainly, that Paxson's statements in the petition to be appointed guardian that he was a friend of and was befriending the minor, and that he made the application at the request of his mother and step-father, were not true; that he did not account to plaintiff for the money which he received for the deed; that he procured himself to be appointed at the request of agents of said railroad company; that the acts of the agents of the railroad company in inducing him to be appointed operated as a fraud on plaintiff; that the probate court did not have proof of the value of the land, or its necessity for railroad purposes; that there was collusion between Paxson and the agents of the railroad company, and that for these and other similar reasons "the said petition and application for guardianship, and the proceedings connected therewith, were fraudulent from their inception, and that, by reason of said fraud, the said probate court did not acquire jurisdiction to appoint a guardian of the estate of said minor;" and "that Joseph S. Paxson never was the legal guardian of said minor, and that the deed aforesaid was absolutely void."

(In respect to this matter it may be fair to parties to remark that there appears in the evidence a written agreement made in 1871, between the mother and step-father of plaintiff, and one Howard, an agent of the railroad com-

pany, defendant, in which, after a recitation that the mother had conveyed to said Howard all her title to certain land in San Francisco, and that it was claimed that the plaintiff herein, then a minor, was seized of the residue of the title to said land, it was agreed by the said mother and step-father that the value of the interest of said plaintiff should be determined by two persons therein named, and that their valuation should be final and conclusive, and that certain proceedings should then be taken to convey the said interest of said plaintiff to said Howard, upon his payment of the sum fixed by said two persons, and that said persons did fix said valuation at \$10,200, the sum afterwards paid by said defendant to said guardian of plaintiff.)

Whether or not the said evidence objected to, and the said findings of the court below, would constitute a sufficient ground for relief in an action brought directly for the purpose of setting aside the judgment of the probate court, with proper averments in the complaint and proper parties before the court, is a question not necessary to be here examined; for it is well settled that a judgment, regular on its face, and rendered by a court having full jurisdiction to render it, cannot be attacked collaterally on the ground of fraud, collusion, or other matter *aliunde*. The opposite rule would subject to the uncertain and insecure test of parol evidence those things to which the law attaches the utmost conclusiveness and stability,—judgments and judicial records. *Joyce v. McAvoy*, 31 Cal. 274; *Breeze v. Ayres*, 49 Cal. 208; *Carpentier v. City of Oakland*, 30 Cal. 439; *Robb v. Robb*, 6 Cal. 21; *Marshall v. Shafter*, 32 Cal. 177; *Chase v. Christianson*, 41 Cal. 253. And authorities other than those of this state to the point are numerous. And the appointment of a guardian by a probate court is a judgment to which the rule applies. *Warner v. Wilson*, 4 Cal. 313; *In re Guardianship of Fegan*, 45 Cal. 176; *Herron v. Dater*, 120 U. S. 464, 7 Sup. Ct. Rep. 620; *Fitts v. Fitts*, 21 Tex. 511. The rule applies to infants as well as to adults. *Joyce v. McAvoy*, *supra*. The admission of the evidence above-mentioned was therefore erroneous, and the said findings of what the court held to be fraud, and upon which the judgment was based, were immaterial, and insufficient to warrant the court in practically vacating the judgment of the probate court upon a collateral attack. Upon such a principle, any judgment could be disregarded upon a showing that the court which rendered it committed an error either of law or fact.

We think that the deed from Paxson to the said defendant, and its approval and confirmation by the probate judge, was a sufficient compliance with the statutory provision under which it was executed. That provision is distinct from the provision of another statute by which a guardian, in a certain prescribed way may sell property of his ward for his maintenance or education. The law under which this sale was made contemplated an entirely different purpose, namely, the furtherance of a public use. No particular form of conveyance or procedure was prescribed. The only limitation upon the sale is that it shall be approved and confirmed by the probate judge. The deed was in proper form to convey the estate, and the probate judge found that it was a case within the statute, and approved the sale. This we think was sufficient. *Exendine v. Morris*, 76 Mo. 416. And we have no doubt of the constitutionality of the statute.

For the reasons given, the judgment and order are reversed, and the cause remanded.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.; MCKINSTRY, J.

76 Cal. 8

HEILBRON *et al.* v. CENTERVILLE & K. I. D. Co. (No. 12,093.)

(Supreme Court of California. April 23, 1888.)

1. APPEAL—ASSIGNMENTS OF ERROR—FAILURE TO SPECIFY PARTICULARS.

Code Civil Proc. Cal. § 659, subd. 3, provides that, when the notice of motion for new trial designates as the ground the insufficiency of evidence, the statement shall specify the particulars in which it is alleged to be insufficient; and, when errors in law are designated, the statement shall specify the particular errors; and, if no such specifications be made, the statement shall be disregarded. *Held*, that specifications that the court erred in finding that the diversion of water by defendant from K. river had not been made continuously, uninterruptedly or peaceably for five years prior to the filing of the complaint, and in not finding to the contrary thereof, and that the court erred in its findings of law that the cause of action was not barred by the statute of limitations, were insufficient, and must be disregarded.

2. SAME—RULING ON DEMURRER—NOT REVIEWABLE, WHEN.

A ruling on a demurrer will be reviewed only on an appeal from the judgment, and not on appeal from an order denying a new trial, especially when the statement in an appeal from such order does not specify the alleged error in such ruling, as required by Code Civil Proc. Cal. § 659, subd. 3.

3. SAME—NOT TAKEN WITHIN A YEAR—DISMISSAL.

An appeal from a judgment taken more than a year after entry thereof, will be dismissed.

Commissioners' decision. In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Action by August Heilbron, Adolph Heilbron, Simon Clayburgh, and S. C. Lillis, against the Centerville & Kingsbury Irrigation Ditch Company, to restrain defendant from diverting the waters of Kings river, and to recover damages for past diversions. Plaintiffs had judgment, from which, and from an order denying a new trial, defendant appealed.

W. D. Tupper, for appellants. *Brown & Daggett*, for respondent.

BELCHER, C. C. The plaintiffs commenced this action to obtain an injunction restraining the defendant from diverting the waters of Kings river, and to recover damages for past diversions. The defendant demurred to the complaint, and its demurrer was overruled. It then answered, and, among other things, set up the statute of limitations. The case was tried by the court, without a jury, and the findings and judgment were in favor of the plaintiffs. The defendant moved for a new trial, and has appealed from the judgment and order denying its motion.

The judgment was entered on the 12th day of September, 1885, and the appeal was taken on the 1st day of March, 1887. As more than a year elapsed between the entry and the appeal, the appeal from the judgment cannot be considered, and must be dismissed.

It is claimed for the appellant that the demurrer to the complaint should have been sustained. The point is not well taken. The ruling on a demurrer is a matter to be reviewed on an appeal from the judgment, and not on an appeal from an order denying a new trial. Besides, on an appeal from an order refusing to grant a new trial, only such errors can be considered as are specified in the statement, and this alleged error is not specified or referred to in the statement presented here. Section 659, subd. 3, Code Civil Proc.

It is further claimed that the action was barred by the statute of limitations, and that the findings of the court to the contrary were not justified by the evidence. This point cannot be maintained. At the conclusion of the evidence and rulings set out in the statement on motion for a new trial, the statement proceeds as follows: "And the defendant assigns and specifies the following as errors occurring at the trial," and then follows a statement of 21 instances in which it is alleged the court erred; and among them are these: "The court erred in finding in its findings of facts that the diversion of water by the defendant from Kings river had not been made continuously, uninterruptedly, or peaceably for a period of five years prior to the filing of plaintiff's com-

plaint, and in not finding to the contrary thereof." "The court erred in its findings of law that the cause of action was not barred by the statute of limitations." The Code provides that "when the notice of the motion designates, as the ground of the motion, the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient. When the notice designates, as the ground of the motion, errors in law occurring at the trial, and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely. If no such specifications be made, the statement shall be disregarded on the hearing of the motion." Section 659, subd. 3, Code Civil Proc. It is evident that the specifications above noted are quite insufficient to meet the requirements of the Code, and they must therefore be disregarded. *Smith v. Christian*, 47 Cal. 18; *Shepherd v. Jones*, 71 Cal. 223, 16 Pac. Rep. 711.

The other points in the case are fully met and answered by the decision, lately rendered, in *Heilbron v. Canal Co.*, ante, 535, opinion filed March 29, 1888. The appeal from the judgment should be dismissed, and, on the authority of the last-named case, the order denying a new trial should be affirmed.

I concur: FOOTE, C.

HAYNE, C., took no part in this decision.

PER CURIAM. For the reasons given in the foregoing opinion, the appeal from the judgment is dismissed, and the order denying a new trial is affirmed.

76 Cal. 11

HEILBRON *et al.* v. KINGS RIVER & F. C. Co. (No. 11,963.)

(*Supreme Court of California.* April 28, 1888.)

1. WATERS AND WATER-COURSES—DIVERSION—RIGHT TO MAINTAIN ACTION.

In an action for damages for diversion of the water of a stream, where the complaint alleges that plaintiffs are owners of the land from which the water has been diverted, and the findings are that they are not owners, but tenants in possession under a lease, the findings are not outside of the issue raised, as plaintiffs' possession gives to them the right to maintain the action.

2. SAME—EVIDENCE—DIVERSION BY THIRD PARTIES.

In an action for diverting water from a stream running through plaintiffs' land, evidence is properly excluded of diversions by others besides defendant; it not appearing whether such diversions were lawful or with plaintiffs' consent.

3. SAME—ISSUES AND FINDINGS.

Where the complaint alleges that defendant diverted water from a stream, and a branch thereof flowing through plaintiffs' ranch, thereby causing the loss of their stock; and the answer alleges that the stream is navigable; that the water diverted was furnished them by another company, which had appropriated the same for more than five years before this action; that such appropriation reclaimed plaintiffs' land, which had been waste; that others besides defendant diverted the water, so that, had defendant not, the plaintiffs would still have been deprived of it; that defendant's rights are vested, and its use of the water reclaims a large area that would be otherwise desert, the material issues are covered by findings that plaintiffs are tenants in possession using the range for stock purposes, that the river flows through their land, and the branch is a natural water-course, and that plaintiffs have been damaged by defendant's diversion of water, and that the cause of action is not barred by the statute of limitation.

4. SAME—ADVERSE USER—SUFFICIENCY OF EVIDENCE—REVIEW ON APPEAL.

Where there is a substantial conflict in the evidence upon the issues of adverse and continuous diversion and use by defendant of water in a stream, relied upon by him as giving prescriptive title and right to the same, a finding that there was not such adverse or continuous use and diversion will not be disturbed.

5. SAME—DAMAGES.

Evidence that from 250 to 300 cattle, worth \$30 per head, died by reason of diversion of water from a stream running through plaintiffs' land supports a finding of the amount of damages at \$1,000.

6. BOUNDARIES—CALL FOR RIVER.

Under a description in a patent as follows: "Thence meandering down the right bank of Kings river,"—the river is properly considered one of the boundaries of the land.¹

7. PLEADING—CROSS-COMPLAINT.

A so-called cross-complaint containing nothing which is not already set out in the answer is demurrable, especially in an action of tort, where no affirmative relief can be granted.

8. SAME—AMENDMENT.

A refusal to allow an amendment on the ground that the matters of amendment are sufficiently pleaded in the original answer, the affidavit in support of the motion stating that the matters in the amendment are substantially the same as those in the original answer, being discretionary with the court below, will not be disturbed.

9. APPEAL—REVIEW—SUFFICIENCY OF EVIDENCE.

The insufficiency of evidence to support a finding not being specified on the motion for a new trial, the facts stated therein cannot be controverted on appeal.

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

This was an action begun on the 4th day of October, 1882, by plaintiffs, August Heilbron, Adolph Heilbron, S. Clayburg, and S. C. Lillis, riparian owners, for injunction and damages for diversion of water from Kings river, in Fresno county, by the defendant corporation, the Kings River & Fresno Canal Company. Judgment was rendered for the plaintiffs, and the defendant appeals.

The complaint in substance alleged that plaintiffs are, and their grantors for more than five years prior to the filing of the complaint had been, the owners and in possession of the Rancho Laguna de Tache, containing 48,000 acres of land, and that the plaintiffs are owners of a large amount of stock, and that said lands are used as a stock range, and are of great value for that purpose; that Kings river, from time immemorial, has flowed, and but for the wrongful acts of defendant would still continue to flow, through said lands; that there is a certain natural branch of said Kings river called "Cole Slough," which receives its supply of water from said Kings river; that the channel of Cole slough is located wholly within the boundaries of said lands, and from time immemorial has flowed through said lands; that defendant is a corporation, and that it constructed a ditch or canal leading out of the channel of Kings river at a point about 27 miles above the point at which said Cole slough receives its supply of water, and in September, 1881, without the consent of plaintiffs, constructed a large dam in the channel of said Kings river, and diverted and still diverts from the channel of said Kings river a large quantity of water, which, but for the wrongful acts of said defendant, would have flowed through plaintiffs' said lands and would have overflowed said lands, and increased their fertility, and furnished water for plaintiffs' stock; that the diversion has caused plaintiffs' lands to fail to produce their usual and accustomed crops of grass, and now deprives plaintiffs' cattle and live-stock of water to drink, and has caused plaintiffs loss and damage in the sum of \$25,000; that the defendant threatens to continue to divert the water, and, unless restrained by a decree of the court, defendant will continue to divert the same to such an extent as to completely drain said channel, and finally change the course of said stream, and that compensation therefor cannot be adequately obtained in an action at law for damages, etc. The prayer is for a permanent injunction.

The answer in substance alleged that Kings river was a navigable stream; that the Centreville channel, from which defendant diverted water, was not a channel of the river except at flood times; that certain persons, having incorporated as the Centreville Canal & Irrigation Company, in 1868, and before that date, diverted the water from said stream, and their successor, the

¹See *Barre v. Flemings*, (W. Va.) 1 S. E. Rep. 731, and note.

Fresno Canal & Irrigation Company, continued so to do, and the latter company, by agreement, being granted full control and right of way in the said channel, in return furnished water to defendant through said channel; that all the water conducted into defendant's canals has been furnished by the said Fresno Canal & Irrigation Company; that in 1869 the incorporators of the defendant appropriated water, in 1870 posted notice of appropriation, and in 1871 incorporated, and continued to enlarge its ditch, and used and appropriated said water for more than five years before the commencement of this action under claim of title continuously and adversely. And the answer further alleged that said waters were unappropriated when so appropriated by defendant; that the water was devoted to useful purposes; that for 10 years prior to said appropriations, plaintiffs' lands were waste, and defendant and its grantors believed plaintiffs and their grantors claimed none of said waters. That divers persons and corporations besides defendant divert water from said river above plaintiffs' lands; that said Fresno Canal & Irrigation Company and defendant have so appropriated said waters, under the laws and customs of California and the United States, for irrigation, and, after supplying said canals, except at flood times, there is not enough to flow down to plaintiffs' lands; so, had defendant not diverted water, it would have flowed into said other canals; that plaintiffs' lands are swamp, and can be reclaimed by diverting said waters, and said diversions have prevented the overflow of parts of said lands. That the lands irrigated by said Fresno Canal & Irrigation Company and defendant are 24,000 acres, which without irrigation would be desert, but which, by irrigation, are worth \$2,000,000, and are populous; that the existence of the Fresno Canal & Irrigation Company and defendant, and of \$1,500,000 of property, depend on the use of said water; that the defendant's rights to said water are vested and accrued under the act of congress of the 24th of July, 1866, and the local customs, laws, and decisions of the courts of said state, and that plaintiffs ought not to maintain their action. That plaintiffs and their grantors well knew of said diversions and outlays by defendant and its grantors, and their ignoring of plaintiffs' claims, and that defendant and its grantors believed their claims valid, yet made no objection thereto, whereby they acquiesced therein and are estopped, and, having so failed, plaintiffs' conduct is a fraud on defendant. That plaintiffs' pretended cause of action did not accrue within five years next before this action, and is barred by statute; nor within three years, and is barred by statute; that divers persons and canals have, at all the times, etc., diverted large quantities of the waters of said river below defendant's ditch, and above plaintiffs', in which plaintiffs have been interested; and, if defendant only had diverted, there would have been no appreciable diminution of the water except at low stages. The defendant filed, further, a cross-complaint, a demurrer to which was sustained; and the defendant thereupon moved for leave to file an amended answer, to support which motion an affidavit of defendant was produced, to the effect "that said amendments in nowise alter the lines of defense herein, nor can they in any manner surprise plaintiffs or work disadvantage to them, being almost, if not wholly, merely, as believed, better pleading of the same defenses already pleaded in the original answer." The motion for leave to amend the answer was denied.

Regarding the amount of the damages sustained by plaintiffs there was evidence to the effect that, through defendant's diverting water from Kings river, the plaintiffs' cattle were deprived of water, and from 250 to 300 died because of such diversion, and it was testified that they were worth \$30 per head. The court found that plaintiffs sustained damages to the amount of \$1,000. Regarding the ownership of the land it was found that in 1866 a patent had been issued to Manuel Castro, which, in the course of its description of the land, uses the following language: "Thence according to the true meridian, the variation of the magnetic needle being fifteen degrees forty-five minutes

east, east at fifty links enters bottom land of the Kings river, twenty-six chains and thirty-eight links, to a post marked 'L. T.' and 'Sec. 36' station; thence meandering down the right bank of the Kings river, south, forty-five degrees, west, eighty-seven chains and sixty-eight links, to station." That the said Castro conveyed to one Jeremiah Clarke on the 10th day of August, 1866. That Clarke on the 1st day of May, 1889, leased the land to the plaintiffs, who have remained in possession ever since as tenants. The cause was tried by the court, a jury having been waived, and judgment was rendered for the plaintiffs. A new trial was denied, and defendant appeals, specifying a large number of errors.

H. S. Dixon, (Flournoy, Mhoon & Flournoy, of counsel,) for appellant.
Brown & Daggett, for respondents.

PER CURIAM. Many of the questions involved in this appeal have recently been determined adversely to the contentions of appellant herein. It is therefore unnecessary to notice them further. *Heilbron v. Canal Co.*, ante, 535, (filed March 29, 1888; *Heilbron v. Last Chance W. Ditch Co.*, ante, 68; *Heilbron v. Centreville & K. I. Ditch Co.*, ante, 932, (filed April 28, 1888.)

1. The defendant's motion for leave to file an amended answer was addressed to the sound discretion of the court, and it appears from the affidavit filed in support of the motion that the matters set out in the amended answer were not substantially different from those which had already been pleaded in the answer on file. The court denied the motion on the ground "that said matters of amendment are sufficiently pleaded in the original answer to the amended complaint." We think, therefore, that the court did not abuse its discretion in refusing to allow it to be filed. The defendant seems to have been given the benefit of all the matters alleged in his original answer and proposed amendments.

2. The demurrer to the cross-complaint, so called, was properly sustained. The cross-complaint contained nothing which had not already been set out in the answer filed. Furthermore, the action is one for tort, and no affirmative relief could be granted. *MacDougall v. Maguire*, 35 Cal. 274.

3. No specifications of the insufficiency of the evidence to support the first, second, third, fourth, fifth, or sixth finding of fact are made in the statement on motion for a new trial. The facts therein stated, therefore, cannot be controverted.

4. The findings of the court upon the question of adverse use are against the defendant on every element necessary to a title by prescription, and are, we think, supported by the evidence. The question is not whether this court would, upon the same evidence, find the facts as they are found by the court below. It is sufficient to say that there is a substantial conflict. There is nothing to show that Clark or his tenants had knowledge or notice of the diversion of water through defendant's ditch. The most that can be said is that the evidence, taking into consideration all presumptions, is conflicting upon that question. Diversion of water by the defendants took place at a point nearly 30 miles above the lands of plaintiff's ranch, on the land of a riparian proprietor. It was not incumbent upon Clarke or his tenants to take notice of what was going on at that distance above their property to ascertain whether any one was diverting water from the channel of the river. There is evidence in the record tending to show that the diversion of water from Kings river was a matter of notoriety in the vicinity of plaintiffs' ranch prior to August, 1877, but it is confined to diversions made by other ditches than that of the defendant. There was also evidence tending to show that the diversion of water by the defendant had not been continuous and uninterrupted for five years before the commencement of this action. The court found such to be the fact. Upon this topic there was also a substantial conflict in the evidence.

5. The findings of the court are not outside of the issue upon the question of ownership. The plaintiffs are tenants, and not owners in fee; but they have the right to the exclusive possession and use of the property and all its appurtenances, and have the right to maintain an action for any injury which interferes with their possession, or the use and enjoyment of the property. In *Lux v. Haggin*, 69 Cal. 436, 10 Pac. Rep. 674, it was said: "When water is diverted from land, an injury is done to the possession. Ordinarily, it is sufficient if the plaintiff shows that he has possession against a mere wrongdoer. * * * The plaintiff in such cases is not bound to prove the same title as he alleges, for the disturbance is the gist of the action."

6. We see no error in the construction given to the patent by the court below with respect to the boundary lines of the ranch. We think, under the description given in the patent, Kings river is one of the boundaries of the lands described in the complaint.

7. There was evidence to sustain the findings of the court with respect to the amount of damages sustained by plaintiffs. The court evidently believed, from the evidence before it, that the amount of water diverted by the defendant, if it had been permitted to flow in the channel of the river, would have furnished the plaintiffs' cattle with sufficient water to drink, and that plaintiffs' stock died by reason of the diversion of the water by defendant.

The court excluded evidence offered on behalf of defendant to show that other parties were diverting water at different points on the river above the ranch of the plaintiffs. In this we think the defendant was not prejudiced. It does not appear whether the diversions referred to were lawful or unlawful,—with or without the consent of the plaintiff. If the acts of the owners of other ditches were joined with the acts of the defendant, the defendant cannot shield itself with evidence of such other diversions.

8. We think that the findings cover all the material issues raised by the pleadings. The court found upon the questions of ownership of plaintiffs and their predecessors, their possession, and the use of the range for stock purposes; that Kings river flows through the lands; that Cole slough is a natural water-course, and a branch of Kings river; that plaintiffs have been damaged by the defendant's diversion of the waters therefrom; and that the cause of action is not barred by the statute of limitations. These are all the material matters in issue.

9. We see no errors in the rulings of the court in admitting or excluding evidence, which operate to the prejudice of defendant's substantial rights. Some of the rulings respecting the notoriety of the diversions, and the means of knowledge possessed by the plaintiffs, appear at first sight to have been erroneous; but an examination of all the testimony shows that they were made upon the ground that the evidence of notoriety and knowledge was incompetent because it did not relate to diversions made by the defendant, but to diversions of water from Kings river generally, and at a point many miles above the lands of the plaintiffs. The only purpose which could have been subserved by the evidence was to show that the defendant's diversion of water by means of its ditch was not clandestine. Judgment and order affirmed.

76 Cal. 127

LEEKE v. HANCOCK. (No. 11,086.)

(Supreme Court of California. April 30, 1888.)

1. NEGOTIABLE INSTRUMENTS—ACCOMMODATION INDORSER—LIABILITY OF.

Where plaintiff, having received a note indorsed by defendant, indorsed it over, and subsequently paid it off, defendant is liable to him for the amount paid, though plaintiff had collateral security of the maker in his hands for money previously advanced, and knew, when he received the note, that defendant was an accommodation indorser for the maker.

2. ASSUMPSIT—COMMON COUNTS—WHEN FINDING ON FIRST COUNT IS SUFFICIENT.

In an action, under the Code, against an indorser of a note by a subsequent indorser, who has paid it off, he may declare against defendant in the common counts for money paid out and expended, etc., with a prayer indicating that they are in the alternative; and a finding and judgment for plaintiff upon the first count is a finding against him on the others, and must be affirmed.

Department 1. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Action by C. Leeke against C. H. Hancock for an amount paid by him upon two notes made by one Buckman, which had been previously indorsed by defendant. Buckman, who was a street contractor, had previously borrowed money of Leeke, for which he had assigned a street contract as collateral security. Judgment for plaintiff, and defendant appeals.

O'Brien & Morrison, for appellant. *Nagle & Nagle*, for respondent.

MCKINSTRY, J. If the moneys paid by the plaintiff on taking up the notes made by Buckman were paid out of funds of the maker in the hands of plaintiff, the payments were in effect payments by the maker of the note. But there is at least a substantial conflict in the evidence with respect to the issue as to whether the plaintiff did pay the notes out of funds of the maker in his hands, or whether he promised to pay them out of funds of the maker dedicated to that purpose. As between themselves, the defendant was an accommodation indorser for Buckman, the maker. But there is nothing on the face of the notes to indicate that relation, and there is evidence that, as to plaintiff, it was understood that the defendant should be bound in the character in which he assumed to act. Even if the plaintiff, indorsee and subsequent indorser, knew that, as between themselves, the defendant indorsed the note for the accommodation of Buckman, he could still hold him as indorser if he consented to receive them only in case the defendant should bind himself to plaintiff as indorser. One of the two joint makers of a note may be a surety only, as between himself and his co-promisor, and yet, as to the payee, his apparent and real character be that of principal. *Harlan v. Ely*, 55 Cal. 340; *Chase v. Evoy*, 58 Cal. 353; *People v. Marshall*, 59 Cal. 387. Section 2832 of the Civil Code does not prohibit the apparent maker in such case from agreeing that he shall be bound as maker, and there is no principle which will render nugatory the actual and apparent contract of an indorser.

The complaint was upon the "common counts" for money paid, laid out, and expended, for money lent, and for money had and received; each count being separately stated. The prayer was for the sum alleged in each count to be due upon the cause of action therein stated, to-wit, \$1,027.50. The court found that the plaintiff paid, laid out, and expended for the use and benefit of the defendant \$1,027.50. The court failed to find upon the issues made by the averments of the other counts of the complaint, and the denials thereof. The finding and judgment upon the first count must be held to be a finding and judgment against the plaintiff upon the other counts. Clearly, in ordinary cases, there must be a distinct finding upon each material issue. But in a case like the present the prayer may be referred to as illustrating the scope of the action, and here the prayer clearly indicates that the counts are in the alternative; the same cause of action being stated in different forms. If such practice seems not to accord with the methods prescribed by the Code of Civil Procedure, the apparent anomaly arises from the fact that the common counts have been allowed. But the right to rely upon them has been settled by the earlier decisions in this state, which, even if we were inclined to do so, we are not authorized to disregard. *Freeborn v. Glazer*, 10 Cal. 337; *De Witt v. Porter*, 13 Cal. 171; *Buckingham v. Waters*, 14 Cal. 146. Where a subsequent indorser has paid the whole note, or a part of it, he may recover from a prior indorser the amount paid as so much money paid, laid out, and

expended. *Butler v. Wright*, 20 Johns. 367; *Baker v. Martin*, 3 Barb. 634; Pom. Smith, Merc. Law, § 327, note 3. Judgment and order affirmed.

We concur: SEARLS, C. J.; PATERSON, J.

(May 14, 1888.)

PER CURIAM. The above-entitled cause having been inadvertently submitted and decided after the death of the defendant, C. H. Hancock, the appellant, and his death having been suggested to the court, and Caroline E. Hancock, his administratrix, having been substituted as a party defendant and appellant, now, upon reading and filing the stipulation of counsel for the respective parties, it is ordered and adjudged—*First*, that the judgment entered herein on the 30th day of April, 1888, affirming the judgment and order of the court below, be, and the same is hereby, set aside and annulled; *second*, that the cause be submitted upon the record and briefs on file; *third*, that the judgment and order appealed from be, and they are hereby, affirmed, for the reasons given in the opinion in said cause filed April 30, 1888; *fourth*, that the *remittitur* herein issue on the 30th day of May, 1888.

76 Cal. 26

BURNHAM v. SAN FRANCISCO FUSE MANUF'G CO. (No. 11,356.)

(Supreme Court of California. April 30, 1888.)

INJUNCTION—TO RESTRAIN SALE OF DELINQUENT STOCK—OFFER TO DO EQUITY.

An injunction will not be granted to restrain the sale of stock for delinquent assessments because notice has not been published 15 days before the day appointed for the sale, as required by Civil Code Cal. § 339, and is therefore irregular, unless the complaint contains an offer to pay the assessments.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Suit for an injunction. Charles F. Burnham, the plaintiff, was a stockholder in the San Francisco Fuse Manufacturing Company. On April 6, 1885, the company made an assessment on its capital stock, which assessment plaintiff failed to pay, and the company, on June 2d, ordered his stock to be sold on June 15th, and notice was first published on June 2d. 13 days prior to the day of sale. Civil Code Cal. § 339, requires the first publication of delinquent sales of stock to be at least 15 days prior to the day of sale. Section 346 reads: "No assessment is invalidated by a failure to make publication of the notice hereinbefore provided for, nor by the non-performance of any act required in order to enforce the payment of the same; but in case of any substantial error or omission in the course of proceedings for collection, all previous proceedings except the levying of the assessment are void, and publication must be begun anew." Plaintiff brought action against the company, praying an injunction to enjoin the sale because less than 15 days intervened between the first publication of notice and the day appointed for the sale; but the complaint contained no offer to pay the assessments. The court issued a restraining order, which was afterwards vacated and the action dismissed. Plaintiff appeals.

J. C. Bates, for appellant. *Jas. A. Waymire* and *W. T. Baggett*, for respondent.

McKINSTRY, J. The order of the 2d of June, directing a sale of the delinquent stock of plaintiff, was irregular, and any sale upon 13 days' notice would have given to the purchaser no title which he could assert against the plaintiff, should the latter tender him the amount of the assessment, and bring his action to recover the stock within 6 months. Civil Code, § 347. But the assessment was valid, (Id. § 346,) and it was the duty of the plaintiff to pay it. A court of equity properly refused to entertain his application for an injunction to prohibit the sale in the absence of an allegation that he had done, or offered to do, equity. True, if he paid, there would be no sale, and he would not need the extraordinary writ; but the jurisdiction of equity does not depend upon the convenience of a party. The statutory remedy is plain, and it was intended by the legislature that this shall be the only remedy in case a

valid assessment is not paid. It may be said the rule thus laid down will encourage sales without the notice which the statute declares to be necessary, and proceedings of the character which are declared to be void by section 346. But the context shows the sense in which the word "void" is employed. It is intended thereby to declare that the irregular proceedings shall be inoperative to confer an indefeasible title to the stock as against the owner, who shall make tender of the assessment, and bring suit for its recovery within the time prescribed in section 347. As the complaint did not state a cause of action, the suit was properly dismissed. Judgment and order affirmed.

We concur: SEARLS, C. J.; PATERSON, J.

76 Cal. 24

BURNHAM v. SAN FRANCISCO FUSE MANUF'G CO. (No. 11,238.)

(Supreme Court of California. April 30, 1888.)

CORPORATIONS—MEMBERS AND STOCKHOLDERS—REMEDIES.

Where a stockholder of a company fails to pay an assessment lawfully made, and his stock is advertised for sale, a complaint setting forth that the company refused to show plaintiff its bills and vouchers, as required to do by Civil Code Cal. § 377, enacting that a corporation for profit shall keep a record of its transactions, which shall be open to inspection by stockholders, that it was a worthless concern, and desired to get plaintiff's stock for the assessment, shows no ground for the appointment of a receiver to wind up its affairs, or for the granting of an injunction to restrain the sale.

Department 1. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Charles F. Burnham, the plaintiff, was a stockholder of the San Francisco Fuse Manufacturing Company. An assessment on the capital stock of the company having been made, and plaintiff not having paid the assessment, his stock was advertised for sale, whereupon he brought suit for an injunction to restrain the sale, and for the appointment of a receiver. A demurrer to the complaint was sustained, and plaintiff appeals. Civil Code Cal. § 377, enacts that corporations for profit shall keep a record of all their transactions, which shall be open to the inspection of any director, member, stockholder, or creditor of the corporation.

J. C. Bates, for appellant. Jas. A. Waymire and W. T. Baggett, for respondent.

MCKINSTRY, J. The complaint avers that on the 6th day of April, 1885, the board of directors of the defendant passed an order whereby they levied an assessment, No. 10, of two dollars a share, on the capital stock of said corporation, payable, etc.; that the order contained a notice that "any stock upon which this (said) assessment shall remain unpaid on the 11th day of May, 1885, will be delinquent, and advertised for sale at public auction, (and,) unless payment be made before, will be sold on Friday, the 29th day of May, 1885, to pay said delinquent assessment, together with the cost of advertising and the expenses of sale;" that on the 12th day of May, 1885, a delinquent list or notice was published by defendant in the Daily Examiner, a daily newspaper, etc., a copy whereof is annexed to the complaint; that, unless restrained, the defendant will, at the time and place mentioned in notice, sell the 100 shares alleged to belong to the plaintiff. So far as appears from the complaint, the order levying the assessment and the publication comply with the provisions of the Civil Code. In addition, however, to the prayer for a decree enjoining the sale, the plaintiff prays "that a receiver be appointed to take charge of and wind up the affairs of the said corporation defendant." This last decree seems to be sought upon the averments that the defendant's secretary, on a certain day, refused to show plaintiff "the vouchers and bills paid or payable, so that he might learn and know the financial condition of defendant;" that the secretary, on a

certain day, testified in an action between these parties that the corporation had no reputation or good-will of any value, "but that it was a worthless concern as it stands;" and that, according to plaintiff's information and belief, the defendant is not making gain, but is running behindhand, and will continue to do so "the way it is now managed," owing to the low price of fuse, etc. The further allegation that the real object of the defendant and its directors is to get the plaintiff's stock for the assessment is hardly a cause of complaint, if the concern is worthless. If, in this state, a corporation may be dissolved at the suit of a stockholder, the court below was justified in refusing such decree upon the facts alleged in the present complaint. Civil Code, 377; Tayl. Priv. Corp. 610, 611.

The demurrer was properly sustained. Judgment and order affirmed.

We concur: SEARLS, C. J.; PATERSON, J.

70 Cal. 57

PEOPLE v. CURTIS. (No. 20,370.)

(Supreme Court of California. May 1, 1888.)

1. CRIMINAL LAW—FORMER ACQUITTAL—INDICTMENT FOR BURGLARY—CONVICTION FOR LARCENY.

Upon indictment for burglary a verdict of guilty of an attempt to commit petit larceny is a nullity, and does not operate as an acquittal of the charge of burglary, since larceny is not included in burglary.¹

2. SAME—VERDICT NOT RESPONSIVE TO INDICTMENT—DISCHARGE OF JURY—FORMER JEOPARDY.

Upon rendering a verdict of guilty of a crime not included in the one charged in the indictment, the jury should not be discharged, but be sent back for further deliberation, but, if discharged with defendant's consent, he is not thereby put in jeopardy.

3. SAME—REVIEW ON APPEAL.

Where, upon an appeal in a criminal case, the discharge of the jury in a former trial upon the same indictment is relied upon in defense, and the minutes of the court regarding such former trial are not brought up, and the bill of exceptions is silent as to any consent to such discharge, it will be presumed that the jury was discharged with defendant's consent.

4. SAME—TRIAL—ORAL CHARGE.

Under Pen. Code Cal. § 1093, subd. 6, a charge to the jury, in a criminal case, may be given orally if taken down by the phonographic reporter.

In bank. Appeal from superior court, San Bernardino county; H. M. WILLIS, Judge.

Baker & Blair, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

THORNTON, J. The defendant was accused by information of burglary, and convicted of an attempt to commit petit larceny. He then moved for a new trial, which was granted. On the second trial he was convicted of burglary in the second degree. The defendant asked on the new trial to be allowed to plead once in jeopardy and former acquittal. This was refused, and an exception was reserved. The defendant, on the new trial, asked the court to direct the jury as follows: "That the defendant having been previously tried on this same information for the crime of burglary, and found guilty by the jury on said trial of the offense of an attempt to commit petit larceny, he cannot now be convicted of the higher crime of burglary." This was refused, and defendant excepted. The defendant could not have been convicted on the information for burglary of an attempt to commit larceny. Larceny is not included in the crime of burglary. This was so held in *People v. Garnett*, 29 Cal. 628, and we think correctly. If larceny is not included in burg-

¹Concerning what will support a plea of former conviction or jeopardy, see *State v. Blanut*, (Ark.) 2 S. W. Rep. 190; *Robinson v. State*, (Tex.) 4 S. W. Rep. 904, and nota.

lary, we cannot see that the defendant could be convicted under the statute (Pen. Code, § 1159) of an attempt to commit it.

The verdict of the jury was then a nullity, but on returning it the jury was discharged. As the verdict was a nullity, and of no effect, the jury should have been sent out for further deliberation. The verdict constituted no legal reason for the discharge of the jury, and in our judgment, if they were discharged without consent of the defendant, (except in the cases specially provided for,) it operated as an acquittal of the defendant. *Bell v. State*, 48 Ala. 696, 697. Under our statute, in a case like this, the consent must appear on the minutes of the court. Pen. Code, § 1140. The minutes of the court as regards the former trial are not before us. The only information we have as to this trial is set forth in the bill of exceptions, and that is silent as to any consent by either party. The bill of exceptions not showing a discharge of the jury without the consent of the defendant, a case is presented where error of the court is not made to appear, and we must presume that the jury was discharged with defendant's consent. As the jury was discharged with the consent of the defendant, without rendering a verdict, it must be held that there was no jeopardy and no acquittal. *People v. Webb*, 38 Cal. 480. Therefore the court did not err in refusing to allow defendant to plead former jeopardy and former acquittal, nor did it err in refusing the instruction above set forth asked by the defendant. The charge of the court, though given orally, was taken down by the phonographic reporter. This is allowed by statute, (Pen. Code, § 1093, subd. 6,) and therefore there is no error in the court not charging the jury in writing. Judgment and order affirmed.

We concur: SEARLS, C. J.; MCKINSTRY, J.; MCFARLAND, J.; SHARPSTEIN, J.

76 Cal. 18

CITY AND COUNTY OF SAN FRANCISCO *v.* HOLLADAY *et al.*

(*Supreme Court of California.* April 28, 1888.)

1. MUNICIPAL CORPORATIONS—PUBLIC PARKS—DEDICATION—RES ADJUDICATA—TITLE AFTERWARDS ACQUIRED FROM UNITED STATES.

In an action of ejectment brought to recover certain parcels of land in plaintiff city, claimed to have been dedicated as a public park, defendants set up in bar of the action a judgment rendered in an action commenced November 16, 1863, brought by the people against defendants, by which it was adjudged that the land in question never had been dedicated to public use. At the time issue was joined in that action, the legal title to the land was in the government of the United States, and did not pass from it until the passage of the act of congress of July 1, 1864, by which act the land was granted in trust for the uses and purposes specified in the ordinances of plaintiff city. *Held*, that the title which passed to plaintiff by the act of July 1, 1864, was unaffected by the judgment rendered in the action commenced November 16, 1863, being acquired after issue joined in such action, and because the attorney general of the state had no power to submit the title of the government of the United States for adjudication; and it was therefore error for the court to hold that the judgment in that action barred plaintiff from questioning defendant's title to the land in controversy. *People v. Holladay*, 9 Pac. Rep. 655, followed.

2. SAME.

But plaintiff was estopped from questioning defendant's title to such land by a judgment in favor of defendants in an action against plaintiff commenced December 17, 1864, several months after the passage of the said act of congress, in which action the same acts claimed as acts of dedication were relied upon by plaintiff.

3. SAME—RIGHT TO BE SUED—QUIETING TITLE.

Under the provisions of the consolidation act, (St. Cal. 1850, p. 223,) authorizing the city and county of San Francisco to "sue and be sued, plead and be impleaded, defend and be defended, in all courts of law, and in all actions of law, and in all actions whatsoever," an action to quiet title may be maintained against said city and county.

In bank. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Wm. Matthews, for appellant. *S. W. & E. B. Holladay*, for respondents.

PATERSON, J. This is an action of ejectment brought by plaintiff to recover of the defendants two parcels of land in the city and county of San Francisco, forming a part of what is known as "Lafayette Park." The plaintiff claims that it is seized in fee of the lands in trust for the people of the state; that the lands were dedicated to the public; that the defendants are trespassers and intruders thereon. Plaintiff claims title under section 5 of the act of congress of July 1, 1864, (13 St. at Large, 333,) and an act of the legislature of California, passed March 11, 1858, (St. 1858, p. 52.) A digest of the provisions of the Van Ness ordinance and other ordinances of the city, mentioned in the act of the legislature referred to, is given in the report of *Hoadley v. San Francisco*, 50 Cal. 266, and shows the basis of plaintiff's claim to the lands in controversy in this case. In defense of the action the defendants made a general denial, and pleaded in bar three final judgments entered before the commencement of the present action. The court below found that all the matters and issues in this action, and all the questions of title and of dedication involved herein, had been, prior to the commencement of this action; heard, tried, and finally adjudicated and determined in favor of S. W. Holladay, one of the defendants herein, and against the plaintiff herein, in an action commenced November 16, 1863, in the Fourth district court, wherein the people of the state were plaintiffs and S. W. Holladay was defendant; that the same land was the subject-matter of controversy in that action as in this, and that the same title and the same question of dedication to public use and acceptance by the public were litigated and adjudicated in that action as in this action; that said former action was commenced at the instance of plaintiff herein, and the trial thereof was managed and conducted in the interests of the plaintiff by its attorneys and officers acting on its behalf. The court further found that all the matters in issue in this action, including the title and question of dedication, were finally adjudged and determined in favor of Holladay, one of the defendants herein, and against the plaintiff herein, in an action commenced December 17, 1864, in said Fourth district court, wherein Holladay was plaintiff, and the city and county of San Francisco was defendant; that the same land was the subject-matter of that action as in the present action. And upon these findings the court rendered judgment for the defendants.

The third action referred to was an action commenced by the people of the state, on the relation of Mayor Bryant, against the present defendants, wherein it was alleged by plaintiff that the land in controversy was a portion of a public square dedicated to public uses. In the lower court said action was decided in favor of these defendants. Plaintiff's motion for a new trial was denied, an appeal was taken to this court, and the appeal was pending at the time the case at bar was decided. The decision of this court in that case is reported in 68 Cal. 439, 9 Pac. Rep. 655, and it was there held that the title which passed to the city and county of San Francisco by the act of July 1, 1864, was unaffected by the judgment in the case of *People v. Holladay*, commenced November 16, 1863, because it was acquired long after issue was joined in the action in which the judgment pleaded in bar was rendered, and because the attorney general of the state had no power to submit the title of the government of the United States for adjudication. The court below therefore erred in holding that said judgment, the first judgment pleaded in bar of this action, estopped the plaintiff from questioning the defendant's title to the lands in controversy.

The third judgment pleaded as an estoppel by the defendants in this action was reversed by this court in *People v. Holladay*, *supra*, and, of course, is no defense to this action. In that case this court said: "If the particular piece of land in controversy had been, prior to the passage of the act of congress of July 1, 1864, dedicated by the city as a public square, congress, by granting and relinquishing the title of the United States to the city, * * * ratified and confirmed the dedication, * * * and this virtually perfected the

dedication." 68 Cal. 444, 9 Pac. Rep. 657. It was not decided in that case whether there had been a dedication. That question, we think, was determined in favor of the defendant herein by the judgment in the second action.

The objection to the validity of the judgment in the first case, which was made in *People v. Holladay*, *supra*, cannot be urged against the judgment in the case of *Holladay v. City and County of San Francisco*, the second judgment pleaded in bar in this case, because *Holladay v. City and County of San Francisco* was commenced December 17, 1864, several months after the passage of the act of congress referred to. If the land has ever been dedicated to the public use, such dedication must have been before the passage of that act,—at least before the commencement of the action, December 17, 1864. In the second action referred to, the same acts which are here claimed as acts of dedication were relied upon by the defendant therein, (plaintiff herein.) The court there necessarily held, in view of its judgment, that no dedication had ever been made. It would seem, therefore, that the matter is *res adjudicata*, and that the city is barred from further litigation of the question, and estopped from denying the fact. Issue therein was not joined until December 30, 1864, and final judgment was not rendered until December 25, 1867. It is claimed by appellant that the record in that case is not binding upon the city or the people, for the reason that, at the date of the institution of the suit, all the title that the city had was the bare right to the possession of this land in trust for the people of the state. But the particular matter litigated in that suit was whether the city held the fee in trust for the people or at all, and it was adjudged therein that the city had no right, title, or interest in the land. The judgment in that case was not appealed from, and is final, so far as the city is concerned. It quieted the title of the plaintiff as against any and all claims of the defendant therein. Upon the strength of that title, so quieted, it appears that some of these defendants have purchased portions of the property in good faith. "It is for the public good that there be an end to litigation. If it were otherwise, there would be no security for any other person, and great oppression might be done under color and pretense of law." *Miles v. Caldwell*, 2 Wall. 39; *Broom*, Leg. Max. 243.

2. The provisions of the consolidation act authorized the city and county of San Francisco to "sue and be sued, plead and be impleaded, defend and be defended, in all courts of law, and in all actions of law, and in all actions whatsoever." Act 1850, § 2; Stat. 1850, p. 223. Under this provision we think that the plaintiff in *Holladay v. City and County of San Francisco*, *supra*, could maintain an action against said city and county. Order affirmed.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; THORNTON, J.

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WRISTEN v. CURTIS. (No. 12,319.)

(Supreme Court of California. April 28, 1888.)

PRINCIPAL AND SURETY—RELEASE OF ONE OF SEVERAL CO-SURETIES—EFFECT.

Under Civil Code Cal. § 1543, providing that a release of one joint debtor does not extinguish the obligation of any of the others unless they are mere guarantors, nor affect their right of contribution from him, a release of one of the makers of a joint and several promissory note does not release the others; and an instruction that a release of one of two or more sureties without the consent of the co-sureties is a release of all the sureties, is error.

Department 2. Appeal from superior court, Yolo county; C. H. GAROUTTE, Judge.

George P. Harding, (W. C. Belcher, of counsel,) for appellant. *Ball & Craig* and *W. D. Grady*, for respondent.

SHARPSTEIN, J. On the 24th of January, 1879, W. C. Harris, W. R. Forman, and the plaintiff executed and delivered to the defendant their two certain promissory notes of that date, each of which notes was joint and several in form, for the sum of \$2,000 each, payable one year after date, with interest at the rate of 1 per cent. per month from date until paid, payable monthly or compounded. Thereafter the defendant commenced an action against said Harris, Forman, and plaintiff herein to recover the amount due on said notes. The case was tried, and by the court taken under advisement; and, while the court had the same under advisement, the defendant herein received of said

Forman the sum of \$2,200, and executed and delivered to him a release in writing, of which the court and plaintiff herein were ignorant, and about two weeks thereafter the court rendered its decision and judgment in favor of defendant herein, and against said Harris, Forman, and the plaintiff herein, for the sum of \$6,223.41, together with the costs, being the full amount sued for in said action. Thereafter an execution was issued upon said judgment for the amount thereof, less said sum of \$2,200; and certain real and personal property of the plaintiff herein were levied upon and advertised for sale under and by virtue of said execution. For the purpose of preventing the sale of said property, and obtaining its release from said levy, plaintiff paid to the sheriff making the levy the sum of \$4,315.99, the full amount due upon said execution, with all costs, which was paid to the defendant herein. The plaintiff recovered judgment against the defendant herein for the amount so paid in satisfaction of said execution, and from that judgment, and from the order denying defendant's motion for a new trial, this appeal is prosecuted.

The main question presented here is whether the release of Forman relinquished the obligation of plaintiff. The Code provides that "a release of one of two or more joint debtors does not extinguish the obligation of any of the others unless they are mere guarantors; nor does it affect their right to contribution from him." Civil Code, § 1543. That the plaintiff, Harris, and Forman, were, upon the face of the notes which they executed to the defendant, joint debtors, is too clear to admit of doubt, and unless the plaintiff was a mere guarantor his obligation was not extinguished by the release of Forman. But the court, by request of plaintiff, instructed the jury that "a release of one of two or more sureties without the consent of the other co-sureties is a release of all the sureties." This is clearly contrary to the provision of the Code relating to the same subject, and "the Code establishes the law of this state respecting the subjects to which it relates."

The instruction being clearly erroneous, the judgment and order must be reversed.

We concur: THORNTON, J.; McFARLAND, J.

72 Cal. 585

RAYNOR *v.* MINTZER *et al.* (No. 11,779.)

(Supreme Court of California. June 27, 1837.)

LIMITATION OF ACTIONS—RUNNING OF THE STATUTE—ACTIONS FOR TORT.

Defendants fraudulently acquired from plaintiff an interest in lands, and incited plaintiff's creditors to levy on his interest, and convey it to them to secure their title, and otherwise embarrassed plaintiff, so that he was obliged to resort to expensive litigation to save his interest in the lands. *Held*, that the statute of limitations against an action for damages for these fraudulent acts began to run at least as early as the entering of the judgment in plaintiff's suit to save his title, although defendants appealed from such judgment, it not appearing that such appeal was malicious or without probable cause.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county.

Action by P. A. Raynor against W. H. Mintzer and others for damages for alleged fraudulent acts of defendants. A demurrer to the complaint was sustained, and plaintiff appeals.

Paris & Goodcell, Harris & Allen, and H. M. Willis, for appellant. A. B. Hotchkiss, for respondents.

BELCHER, C. C. This is an appeal by the plaintiff from a judgment rendered against him on demurrer to his complaint. The action was brought to recover damages which the plaintiff claimed to have suffered on account of the wrongful and fraudulent acts of the defendants in attempting to deprive him of certain valuable real property which he owned in the county of San

Bernardino. It is alleged that the defendants, in 1875, agreed and conspired together to cheat and defraud plaintiff out of his property, and that all their subsequent acts were in pursuance of that conspiracy; that they thereby caused him to suffer great loss and damage, and forced him to resort to expensive and vexatious litigation to protect his rights. The complaint covers 35 pages, without the exhibits of the printed transcript, and tells at great length the story of the wrongs suffered by plaintiff, and of the litigation consequent thereupon. The facts may be briefly stated as follows: In 1875 the plaintiff was the owner of an undivided four-sevenths interest in certain real property, and the defendants were the owners of the other three-sevenths. The defendants fraudulently acquired from the plaintiff his interest, and, after acquiring it, organized themselves into a corporation by the name of the Colton Land & Water Company, of which they were the only members and stockholders. They then transferred the whole property to the corporation and divided the stock among themselves according to their respective interests in the property. Thereafter, on June 7, 1887, they caused the corporation to commence an action against the plaintiff to quiet its title to the property, and to enjoin him from asserting that he owned any interest therein. The plaintiff answered, and by way of cross-complaint set up that he owned four-sevenths of the property, and prayed for affirmative relief. The case was tried, and on October 27, 1879, it was adjudged and determined that the plaintiff owned the interest claimed by him, and that the corporation and other parties to the suit reconvey the same to him. A motion for new trial was then made and denied, and an appeal from the judgment and order was taken to this court. This appeal was heard, and the judgment was slightly modified and affirmed in January, 1881. *Water Co. v. Raynor*, 57 Cal. 588. While that appeal was pending, the defendants, in pursuance of their fraudulent scheme to get the plaintiff's property, and in order to evade the judgment, if a decision should be in his favor, sought out various creditors of the plaintiff, and, among others, one Clyde, and incited and urged them to bring suits and obtain judgments on their claims, and to have the plaintiff's interest in the property levied on and sold. To induce the creditors to do this, and to proceed at once and buy in the property before the determination of the appeal, the defendants promised the creditors to take from them whatever title they might acquire, and to pay them therefor the full amount of their respective claims, with all costs incurred, themselves taking the chances as to the title being good. In pursuance of this arrangement, Clyde commenced an action upon his claim for nearly \$1,800, and obtained a judgment by default. He then had an execution issued and levied on the plaintiff's interest in the property, and at the sale bought the property in his own name. He obtained a certificate of sale, and on December 7, 1880, transferred the same, and all his interest in the lands described therein, to the defendants. Several distinct tracts of land were sold in one parcel, and, the plaintiff being without means to redeem from the sale, the sheriff, on the 25th of May, 1881, executed to the defendants, as the assignees of Clyde, a deed purporting to convey all the plaintiff's interest in the lands so sold. On the 8th of October, 1881, the plaintiff commenced a new action against the defendants and Clyde and the Colton Land & Water Company, to have the defendants adjudged his trustees as to all property transferred to them by the sheriff's deed of May 25, 1881, and to compel them to reconvey the same to him upon such terms as might be just. That action was tried, and on the 6th of November, 1883, judgment was duly rendered and entered therein in favor of the plaintiff, and it was thereby adjudged and determined that the defendants held the property as trustees for plaintiff; that the title acquired by them under the sheriff's deed was acquired by means of actual fraud, and in violation of their duties as trustees; and that they reconvey to the plaintiff all property and interest conveyed to them by the sheriff's deed, upon payment by him to them of the sum of money paid to Clyde for the as-

signment of his certificate, with interest thereon. The defendants then moved for a new trial; and, their motion being denied, appealed to this court, where the judgment and order were affirmed on the 23d of June, 1885. *Raynor v. Mintzer*, 67 Cal. 159, 7 Pac. Rep. 431. To show the special damages sustained by the plaintiff, it is then alleged that on the 12th of October, 1875, plaintiff was the owner of two tracts of land in San Bernardino county, which were mortgaged to secure the payment of debts owing by him; that the mortgages were thereafter foreclosed, and the tracts sold under the decrees of foreclosure; that, by reason of the aforesaid fraudulent acts of the defendants, the plaintiff was unable to pay the debts, or redeem from the sales; that one tract was sold for \$20,000 less than its actual value, and he was thereby damaged in that sum, and the other tract was sold for \$5,000 less than its actual value, and he was thereby damaged in that sum; that, on the same 12th of October, plaintiff was the owner of two other tracts of land in San Bernardino county, which were thereafter levied upon and sold under executions, by his creditors; that the sales were instigated by the defendants in order that he might be hindered and embarrassed in resisting their fraudulent claims, and that, by reason of their fraudulent acts, he was unable to pay the debts or redeem the property; that each tract was sold for \$10,000 less than its actual value, and he was thereby damaged in the sum of \$20,000; that, in resisting the action brought against him by the Colton Land & Water Company, and in prosecuting the action against the defendants and Clyde, he necessarily incurred and expended for attorney's fees, and other expenses not included in the costs awarded him, the sum of \$5,000 in the one case, and \$10,000 in the other, and that he was thereby damaged in those sums; and "that, by reason of the aforesaid fraudulent acts of the defendants, the plaintiff has suffered great hardship and privation, often being destitute of the necessities of life for himself and family, and has for years been precluded from engaging in any business, and been shut out from society and friendly and social intercourse, and been greatly annoyed, embarrassed, and worried, and endured great mental suffering, and been injured in his health, and otherwise greatly injured, to his damage in the further sum of fifty thousand dollars." The prayer then is for judgment in the sum of \$110,000 and costs.

This action was commenced on the 23d day of November, 1885, and the demurrer was upon the grounds, among others, that the complaint did not state facts sufficient to constitute a cause of action, and that the action was barred by the provisions of subdivision 1, § 339, Code Civil Proc. It does not appear upon what ground the demurrer was sustained; but, if it might properly have been sustained on any one of the grounds presented, the judgment cannot now be reversed. It is clear that the action was one to recover damages for tort, and was based upon a liability not founded upon an instrument of writing. The limitation was therefore two years. *Piller v. Railroad Co.*, 52 Cal. 42; *Wood v. Currey*, 57 Cal. 208. The question, then, is, when did the statute begin to run? It is urged for the appellant that all the acts of the defendants, including the appeals to this court, were parts of one continuous scheme, having in view the one ultimate fraudulent purpose of depriving him wrongfully of his property, and that his cause of action did not fully accrue until the decision of this court made upon the last appeal, on June 23, 1885. We do not think this position can be maintained. All of the wrongful acts of defendants were committed prior to and pending the appeal in the *Colton Land & Water Co.'s Case*. The plaintiff's action against the defendants and Clyde was also commenced and tried more than two years before the commencement of this action, and by the judgment entered therein he was fully restored to all the rights in the disputed property. It is true, the defendants moved for a new trial, and appealed from that judgment, but it is not alleged that they did this maliciously or without probable cause; nor did this court hold the appeal frivolous, and award damages

therefor. It would seem, too, that all the proximate and recoverable damages which plaintiff has sustained had accrued when that action was commenced, or, at least, when it was tried. But, however this may be, the general rule is that a cause of action for tort arises when the wrongful act, causing damage, is done, and the statute of limitations then begins to run against it. The damages occasioned by the act may not all have been sustained at that time, but that fact does not postpone the running of the statute. See cases above cited; and *Taylor v. Bidwell*, 65 Cal. 489, 4 Pac. Rep. 491; *Northrop v. Hill*, 57 N. Y. 351; Ang. Lim. § 298. It follows, in our opinion, that the plaintiff's cause of action was complete as early, at least, as November 6, 1883, and was barred by the statute. The demurrer was therefore properly sustained, and the judgment should be affirmed.

FOOTE and HAYNE, CC., concurred.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

77 Cal. 380

PEOPLE *ex rel.* ATTORNEY GENERAL v. STANFORD *et al.* (No. 9,733.)

(Supreme Court of California. April 30, 1888.)

1. CORPORATIONS—FRANCHISES—FORFEITURE—QUO WARRANTO.

Under Code Civil Proc. Cal. § 803, providing that an action may be brought by the attorney general for the usurpation of a franchise, and Civil Code Cal. § 358 authorizing an inquiry as to the right of a corporation to exercise corporate power at suit of the state, on information of the attorney general, the people may maintain an action, at the relation of that officer, to forfeit the franchises of a railroad corporation, and restrain the exercise of the same.

2. SAME—PLEADING—EXISTENCE OF INCORPORATION.

Where a count in a petition prays for the forfeiture of franchises then being exercised by a company of persons acting as a corporation, having alleged that if it ever had, as a corporation, any legal existence, privilege, or franchise, the same had become forfeited, the previous existence of the corporation is not alleged, and no cause of action is stated.

3. SAME—DENIAL OF RIGHT TO FRANCHISE.

In a proceeding to forfeit the franchise of a corporation, and restrain its members from exercising the same, an allegation that defendants never had such franchise is sufficient, without specifying in what respects their right thereto is defective.

4. SAME—LIMITATION OF ACTION.

The exercise of a franchise, without authority, by a company acting as a corporation, is a continuous usurpation, and the statute of limitations will not run.

5. SAME—ASSIGNMENT OF FRANCHISES.

Const. Cal. art. 4, § 31, provides that corporations may be formed under general laws, but shall not be created by special act. The act of 1861 providing for the incorporation of railroad companies, as amended by the act of May 6, 1862, requires a two-thirds vote of the supervisors or common council of the city and county or city to entitle such companies to the use of streets, etc. Held, that an assignment of a right, granted to certain persons by private act, to maintain a railroad, collect fares, etc., to a corporation, without such grant from the supervisors, conveys to it no right to exercise such franchise.

6. SAME—ESTOPPEL—BY PLEADINGS.

An action brought by the people against a railroad company as a corporation, in which they obtained judgment that the company had built a bridge over a navigable stream, which constituted a nuisance, and an order of abatement thereof, does not estop them from bringing another action against the persons constituting such company, denying that it ever acquired the franchise to build its road or operate cars thereon.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Action by the people of California, at the relation of the attorney general, against Leland Stanford and others, exercising franchises as a railroad corporation, to forfeit the same, and restrain defendants from further operation of the road. Judgment for plaintiffs, and defendants appeal.

McAllister & Bergin, for appellants. *Geo. A. Johnson*, Atty. Gen., and *J. P. Meux*, for respondents.

McKINSTRY, J. Defendants' demurrer to the complaint, and to each count thereof, was overruled. It is contended by appellants (defendants) that the attorney general had no power to institute or prosecute the action. It is unnecessary here to decide whether the attorney general has power to institute an action on behalf of the state, or people of the state, in the absence of a statute authorizing it. An action may be brought by the attorney general for the usurpation of an office or franchise. Code Civil Proc. § 803. An inquiry as to the right of a corporation, doing business as such, to exercise corporate powers, may be made at the suit of the state on the information of the attorney general. Civil Code, § 358.

As to the demurrer to the second count of the complaint, which avers that if the Potrero & Bay View Railroad Company "ever had any legal existence" as a corporation, the same became forfeited and ceased to exist by reason of acts and omissions of the said "pretended corporation." *Scire facias*, which would seem to have been the more usual proceeding where a legally existing body had abused the powers and franchises intrusted to it, is abolished. Code Civil Proc. § 802. "It would seem, however, that an information in the nature of *quo warranto* would lie against a legally existing corporation for an abuse of its franchises." Ang. & A. Corp. 778; 1 Bl. Comm. 485; Kyd, Corp. 474-486. A private corporation created by the legislature may lose its franchises by a misuser or non-user of them; and they may be resumed by the government under a judgment upon a *quo warranto* to ascertain and enforce the forfeiture. *Terrett v. Taylor*, 9 Cranch, 51. A corporation may be dissolved by a forfeiture of its charter, judicially ascertained and declared; its being as a corporation may be declared to be ended; because it is a tacit condition of a grant of incorporation that the grantees shall act up to the end and design for which they were incorporated. The sovereign power has at all times the right to inquire into the matter of the user of a franchise, or the title by which it is held. Ang. & A. Corp. 774; High, Extr. Rem. 472. In the second count of the complaint herein it is alleged that by reason of the acts and omissions of the Potrero & Bay View Railroad Company, if the said company ever had, as a corporation, "any legal existence, right, privilege or franchise," etc., "the same became forfeited," etc. The plaintiffs pray, among other things, that it be adjudged the said pretended corporation has no legal existence; and, if the second count alleges a cause of action, such a judgment would operate as well a forfeiture of corporate rights by reason of the misusers and non-users averred, as a judgment that the corporation never had a legal existence.

The defendants did not demur on the ground of a misjoinder of causes of action. But each count of a complaint must contain a distinct statement of the facts constituting a cause of action. Unless the second count alleges that the Potrero & Bay View Railroad Company once had a legal existence as a corporation, the second count fails to state a cause of action. There could be no resumption by the state or forfeiture of franchises never granted. It is manifest that, if the plaintiffs failed to allege that the company referred to had a legal existence as a corporation, there could be no necessity or basis for nor any propriety in a judgment of forfeiture. When facts alleged depend for their materiality as a basis for relief upon another fact, the fact upon which the others depend must be stated. To state it hypothetically is not to state it at all for any purpose of a pleading. Where a corporation may be chartered by special act of the legislature, it has been held in one state to be necessary that the information (a forfeiture by reason of misuser or non-user being claimed) shall refer to the act by which the corporation was chartered, in order that the court may determine what things it was authorized to do or omit.

Danville v. State, 16 Ind. 456. In California it is certainly enough to aver the existence and due organization of the corporation under the general laws. But the second count does not even aver that the Potrero & Bay View Railroad Company is or was a corporation. It may be the acts and omissions set forth in the second count might be proved under the averments of the first count; that, under the averments of the first count, the plaintiffs would have been authorized to prove that the defendants had no legal right to the franchises described when the action was commenced. See *People v. Bank*, 6 Cow. 216. However this may be, the second count of the complaint herein does not state a cause of action. It is alleged in the second count that "the acts and doings of said corporation, and the said defendants acting for said corporation as said pretended officers," were the acts and doings subjecting the franchises of the corporation to forfeiture. There is no statement that the defendants were not real officers or agents, if there was a real corporation. They are called "pretended" officers because they could not be real officers of a corporation which had no legal existence. This is evidently the scope and effect of the allegation in that regard. Yet, in order to make the facts averred as constituting a ground for a judgment of forfeiture, of any avail, it would have to be taken for granted, although not alleged, that the Potrero & Bay View Railroad Company was, previous to the acts and doings alleged, a legally existing corporation; and, if the individual defendants were the officers and agents of a legally existing corporation, their acts and doings were those of such corporation. The demurrer to the second count of the complaint should have been sustained.

It is insisted on the part of the appellants that the demurrer to the first count of the complaint should have been sustained by the court below; that the rules of pleading applicable to other civil actions, under the Code of Civil Procedure, obtain with respect to this action, and that the complaint should therefore have specified what the Potrero & Bay View Railroad Company failed to do which was necessary to create a legal corporation; wherein it omitted any requirements of the laws. This because, in every case, the plaintiff is required to state the facts constituting his cause of action "in ordinary and concise language." It is obvious that the facts which it is necessary to state depend upon the character of the action. In an action to quiet title, under the Code, it has been held not to be necessary to aver the nature and particulars of the claim asserted by the defendant; nor is it always necessary, in a bill to foreclose a mortgage, to aver the precise nature of a claim to a lien or incumbrance averred to be subsequent and subject to the mortgage. The constitution of 1849, in force when the Code of Civil Procedure was adopted, did not give the district courts express power to issue writs of *quo warranto*. Section 802, Code Civil Proc., as the same read originally, provided: "The writ of *scire facias*, the writ of *quo warranto*, and informations in the nature of *quo warranto* are abolished," etc. Section 5, art. 6, Const. 1879, declares that the superior courts shall have power to issue writs of *quo warranto*, and that the constitution does not prohibit the legislature from providing for actions or informations or proceedings in the nature of *quo warranto*. Informations in the nature of *quo warranto* existed at the common law. In England informations in the nature of *quo warranto* were filed by the attorney general, or by the "king's coroner," of his own authority; afterwards by the king's coroner under the direction of the court of king's bench,—the last under St. 4 & 5, Wm. & M. c. 18. Still later, in certain cases, by leave of the court, in pursuance of St. Anne, (c. 20.) The statute of Anne introduced a more convenient mode of proceedings to inquire into a usurpation of or intrusion into certain enumerated offices and franchises. Ang. & A. Corp. §§ 731-735.

The chapter of the Code of Civil Procedure relating to actions for usurpation of an office or franchise provides, in effect, for an information in the nat-

ure of *quo warranto*, the remedy or proceeding being extended to usurpations or intrusions into any office or franchise. We think the statute constitutional. In the first place, it may be considered as a mode of procedure for the exercise of the jurisdiction in *quo warranto* conferred by the constitution. *State v. Merry*, 3 Mo. 278. In the next place, it is an action, and the legislature is not prohibited by the constitution from providing for such an action. We are of opinion the first count of the complaint states facts constituting a cause of action. Franchises are privileges of the sovereign in the hands of a subject. The state is the source from whence all franchises are derived. As against the state there is no presumption that citizens exercising a franchise are exercising it rightfully. Hence it is not necessary, in a proceeding of this character, for the people to allege wherein the right of a defendant is defective. Even if it were conceded that, under our law, a franchise can be acquired by prescription, it would still be for the defendant to a proceeding like the present to allege and prove the long-continued use. "While in ordinary civil actions the burden rests upon the plaintiff to allege and prove his title to the thing in controversy, the rule is reversed in cases of *quo warranto* informations, and the respondent is required to disclose his title to the office or franchise in controversy; and, if he fails in any particular to show a complete title, judgment must go against him." "The proper course for the respondent is either to disclaim or justify. * * * If he seeks to justify, he must set out his title specially and distinctly." High, Extr. Rem. §§ 712, 716. The defendant cannot plead *non usurpavit*, for the object of the proceeding is to compel him to set forth by what warranty or authority he exercises the office or franchise. Ang. & A. Corp. § 756; 2 Dill. Mun. Corp. (3d Ed.) 893. The demurrer to the first count of the complaint was properly overruled.

The court below sustained a demurrer to the defendants' answer. The defendants pleaded as a defense that the cause of action set up in the first count of the complaint was barred by sections 338, 343, Code Civil Proc. If the proceeding were simply one in which a forfeiture were sought by reason of the misuse or non-use of its powers by a corporation, the statute of limitations might be pleaded in bar, (Code Civil Proc. § 345;) but the continued exercise of a franchise without right is a continuously renewed usurpation on which a new cause of action arises each day.

The answer avers that the Potrero & Bay View Railroad Company was and is a corporation, with the franchises mentioned, under the laws of California. This is sufficient reference to the general laws under which such corporations may be formed. The courts take judicial notice of such general laws; and the cases in other states which seem to require that, in an action like the present, the defendant, claiming to be a corporation, shall allege the special act creating it as such, have no application here. The answer must show, however, that the corporation was organized in the manner required by the general laws. Here the defendants set forth in the answer the articles of association, which seem to comply with the statute. But did the corporation, thus formed, possess, when the suit was commenced, the franchises claimed by it herein? May 6, 1862, the act of 1861, to provide for the incorporation of railroad companies, was amended by providing that no railroad company thereafter organized should have the right to use any of the streets, lands, or waters within a city or city and county, unless the right to use the same should be granted to said company by a vote of two-thirds of all the members of the board of supervisors or common council of the city and county or city. The answer does not allege any such grant from the supervisors of the city and county of San Francisco. The defendant the Potrero & Bay View Railroad Company claims the right to maintain a railroad, and to run cars thereon, upon the streets described in the answer, to collect fare, etc., under and by virtue of the act of April 2, 1866, purporting to grant to certain persons (alleged to

be assignors of the Potrero & Bay View Company) the right to lay down and maintain an iron railroad along and upon certain streets; and upon acts amendatory thereof and supplemental thereto. The act of 1866 was not a grant of a mere proprietary interest in lands, but was, if valid, a grant of a franchise. The constitution of 1849 provided: "Corporations may be formed under general laws, but shall not be created by special act," etc. Article 4, § 31. The true construction of that constitutional provision is that private corporations must derive their powers from general laws, and not from special statutes. *San Francisco v. Water-Works*, 48 Cal. 513. It follows that, if the grant of the franchise of laying down and maintaining a railroad, within the limits of San Francisco, to certain persons therein named, was a valid and operative grant, yet the defendant corporation acquired no right to the franchise by assignment from such persons. To uphold such assignment would be to give to the particular corporation, through it, a franchise which other corporations of the same class could acquire only by grant from the supervisors, as provided in the general laws. *San Francisco v. Water-Works*, *supra*. The answer fails to aver facts showing a right to exercise the franchise mentioned in the pleadings.

In a separate and distinct answer to "the supposed cause of action secondly alleged," in the complaint, the defendants aver, in effect, that on January 14, 1882, the people of the state did institute an action in this honorable (the superior) court against the defendant the Potrero & Bay View Railroad Company, praying that the piles and bridge placed by said defendant at the point of intersection of Kentucky with Tulare streets be adjudged and declared to be a nuisance, and, as such, be abated, etc.; that the defendant appeared, and answered to the complaint in said action, and such proceedings were therein afterwards had that on January 30, 1882, the court did adjudge, among other things, that the wooden piles, timbers, and bridge, built under the control and use of the defendant the Potrero & Bay View Railroad Company, at the junction aforesaid, are and constitute, "as now built," a public nuisance, and did further adjudge that the defendant, without delay, take away and remove said bridge, etc. The answer further alleges that the removal of the bridge, piles, etc., in obedience to the judgment aforesaid, constitutes the tearing up, destroying, and removing of portions of the track or roadway charged in the second count of the complaint. If the answer had averred that the bridge at the intersection of Kentucky and Tulare streets could not be erected in such manner as that it would not constitute a public nuisance, the answer would have constituted a good answer to the portion of the second count of the complaint charging the tearing up of the track, etc., at the junction aforesaid, and the abandoning of the use thereof by the company. The people could not first prevent the employment of its franchise by the corporation, and then forfeit the corporate existence because of non-employment of that franchise. As we have seen, however, the second count of the complaint states no cause of action, and the answer last above referred to is addressed only to the second count.

The first count of the complaint alleged that the Potrero & Bay View Railroad Company never had the right or franchise to build and maintain tracks or run cars upon streets within the city and county of San Francisco, and the answer fails to aver facts showing that the company had such rights or franchise. The argument of appellants goes further than a claim that plaintiffs herein are estopped from demanding a forfeiture of the franchises of the Potrero & Bay View Company because of its failure to do that which a court, on application of plaintiffs, has prohibited the company from doing. It will be observed that in the former action the bridge was declared to be a nuisance "as it was built." It is asserted that the plaintiffs are estopped from prosecuting the present action by the mere fact that they had succeeded in another action, brought against the Potrero & Bay View Railroad Company, as a cor-

poration, in obtaining a judgment that the company had placed obstacles in a navigable stream which constituted a public nuisance. There are cases in which a party to an action, having pleaded or relied upon the existence of a fact, and having secured to himself some substantial benefit by reason of an adjudication involving the existence of the fact pleaded or proved, cannot in a subsequent suit be permitted to assert that the same fact did not exist. To permit him to do so would be to encourage frauds upon the courts of justice. *Lilley v. Adams*, 108 Mass. 50; *Hooker v. Hubbard*, 102 Mass. 239; *Railroad Co. v. Howard*, 13 How. 307; *Reese v. U. S.*, 9 Wall. 13. And so a state may be estopped from asserting a claim in her courts by reason of some prior action of the legislature. *Com. v. Heirs of André*, 3 Pick. 224. In *State v. Taylor*, 28 La. Ann. 460, the plaintiff alleged that by the act No. 12, 1866, the governor, on the 6th of March of that year, leased to the defendant "the new canal and shell road" for 15 years for an annual rent,—Taylor to put the leased property in good condition, etc.; that the lessee had not paid rent nor complied with the terms of his lease, etc., and had thereby forfeited his rights. The defendant alleged he had been released from the payment of rent by the act No. 118 of 1867, and a contract thereunder, and in lieu thereof was to widen the canal, etc. The plaintiff responded that the act of 1867 was unconstitutional and void. It appeared that in a previous action—*Case v. Taylor* (defendant in *State v. Taylor*)—the state intervened and alleged that the rights of said Taylor, under the act of 1866, and the contract thereunder, had been materially modified and altered by the act No. 118 of 1867, asserted the binding force and operation of said act No. 118 of 1867 to protect the rights of the state in relation to said canal, etc., "and succeeded in her demand." The supreme court of Louisiana held the state, by reason of her conduct in the former action, was estopped from demanding that the act No. 118 of 1867 be declared invalid. In the former action the state had obtained a judgment fixing the contract rights of the state and Taylor, and deciding that the contract and its terms were determined by reference to the act of 1867, the contract under it, and a subsequent act of 1870. Whether the court was right in saying that the plea was not *res adjudicata*, but estoppel, it is not necessary to decide. The question here presented is not like that in *State v. Taylor*.

In the action brought by the people to abate the alleged nuisance, the Potrero & Bay View Railroad Company was named as a corporation. The company or persons interested did not deny that it was a corporation, and the plaintiffs took judgment against the defendant. So far as appears, the company was a corporation *de facto* and *de jure*. But it was a corporation which never acquired the right to erect bridges, or lay down tracks, or maintain a railroad within the limits of San Francisco. If, without having authority to erect a bridge at all, it built a bridge in such manner as to constitute a public nuisance, upon what principle does the prosecution of an action to abate the nuisance estop the plaintiffs from claiming that the corporation never acquired the franchise to build a road, including bridges, or operate cars thereon, within the limits of the city and county? In the former action the present plaintiffs did not declare, or obtain any advantage by having the court adjudge, that the defendant the Potrero & Bay View Railroad Company was lawfully exercising the franchises described. Judgment affirmed.

We concur: PATERSON, J.; TEMPLE, J.

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PEOPLE v. CENTRAL PAC. R. CO. (No. 9,791.)

(Supreme Court of California. April 30, 1888.)

1. COVENANTS—ACTION FOR BREACH—DAMAGES—PENALTY.

In an action to recover a certain sum paid by plaintiff as interest on bonds on breach by defendant of covenants contained in an agreement made in pursuance of

an act of the legislature of April 4, 1864, entitled "An act to aid the construction of the Central Pacific Railway Company, and to secure the use of the same for military and other purposes," it appeared that defendants agreed to transport and convey certain persons and goods free of charge, and, on receipt of a patent, to convey certain lands in fee to plaintiffs; that plaintiff paid interest on defendant's bonds to the amount aforesaid; that section 4 of the act recited that the said grant made to defendant was made upon the express condition and on consideration that defendant should transport and convey, etc., and also that defendant should be liable to repay plaintiff the amount which should be paid by them, under the agreement, on breach of any of the covenants. *Held*, that the amount so paid was a grant, and not a loan, notwithstanding the use of the word "repay;" that as the sum for which the defendants were liable on breach of covenant was made payable for one breach or many, for a breach attended with small loss or great loss, and the actual damage could be easily computed, the same must be considered in the light of a penalty, and not as liquidated damages; and that the contract could not be considered as being alternative on defendant's part.

2. SAME—PLEADING—ALLEGATION OF BREACH.

In an action to recover a certain sum incurred as a penalty for breaches of contract, the complaint is not sufficient where it merely recites the contract containing the penalty, alleges generally the breaches thereof, and prays for judgment for the penal sum, as it should specifically assign each individual breach relied upon, and the actual damage sustained as the result of each individual breach.

3. SAME—AMBIGUITY.

In an action to recover a certain sum as a penalty for breaches of contract, where, for certain considerations, defendant agreed, *inter alia*, to convey certain land to plaintiffs within 90 days of receipt of patent, it appeared that the complaint contained no averment that defendant had received the patent, but alleged that defendant was the owner of the land, and that "it had been within the ability and power of the defendant at all times to apply for, accept, and receive a patent from the United States." *Held*, the complaint was insufficient, on the ground of ambiguity and uncertainty, there being nothing to show that the application for the patent would have been successful.

4. APPEAL—REVIEW—OBJECTIONS TO PLEADINGS.

Where a certain averment in a complaint is demurred to on the ground of ambiguity and uncertainty, and the demurrer is sustained, a decision in favor of the plaintiff on supposed issues made by objections other than the specific objection mentioned cannot be implied.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

The people of the state of California brought an action against the Central Pacific Railroad Company to recover money paid under an agreement made in pursuance of an act of the legislature of April 4, 1864, entitled "An act to aid the construction of the Central Pacific Railroad Company, and to secure the use of same for military and other purposes." Defendant demurs. Demurrer sustained. Plaintiff appeals.

Geo. A. Johnson, Atty. Gen., and *Wm. M. Pierson*, for appellant. *Garber, Thornton & Bishop*, for respondent.

MCKINSTRY, J. A demurrer to the complaint was sustained, and, plaintiffs declining to amend, final judgment was entered for the defendant, from which plaintiffs have appealed. The complaint sets out the act of the legislature of April 4, 1864, "to aid the construction of the Central Pacific Railroad Company," etc.; and avers that on the 4th day of May, 1864, the defendant made, executed, and delivered an agreement in writing, as required by said act of the legislature; which alleged agreement is also set out at length. It also alleged that the state of California "has duly performed all the conditions mentioned in said act of the legislature by it to be performed," and has paid the interest on the \$1,500,000 bonds, as provided in the act; the aggregate of payments of interest being \$1,942,500, and the last of such payments having been made December 31, 1882. The judgment prayed is for \$1,942,500 and interest and costs. The complaint also avers that since the approval of the act and filing of the agreement aforesaid, and during each and every year since said times, "there have been necessarily transported on and over the railroad of said defendant numerous public messengers of the state of California, and

of the various counties of said state; and numerous convicts, and numerous public messengers in charge thereof, going and sent on and over the railroad of said defendant to the state prison of said state; and numerous lunatics, and numerous public messengers in charge thereof, going and sent on and over the railroad of said defendant to the state insane asylum of said state from the various counties and cities and counties of said state; and various materials, and various public messengers in charge thereof, transported on and over the railroad of said defendant for the construction of the state capitol building of said state; and various articles intended for public exhibition at the fairs of the State Agricultural Society of said state, transported on and over the railroad of said defendant. That at the date of the passage of said act of the legislature, and of the execution of said agreement, and since, the said defendant was and has been the owner and in possession of the said south half of section 19, in township 11 north, of range 7 east, Mount Diablo meridian, referred to in said act of the legislature and said agreement, and it has been within the power and ability of the said defendant and its agents at all times since the passage of said act, and the execution, delivery and filing of the agreement aforesaid, to apply for, accept, and receive a patent from the United States of America for the lands and premises described in said act of the legislature and said agreement, and to execute, acknowledge, and deliver to the state of California a deed in fee-simple for the conveyance thereof. Nevertheless the plaintiff alleges that, although often requested and required so to do, the defendant has willfully and designedly, during all of the time aforesaid, refused and neglected to transport or convey over its said railroad free of charge, or without any other compensation than as provided in said act, all or any of the public messengers aforesaid, or all or any of the convicts aforesaid to the state prison of said state, or all or any of the lunatics aforesaid going to the state insane asylum aforesaid, or all or any of the materials aforesaid for the construction of the state capitol building aforesaid, or all or any of the articles aforesaid intended for public exhibition at the fairs of the State Agricultural Society aforesaid; and has, although often thereunto requested and required, refused and neglected to apply for or accept or receive a patent from the United States for the lands and premises aforesaid, or to execute, acknowledge, and deliver to the state of California a deed for the conveyance thereof, in fee-simple or otherwise."

It is contended by appellants that the questions of "compensation" or of a "penalty" are utterly foreign to the issues herein; that the statute, and its acceptance by the defendant, constitute a contract between the state and the defendant, the terms and conditions whereof fix the rights of the parties herein; that the covenants or promises on the part of the defendant, in consideration of payments by the state of interest upon the bonds, were to transport and convey, "at all times when required," all public messengers, convicts ordered to the state prison, lunatics sent to the insane asylum, materials for the construction of the state capitol, articles intended for exhibition at the fairs of the State Agricultural Society, and troops and munitions of war of the state, free of charge; and also, within 90 days after receiving a patent therefor, to convey the land described, or to repay to the state the amount by it paid as and for interest upon the bonds mentioned in the act. The proposition is that the money to be paid by the state for interest on the bonds was, in effect, a loan by the state to the defendant, to be repaid in either one of two ways,—by doing for all time the things specially agreed to be done by defendant, or by paying back the money. It is claimed the promise of the defendant was in the alternative; the defendant having the option at any time to refuse to perform any of the things promised, and to pay the money advanced by the state in lieu of such performance. But the language of the act does not bear out the suggestion that the money paid by the state for interest was a loan to the defendant. The act is entitled "An act to aid the construction of the Central Pacific Rail-

road Company and to secure the use of the same for military and other purposes," etc. The preamble recites that whereas war exists, and congress "has granted aid" for the construction of the Central Pacific Railroad, which is insufficient to complete the road, etc.; and "whereas it is important, in view of the present state of war, that the railroad be constructed as soon as possible," etc. Neither in the title nor in the preamble is there any hint that it was the intent to provide for lending money to the defendant, although the general language employed might be held to include "aid" in the form of a loan, did the body of the act clearly provide for it.

The first section of the act authorizes the defendant herein to issue bonds of \$1,000 each, the interest on the first 1,500 to be payable at the state treasury. The second section provides for the levy of a tax to pay the interest on the 1,500 bonds. The fourth section begins: "The said grant to said company is made upon the express condition and in consideration that the said company shall and do at all times when required, from and after the passage of this act, transport and convey," etc. The fifth section appropriates the money to be paid as interest on the bonds. The fourth section also requires that the railroad company shall enter into an "agreement," promising to comply with the terms and conditions set forth in the act. At the close of the fourth section is the sentence that, in case the company shall fail or refuse to perform any of such conditions, "it shall be liable to repay to the state the amount which shall have been paid by the state under this act." The word "repay" purports a payment to the state of the moneys granted by the state, but does not of itself necessarily imply a promise to repay the moneys as moneys advanced by way of loan to the defendant. By the act the state pledged its faith to pay, and provided for taxation to pay the interest upon certain bonds; and defendant, by its acceptance and agreement filed, promised to carry public passengers free of charge, etc. The act does not provide for an agreement by defendant promising to repay the moneys advanced by the state. The liability of defendant to pay money arises entirely out of the defendant's acceptance of the benefits of the act, which fixes a penalty in case of default in the performance of these conditions which the defendant is to agree to perform by written agreement filed. True, the acceptance of the grant bound the railroad company by all the provisions of the act, including the provision for "repayment" in case of default; but the foregoing statement explains the nature of the defendant's obligations thus assumed. The state grants, by appropriation, certain moneys to aid the construction of defendant's railroad. In consideration of the grant, the defendant promises to do certain things for the state, and for the benefit of citizens of the state. The money for interest is appropriated, and the recurring payments of interest are to be made, even though the company shall fail to perform any of the conditions on its part. In case of failure to perform, however, the company is liable in damages at least up to the amount previously paid by the state. But the amount which may have been paid by the state is either an amount stipulated to be paid as damages, or it is merely a penalty. The contract on the part of the defendant is not in the alternative; it is not an agreement to perform the conditions, or, at its option, to pay the amount. The promise to carry all public messengers free of charge, etc., is an absolute promise. The distinct and separate clause of the statute that, "in case the said company shall fail and refuse," etc., does not give to the defendant the right, at its election, to pay the amount stated, instead of performing the conditions by it to be performed. If by accepting the benefits of the statute, the defendant became liable to pay a stipulated sum, it was to be paid only in case of default in the performance of conditions otherwise absolute. The defendant, like any other contracting party, had power to violate its contract and take the consequences. But it was not authorized by the term of a contract (derivable from its written agreement, or from that agreement and the statute) to pay an agreed sum, and thus dis-

charge itself. 1 Suth. Dam. 477. Had the act provided that the defendant should have the choice to perform specific acts, or to pay to the state the amount paid for interest, or that the defendant might pay the money in lieu of performing the other acts, the case might have been different. *Slosson v. Beadle*, 7 Johns. 72; *McNitt v. Clark*, Id. 465. But we think the statute cannot be construed to give such an election to the defendant. The payment of interest is called in the statute a "grant." Although the money was not there actually paid, it was appropriated contemporaneously with the passage of the statute. In effect, the grant was in the present; the conditions were to be performed in the future. That a loan, or mere advance in the nature of a loan, was not intended, is rendered the more apparent, not only from the fact that neither of these terms is employed, but from the further circumstances that all the services were not to be performed for the state directly, and that there is no provision for credits in case of part performance, whatever the extent of such performance. Yet it must be presumed, the contrary not being alleged, that the defendant built the railroad within the times stipulated, and performed all other conditions which the complaint fails to allege it did not perform.

The state must rely upon the statute, and the defendant's "agreement" so far as it complied with the statute. They do not provide for, nor do they contemplate, that the defendant shall pay money unless it shall fail to do some of the acts by it to be done. As we have said, the act provides either that the sum stated shall be the stipulated damages, or that the sum stated is a penalty. In the latter case the plaintiffs are entitled to recover only the actual damages proved. No doubt, parties may liquidate, by stipulation in advance, the amount to be paid as damages. But, conceding a contract between the state and defendant, the intention of the parties is always material. The intention should be apparent to liquidate the damages, in the sense of just compensation. The intention to measure the damages is not satisfactorily shown when the amount stated varies materially from a just estimate of the actual loss. 1 Suth. Dam. 481. If the act of the legislature is to be interpreted as claimed by appellants herein, it was intended, in case the defendant failed or refused to transport free of charge a single public messenger, convict, or lunatic, or a single article intended for exhibition at a state fair, that it should pay all moneys paid out by the state under the act; amounting, when this suit was commenced, to nearly \$2,000,000. It has been said that the real question in such cases is not so much the actual intention of the parties as whether the sum is in fact in the nature of a penalty, and that this is to be determined by the magnitude of the sum in connection with the subject-matter. *Jaquith v. Hudson*, 5 Mich. 123. But this is only saying that, under certain circumstances, the law will impute an intention to the parties not derivable from the ordinary sense of the words.

In many cases it had been held that the parties could not have meant what they have apparently said; for instance, where a number of things are stipulated to be done, it has been held that the parties could not have meant that a large sum should be payable, as liquidated damages for a failure to perform one or more of them. *KEATING, J.*, in *Lea v. Whitaker*, L. R. 8 C. P. 74. In such cases the lump sum is to be regarded as a penalty. *Kemble v. Farren*, 6 Bing. 141; *Galsworthy v. Strutt*, 17 Law J. Exch. 226; *Betts v. BCrch*, 28 Law J. Exch. 267; *Sparrow v. Paris*, 7 Hurl. & N. 599. The tendency and preference of the law is to regard a stated sum as a penalty, except where the actual damages cannot be ascertained by any standard. But, where the damages which must result from the breach of a single contract are uncertain in their nature, any stipulation which the parties may make, ostensibly for the purpose of liquidating the damages, should receive favorable consideration. Where the sum is agreed to be paid for any of several breaches of contract, and the damage resulting from a breach of all of them are uncertain, and there is no fixed rule for measuring them, but the breaches are apparently of various

degrees of importance and injury, the cases in this country are somewhat conflicting as to whether the sum should be held to be a penalty or as liquidated damages. "But," as said by RYAN, C. J., in *Lyman v. Babcock*, 40 Wis. 503, "on principle, we are very clear the sum should be held a penalty; for it appears to us it would be as unjust to sanction a recovery for the sum agreed to be paid alike for one trivial breach, or for one important breach, or for breach of the whole contract, as it would be to sanction a recovery equally for damages certain or uncertain in their nature." And see 1 Pars. Cont. 161. Mr. Sutherland says: "This is believed now to be the doctrine generally held: If a gross sum is stipulated to be paid for any failure to fulfill an agreement consisting of several parts, and requiring several things to be done or omitted, it is a penalty." 1 Dam. 525. The statement is true, as we have seen, even where the actual damages are uncertain, if it appears that the damages resulting from one of the breaches may be great, and from another small, since the inequality is logically certain. But where, as in the case at bar, the sum is made payable for one breach, and for many, for a breach attended with a small loss or a great loss, and the actual damages are easily computed, the inequality is at once seen; the stipulation as to a definite sum is so framed that it cannot possibly be construed to adjust the recompense to actual injury. The sum mentioned and referred to in the act of the legislature is to be treated as a penalty, and not as liquidated damages.

Can the present case be treated as an action to recover damages for a breach of one or more of the conditions to be performed by the defendant? At common law, where there was an agreement, under seal, containing a penalty, the plaintiff could bring debt for the same; or covenant, and recover damages for a breach of a covenant. *Martin v. Taylor*, 1 Wash. C. C. 1. But after a judgment in an action of debt, if it appeared that the demand was not for damages liquidated, but was a penalty, the defendant could seek relief in equity. *Perkins v. Lyman*, 11 Mass. 76. Courts of equity relieved against a penalty upon compensation, but, when the covenant was to pay a particular liquidated sum, a court of equity could not make a new covenant for a man. *Lowe v. Peers*, 4 Burrows, 2228. Courts of law everywhere now administer the same equity to relieve from the penalties in other forms of contract as from those in bonds. 1 Suth. Dam. 481. Under our system of pleading, if an amount is stipulated as liquidated damages in a contract, whether under seal or not, the plaintiff should sue for that amount, for such is the contract. And such (aside from the suggestion as to defendant's alternative promise) seems to be the theory of the present action. But, where the sum stated is merely a penalty, a plaintiff must sue for the actual damage sustained by reason of the breach of the particular condition or conditions he claims to have been broken. The allegation of a breach must be governed by the nature of the contract, but it must be distinctly stated. It should be assigned in the words of the contract, or in words co-extensive with the sense and effect of it. *McLaughlin v. Hutchins*, 3 Ark. 213. The statement of a penalty in a contract is of very little importance, its only consequence being to limit a recovery of actual damages, so that no more, perhaps, can be recovered than the sum named in the penalty. In cases of penalty, the penalty is not a debt; the recital of a contract containing the penalty is not the equivalent of an averment of damages caused by a breach of a condition of the contract; nor is a prayer for judgment for the penal sum an averment that the plaintiff has suffered damages in that sum by reason of the breach. It follows that each breach of a condition on the part of the defendants, relied on, should have been specifically assigned, and the damage sustained as the result of such breach should have been alleged. The complaint avers that between the 5th day of May, 1864, and the 1st of January, 1883, there were transported numerous public messengers, etc. So far, no breach. It further alleges that, between said dates, on occasions not specified by date, or otherwise identified

or described, the defendant exacted fares (if that is alleged) of "numerous public messengers of the state, and of various counties and cities and counties," no one of such messengers being named, or his official character or agency given, and exacted fares for numerous convicts and lunatics, not named, for transportation upon portions of defendant's railroad, not described; further, that defendant charged and collected freights (assuming so much to be averred) for the transportation of "various" materials for the state capitol, and for "various articles" for exhibition at the state fairs, not specifying any of such materials or articles, or its point of shipment, or by whom shipped, nor stating that any of such articles was in fact exhibited at a state fair. If the complaint in these respects were sufficient, the plaintiffs would be at liberty, at the trial, to prove any instance in which, during a period of more than 18 years,—or, at least, within the statutory period of limitation,—the defendant had collected fare for the transportation of any public messenger, convict, or lunatic, or for any article "intended" for exhibition at a state fair. The Code provides for no "bill of particulars" in such case, nor was defendant bound to move that plaintiffs make their complaint more specific. The complaint does not inform the defendant that the plaintiffs will rely upon any particular omission or refusal, or omissions or refusals, to carry free; indicating it or them by any description which could enable the defendant to prepare to meet the case which might be made by plaintiffs at the trial. Nor is there any averment that the defendant has refused to carry all and every public messenger, etc. We think the averments referred to are insufficient as an assignment or assignments of breaches of conditions. Beyond question, they are "uncertain."

With respect to the land described in the statute, the defendant was to convey it to the state within 90 days after receiving a patent from the United States therefor. The complaint contains no averment that the defendant has received a patent for the land. Though it avers no breach of the literal contract, does it set forth facts showing a substantial breach, within the purpose and intent of the supposed contract? The complaint avers that the defendant has been the owner of the land since the passage of the act of the legislature. It may be argued that, since it is the manifest purpose of the act and agreement that the state shall receive a good title from the defendant, it was the duty of defendant to convey the title which it had as "owner." But, whatever may be the meaning of the averment last referred to, that it means that the legal title has been in the defendant is made uncertain by the language which immediately follows it, and is directly connected therewith: "It has been within the ability and power of the defendant at all times to apply for, accept, and receive a patent from the United States." This last is not an averment that the defendant has been in a position to demand, or could put itself in a position to demand, a patent. It may be that, without fault of the defendant, its application for a patent would have been fruitless; the plaintiffs do not allege that it would have been effectual. Nor is there an allegation that the plaintiffs have suffered damage by reason of the failure of the defendant to convey to the state, either in the amount paid out by it for interest, or in any sum. As we have seen, the defendant would not have been indebted to the state in the amount paid by the latter for interest, upon failure to secure a patent or to convey the land. The doctrine of nominal damages may sometimes be resorted to where there is a failure of proof; not where there is a failure of averment. The attempted statement of a breach of a condition to convey the land within 90 days after receiving a patent therefor is ambiguous and uncertain.

It is unnecessary to decide whether, if the complaint had not been subject to demurrer in other respects, the general averment of performance of all the conditions mentioned in the act of the legislature would be sufficient under section 457, Code Civil Proc. It may, however, be proper to say here that

the provision in the statute that the defendant, "when required," shall transport, free of charge, imposes on the state, or those made agents of the state, a special request or demand in each case that the person or article be carried free. It has been insisted the words of the statute are not the equivalent of "when required," or "demanded;" that they only mean when "necessary,"—when it is for the public interest, or, in a larger sense, the public convenience. But, the scope and purpose of the act being considered, it could not have been contemplated that the defendant should become liable in case its officers or agents should charge a fare or freight, in ignorance of and without any notice that the man or article was of a class mentioned in the statute. So to hold would be unreasonable in itself, as it might set a trap for defendant, and would make its liability depend on an event not in the contemplation of the law-makers. It has been said that "required" cannot mean "requested," because there was and has been no legislation providing any special mode by which a request can be made by or for the state. But effect must be given to the language of the act which provides for a request or demand. By accepting the act and executing the agreement, the defendant consented to be bound by such reasonable request as is appropriate in the cases provided for. The defendant could disregard such reasonable demand only at its own risk, and would become liable on refusing to comply with it. Thus, if one claiming to be a public messenger, or the convoy of a convict or insane person, shall demand free passage, the defendant must inform itself of his real character, and for the purpose of ascertaining it may adopt reasonable rules and regulations. Practically, there can be little difficulty in carrying out the intent of the statute. Of course the defendant, under pretense of an investigation, cannot avoid its duty, or escape responsibility, by requiring unreasonable vouchers, or imposing conditions which will delay or interfere with the exercise of the right of a particular applicant. The averment that a defendant "although often requested," like the averment of a promise, is often made where the law implies a request or promise. It is an immaterial allegation. "In point of form there are in pleading two descriptions of request,—one termed a special request; the other the *licet scæpe requisitus*." 1 Chit. Pl. (16 Amer. Ed.) 541. Where the special request is not necessary, the *licet scæpe requisitus* is of no avail, and the omission of it will not vitiate the pleading. *Quimby v. Lyon*, 63 Cal. 395. This merely formal allegation cannot be substituted for a special request to be alleged and proved.

The objection that the complaint was ambiguous and uncertain was taken by demurrer, and the demurrer was sustained. The Code (Civil Proc.) contemplates one demurrer to a pleading, in which may be taken any or all of the objections enumerated in section 430. If a demurrer is overruled, it is a determination that the pleading is good as against all the objections to it; and if, on appeal, it appears that any of the objections were well taken, the judgment is reversed. On the other hand, if any one of the objections taken is valid, and the demurrer is sustained below, the judgment based on the order sustaining it will be affirmed. Where the order sustaining or overruling the demurrer is general, the rule cannot be questioned; and, as a general order is alone contemplated by the Code, any matter inserted in the order other than the decision for or against the demurrer is surplusage, and not to be regarded. In the case at bar the order is either a determination that the complaint is insufficient, or the issues of law made by the demurrer have never been determined. A decision in favor of the plaintiffs upon the supposed issues made by the objections other than the specific objection mentioned in the order cannot be implied. The party against whom an order is made sustaining a demurrer is not entitled to notice of the motive or reasoning which induced the judge to make the order. In considering the appeal from the judgment, we are to treat the order on demurrer as if it were itself directly appealable. In such case both parties could not appeal, since the party in whose favor the order

was made would not be injured by it. When one of several objections to a complaint is held valid, and the demurrer is sustained, and the plaintiff declines to amend, but stands upon the complaint as sufficient, he cannot be permitted to say here that an "opinion" of the judge below—or matter in the nature of an opinion inserted in the order—indicates that the judge made the correct order for a wrong reason. The question always is, ought the demurrer to have been sustained? Judgment affirmed.

We concur: PATERSON, J.; TEMPLE, J.

76 Cal. 44

NOONAN v. NUNAN. (No. 9,997.)

(Supreme Court of California. April 30, 1885.)

1. EVIDENCE—ADMISSIBILITY—PROOF OF FACTS FOUND BY THE COURT.

Where the court found all relevant facts which the judgment roll in a previous action, sought to be introduced in evidence, would have proved, such judgment roll was properly excluded.

2. PARTNERSHIP—WHAT CONSTITUTES—PURCHASE OF DECEASED PARTNER'S SHARE.

The purchase of the share of a deceased partner does not of itself create a new partnership between the purchaser and the surviving partner, as the assets purchased are primarily liable to the payment of the claims of the partnership creditors, and to the balance of advances made by the surviving partner during its existence. It is merely a purchase of the residuum, and the purchaser in equity only becomes therein a tenant in common with the surviving partner.¹

3. TRUSTS—ACTION TO ESTABLISH—PLEADING AND PROOF.

In an action to declare a partnership, for dissolution and an accounting, it appeared that plaintiff purchased the share of a deceased partner, but the assignment was made in the name of defendant, the surviving partner, and the property was used in the business. *Held*, the court finding no actual partnership, that defendant could not be charged with a trust so as to render himself liable to an accounting; no facts being alleged in the complaint constituting a trust, but, on the contrary, it being averred that the property should constitute assets of a partnership.

Department 1. Appeal from superior court, city and county of San Francisco; H. REARDEN, Judge.

Thomas Noonan brought suit against Matthew Nunan to declare a partnership, a dissolution, and an accounting. Judgment for defendant. Plaintiff appeals.

O. P. Evans, J. C. Bates, and E. J. & J. H. Moore, for appellant. *McAlister & Bergin*, for respondent.

MCKINSTRY, J. The notice of appeal was served January 12, 1885, and filed on the 13th of the same month. The certificate of the clerk shows that the undertaking on appeal was filed on the 16th day of January, 1885. The motion to dismiss the appeal must be denied. If the facts found in the action, *Odd Fellows' Bank v. Thomas Noonan et al.*, to the effect that the right, title, and interest of the estate of Armstrong, deceased, in the leasehold and its appurtenances were purchased from the administratrix, in the name of Matthew Nunan, but really by the plaintiff herein, who paid the whole purchase price therefor, for his sole use and benefit, (and the decree thereupon,) determined any fact which tended to establish a partnership between the parties hereto, the ruling of the court herein, excluding the judgment roll in that action, did not injure the appellant, because the court below found the same facts in the present action. The court found all the facts in this action which the judgment roll would have proved, so far as they are relevant to any issue herein.

In the complaint in this action it is alleged "that it was agreed and understood by and between him, this plaintiff, and this defendant, that if he, the

¹On the general subject of what constitutes a partnership, see *Clift v. Barrow*, (N. Y.) 15 N. E. Rep. 327, and note; *Dame v. Kempster*, (Mass.) 15 N. E. Rep. 927; *Hendy v. March*, (Cal.) 17 Pac. Rep. 702; *Railway Co. v. Johnson*, (Tex.) 7 S. W. Rep. 838.

said Thomas Noonan, would buy the said interest, [of Armstrong's estate,] he and the said Matthew Nunan would thenceforward be partners in the said business, and would conduct the same as such, in the same manner as the said Armstrong and the said defendant had done," etc. The court below found this averment not to be true, and there was a substantial conflict, at least, in the evidence bearing on the issue made by it, and the denial thereof. If it be assumed that there was a sale and conveyance of the interest of deceased in the leasehold which placed the legal title in an undivided one-half thereof in Matthew Nunan in trust for Thomas Noonan, the latter would perhaps be entitled, upon proper averments, to a decree directing a conveyance of said undivided one-half of the legal title to him, unless it appeared from the facts alleged and proved by the defendant that there were debts due from the former partnership, or from Armstrong to the former partnership, which rendered it necessary and proper that the leasehold should be sold, and its proceeds applied to the liquidation of such debts. But the leasehold and appurtenances were assets of the late partnership between defendant and Armstrong, which was dissolved by the death of the latter. It was the duty and right of the surviving partner to settle the affairs of such partnership, and the purchase by the plaintiff was of course subject to the application of the assets to the satisfaction of the creditors of the former partnership, and of the balance of advances, if any, made by defendant to the partnership during its existence. In equity it was a purchase of the residuum, if any there should be. Subject to a settlement of the partnership affairs, plaintiff became in equity tenant in common with the defendant in the property of the late firm. But the mere purchase of the interest of the estate in such property did not create a new partnership between the parties hereto.

It is insisted, however, that, conceding there was no conventional partnership, the subsequent use by defendant in his business of the property of which he and the plaintiff were owners as tenants in common, charged the defendant with a trust, and with the duty of accounting to the plaintiff for profits derived from such use. It was held in *Heinlen v. Martin* that where the defendant had the mere legal title to the land, and the plaintiff was entitled to the use thereof, and the defendant had excluded the plaintiff therefrom, and the suit was brought for a conveyance of the legal title, equity and justice demanded that, in analogy to the relief granted at law, the plaintiff should recover the "rental value" of the land from the time he demanded a deed, which in that case was the commencement of the suit. 53 Cal. 321. In the case at bar no demand was made for a conveyance of the plaintiff's alleged portion of the leasehold. On the contrary, the averments are that the leasehold constitutes part of the partnership assets. In *Quackenbush v. Sawyer* there was a specific agreement between the parties, substantially alleged and proved, that the defendant should account for moneys received from a third person for the benefit of himself and the plaintiff, (54 Cal. 439,) and the court there held that the mere joint ownership of property does not constitute a partnership. *Stokes v. Stevens*, 40 Cal. 391, was an action of replevin. The cases cited by appellant from 15th and 16th Vesey only redecide the established rules that partnership for an indefinite period may be dissolved by either partner at any time, and that, when there is a partnership, without any stipulation as to proportions, the partners are entitled to equal moieties. *Peacock v. Peacock*, 16 Ves. 49; *Featherstonhaugh v. Fenwick*, 17 Ves. 298.

No facts are alleged in the complaint herein from which would arise an implied or constructive trust with respect to the real property employed in the defendant's business. It is averred, on the contrary, that it was so used by him in accordance with an agreement that it should constitute assets of a partnership. If it be conceded that a trust may arise sometimes from the fact that property owned by a plaintiff and defendant, as tenants in common, has been profitably used by the defendant, and that, in such case, the latter may

be held to an account, the complaint is not drawn upon that theory, nor are facts alleged which justify a decree appropriate to such a supposed case. It is a cardinal rule in equity pleading that the *allegata* and *probata* must agree. *Green v. Covillaud*, 10 Cal. 332; *Murdock v. Clarke*, 59 Cal. 693. A party cannot be allowed to claim relief inconsistent with his pleading. *Weil v. Posten*, 77 Mo. 287; *Gregory v. Nelson*, 41 Cal. 278; *Cummings v. Cummings*, ante, 442; *Carpenter v. Brenham*, 50 Cal. 549; *Burnett v. Stearns*, 33 Cal. 549. The averment of the complaint is that the leasehold and the appurtenances constitute the capital of the partnership formed by the plaintiff and defendant, and any accounting based on a finding of the fact of such partnership ownership must be upon different principles from an accounting based on the mere use of plaintiff's property by defendant. The purpose of the present action is to obtain a decree declaring a copartnership, decreeing its dissolution, and an account as incident to and consequent upon such dissolution. The court found there was no partnership. Its existence or non-existence was the main issue joined. There was no question presented by the pleadings in regard to a co-tenancy of those not partners, or in respect to the liability of co-tenants as such. As the appellant neither asked for the judgment which it is now claimed should have been entered in the court below, nor alleged facts upon which such a judgment could properly have been entered, he cannot here demand a reversal of the judgment which responded to the issues actually made and submitted to the trial court. Judgment and order affirmed.

We concur: SEARLS, C. J.; PATERSON, J.

NEWTON *et al.* v. CHILES *et al.* (No. 12,259.)

(Supreme Court of California. April 30, 1888.)

Commissioners' decision. Department 2. Appeal from superior court, Yolo county; C. H. GAROUTTE, Judge.

G. P. Harding, for appellants. R. Clark, for respondents Glenn and White. F. E. Baker and C. P. Sprague, for respondents Newton, Armstrong, and Diggs.

BELCHER, C. C. This is an appeal from a judgment, and the case comes here on the judgment roll. The action grew out of a contract to construct a house, and was brought by material-men and laborers. The owners and contractors were made defendants, and the contractors filed a cross-complaint asking affirmative relief against their co-defendants. No good would be subserved by stating the facts more fully. The pleadings, we think, were sufficient. The findings are full, and cover all the issues. The conclusions of law and the judgment are warranted by the findings. We find no error in the record prejudicial to the appellants, and we therefore advise that the judgment be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

76 Cal. 60

COX v. McLAUGHLIN. (No. 12,189.)

(Supreme Court of California. May 1, 1888.)

1. ASSUMPSIT—WORK AND LABOR—PLEADING—AMENDMENT.

In an action for services rendered in grading a railroad, where the complaint is for the recovery of contract rates on the original contract,—profits which would

have been made, etc., had not plaintiff been prevented from finishing the work by defendant's default,—it is proper to permit an amended complaint to be filed, stating no new facts constituting a new cause of action, but seeking to recover the value of the work actually done upon a *quantum meruit*.

2. SAME—QUANTUM MERUIT—RIGHT TO INTEREST.

In an action on a *quantum meruit* for the actual value of work done, etc., in grading a railroad, where the amount, character, and value of the services rendered, and material furnished, are uncertain, and can only be established by a verdict or the findings of a court, and are not susceptible of ascertainment either by computation, or by reference to market rates, or other known standard, plaintiff is not entitled to recover interest prior to verdict or judgment.

TEMPLE, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Action by Jerome B. Cox against Kate D. McLaughlin, executrix of the last will and testament of Charles McLaughlin, deceased, for the actual value, under a *quantum meruit*, of services rendered and material furnished under a contract between plaintiff and Charles McLaughlin for grading a railroad, a portion of the Western Pacific Railroad route. Judgment for plaintiff. Defendant appeals.

Wilson & Wilson, (L. D. McKisic, of counsel,) for appellant. D. M. Delmas and Henry E. Highton, for respondent.

PER CURIAM. This cause has been before this court several times on an appeal, and it is unnecessary to restate the facts. The history of the case may be found in the following volumes of our reports: 44 Cal. 18; 47 Cal. 89; 54 Cal. 605; 52 Cal. 590; 63 Cal. 196. It is sufficient to say that in 1864 Charles McLaughlin, now deceased, entered into a contract with the Western Pacific Railroad Company to grade the road-bed of its railroad from near the city of San José to Sacramento, a distance of 123 miles, and to construct all the superstructures, etc., necessary to place the road in complete running order, for the sum of \$5,400,000; and that in January, 1865, said McLaughlin made a contract with the plaintiff, Cox, and his associates, by the terms of which the latter were to grade that part of the road which lies between San José and Stockton, a distance of seventy-four and a quarter miles, to do the masonry work and all things necessary for placing the cars, ties, and iron equipments on the track, for which McLaughlin was to pay them the sum of \$900,000. Cox afterwards became the assignee of all his associates. Payments were to be made by McLaughlin to Cox as the work progressed, at amounts to be fixed by the estimates of the chief engineer of the said Western Pacific Railroad Company. Cox finished the first twenty miles, and part of the twenty-first mile, and received certain payments; but, McLaughlin then failing to make further payments as provided in the contract, Cox was unable to proceed further with the work through want of funds, and abandoned it. Upon the former trials in the court below, (except the first, when an attempt was made to enforce a mechanics' lien,) Cox persistently proceeded upon the theory that the failure of McLaughlin to make the payment due operated as a technical "prevention" of a compliance with the contract by Cox, and that, therefore, the latter could recover contract rates on the original contract, profits which he would have made, etc. This position was held repeatedly by this court to be untenable; and after the case was last here he amended his complaint in the court below so as to aver a claim for the value of the work actually done as upon a *quantum meruit*. The court below tried the case without a jury; found the value of the work, over and above all moneys paid, to be \$98,228.49, and gave plaintiff judgment for said sum, with interest at statutory rates from June, 1866, the time of the failure of McLaughlin to make said payment. From this judgment, and from an order denying a new trial, defendant appeals. Said Charles McLaughlin having in the mean time died, his executrix, Kate D. McLaughlin, was substituted as defendant. On

the 26th day of April, 1888, Kate D. McLaughlin having died, J. C. Pennie, administrator of the estate of said Charles McLaughlin, was made party defendant. The main points made by the appellant are these: *First*, that the court abused its discretion in allowing said amendment to the complaint; *second*, that plaintiff should not recover because of a certain contract which he made with the chief engineer of the Western Pacific Railroad Company; *third*, that there is no evidence to support the finding as to the work actually done or its value; *fourth*, that no interest should have been allowed.

1. We think that there was no abuse of discretion in allowing the amendment setting up the *quantum meruit*. There were no new facts stated upon which a new cause of action was based. The facts as stated in all the complaints were substantially the same; and, indeed, it is not clear that plaintiff could not have proceeded upon the theory of a *quantum meruit* under his former complaints. The same contracts, assignments, the work done and materials furnished, performance by the plaintiff, the breach by the defendant, the existence of all the conditions precedent to payment, have appeared in all of the complaints as the basis upon which the right to compensation in the plaintiff rested. When this case was last here, the court directed that the judgment should be reversed, and that judgment should be entered in the court below on the findings for defendant. Afterwards, on rehearing, the judgment of this court was modified so as to reverse the judgment of the lower court, and send the case back for a new trial. There must have been some object in this modification, and in view of the facts which have been repeatedly before the court, it was evidently regarded as possible to frame a complaint which would enable the plaintiff to recover the reasonable value of the services rendered and materials furnished. Of course, unless the facts stated constitute a new cause of action, the plaintiff's cause is not barred by the statute of limitations.

2. Under the contract between the railroad company and McLaughlin the road was to be constructed according to a general route and profile, but it was to be varied according to the directions of the chief engineer. Cox was to receive the round sum of \$900,000 for his entire work between the points named in his contract with McLaughlin, whether the variations ordered by the engineer should make that work heavier or lighter. Under these circumstances, Cox entered into a secret contract with the person who for part of the time was the engineer, that he would give to said engineer a certain percentage of the profits of his contract if he (the engineer) would, without impairing the character of the road or doing anything to the disadvantage of the railroad company, make such variations, when it should be possible to do so, as would make the work of said Cox less expensive. It is claimed that this constituted a breach of the contract by Cox, Meyers & Co., a fraud upon the defendant, which in any event should defeat the claim of the plaintiff. The court found that both the railroad company and McLaughlin were willing that the engineer should make the work lighter without injury to said interest; that the variations were made, in some instances, at the request of said company and McLaughlin, and were all submitted to and approved by them; and that the said contract between said engineer and Cox was not fraudulent. Under his agreement with Cox, the engineer, for a period of about three months, shared in the dividends of the contractors to the amount of \$3,500 altogether. The original profile had to be succeeded by a definite location, which necessitated many changes, and these changes, as we have seen, were sanctioned by all parties. It was possible for the engineer, in making his definite location, by the exercise of extraordinary diligence and skill, to so perfect the work as to suit the convenience and the interest of all parties concerned. It appears that his work was done openly, and was in all respects indorsed. After the period mentioned, in which the engineer was receiving 10 per cent. under said agreement with Cox, a new contract was made between the contractors and

McLaughlin. Assuming that the contract between the engineer and Cox was one not proper to have been made, we cannot see how McLaughlin was in any way injured by it, or that it should prevent plaintiff from recovering in this action. McLaughlin received all the benefit of Cox's work, and was paid for it by the railroad company without objection. Furthermore, it is proper to say that this same claim of fraud has appeared in every answer and on every appeal without receiving any notice. If it has been passed upon in any respect, it must have been adversely to the defendant. We must assume that this court, on former appeals, has considered all the points, this one among the rest. The case has appeared here repeatedly upon substantially the same facts. If this point, now made, is good, it has always been good, and certainly would have been noticed in the former decisions of this court herein. Again, if we admit that this agreement with the engineer was fraudulent, and sufficient to prevent a recovery by Cox under his contract, the answer is, the present action is not upon such contract, but upon a *quantum meruit* for the value of the services and materials furnished.

3. After the lapse of a great many years it was, of course, a difficult thing to show accurately the amount and value of the work actually done. The whole contract price for the entire distance of the road which was to have been built by Cox was \$900,000. McLaughlin, himself was to be paid for the same work \$2,058,000, absolutely, whether performed by him or for him by others; and he testified that the price which he was to be paid for the work was reasonable. Mann, the agent for McLaughlin, who executed the contract for McLaughlin, testified that the contract was fair; that the price, with 10 per cent. kept back, would allow a man to build the road, and not give him much profit, if any. At the time the work was done the chief engineer believed that the work could not be done for the price named. Under their contract the contractors were entitled, for the first 20 miles completed, to the sum of \$308,427.46. McLaughlin's contract with the railroad company entitled him to receive from it the sum of \$440,000, and he actually cleared the sum of \$131,573, profit on the first 20 miles. There was testimony showing that there are no means now of ascertaining how much earth and how much rock had been removed by the contractors upon the road. Defendant's witness Stangroom testified that the value of the labor performed and materials furnished by the subcontractors was \$186,963. The plaintiff testified that the actual value of the work and material was more than the estimates made by the engineer; was, in fact, about \$360,690. The court found that the value of the labor and materials was \$285,918.49. It would seem, therefore, that the court took a sum which is nearly an average between the estimates made by the plaintiff and by Stangroom, and rendered judgment accordingly. The uncontradicted testimony shows that the work done was about four-ninths of the whole work. The price to be paid for the entire work was \$900,000. The 20 miles were completed, according to the contract, in a good and workmanlike manner. Changes and deviations were made under the orders, and with the consent of McLaughlin and the railroad company. The work was turned over to the company by McLaughlin in fulfillment of his contract with the company, and according to estimates made on his behalf. If the rule be that the contractors are entitled to such proportion of the whole contract price as the work done bears to the whole work, then the evidence would warrant a judgment in favor of the plaintiff for \$400,000; but we assume that the value must be determined regardless of the prices fixed in the contract, and it is sufficient to say that the evidence as to such value is conflicting, and the finding of the court is warranted by some of the testimony in the case.

4. The court below allowed interest on the amount recovered, from June 15, 1866. Appellants attack this portion of the judgment as unwarranted by the facts and law. It may be stated as a general principle that interest is not allowed on unliquidated damages or demands. This term "unliquidated dam-

ages" applies equally to cases of tort, as slander, assault and battery, etc., and to cases upon a *quantum meruit*, for goods sold and delivered, or services rendered. The reason of such denial of interest is said to be that the person liable does not know what sum he owes, and therefore can be in no default for not paying. The damages in such cases are an uncertain quantity, depending upon no fixed standard, are referred to the wise discretion of a jury, and can never be made certain except by accord or verdict. As to such damages there can be no default, and hence the initial point at which to fix the starting of interest is wanting. To this general rule there are many exceptions; and while it is said "a demand is unliquidated if one party alone cannot make it certain,—when it cannot be made certain by mere calculation,"—(1 *Suth. Dam.* 610,) yet the same author, in the next sentence, adds: "The allowance of interest as damages is not dependent on this rigid test." A review of the cases relied upon in support of this last assertion assert this proposition: "Whenever a debtor is in default for not paying money, delivering property, or rendering services in pursuance of his contract, justice requires that he should indemnify the creditor for the wrong which he has done him." *Van Rensselaer v. Jewett*, 2 N. Y. 135; *Lush v. Druse*, 4 Wend. 313; *Van Rensselaer v. Jones*, 2 Barb. 643; *Adams v. Bank*, 36 N. Y. 255. These, and many other cases which might be cited from New York, were mainly based upon express contracts, in which money was to be paid, services rendered, or a duty to be performed at a fixed and certain time,—cases in which the default of the debtor at the fixed period was apparent; the amount of the recovery, and not the right to recover at all, being the sole question. This further distinction may be drawn from the New York cases: notwithstanding the damages are unliquidated and not capable of ascertainment by computation, still, if they can be determined by computation, together with a reference to well-established market values, then interest may be recovered. The reason given for this modification of the earlier rule is that in many cases market values are so well established and so easily obtained that it is easy for the debtor to obtain some proximate knowledge of how much he is to pay. This distinction was noted by SELDEN, J., in *McMahon v. Railroad Co.*, 20 N. Y. 463. Under the law as held in New York at the present time, it is not far wide of the mark to say all the cases in which interest may be recovered by the creditor upon an unliquidated demand for damages arising upon a contract proceed upon the theory—*First*, that the damages are capable of ascertainment by calculation; *second*, that, if not capable of being thus ascertained, they may be determined by reference to well-established market values, together with computation; or *third*, that the debtor is in default in not performing some obligation devolving upon him, whereby the amount of his debt could be rendered certain or susceptible of being made so by calculation. These distinctions were referred to in *McMahon v. Railroad Co.*, *supra*, and the right to recover interest upheld upon the third ground, namely, that it was the duty of defendant to have caused its engineer to furnish estimates of the work done, and that, had he done so, the amount of the claim would have been so ascertained as to carry interest. We have referred to some of the New York cases, for the reason that we think that they are in the advance upon the question of allowing interest upon unliquidated demands.

The case at bar is not an action upon an express contract between the parties. Such a contract, it is true, existed; and, had plaintiff recovered under it, he would have been entitled to interest upon the several payments provided for therein from the dates at which they fell due, but for reasons not now necessary to be enumerated a recovery upon the contract has been abandoned, and plaintiff counts upon a *quantum meruit*, for the performance of labor and services, precisely as he might have done had there been no contract. His services, and the material furnished by him, were uncertain as to amount, character, value, and time of payment, until fixed by a verdict or findings of

the court. They were not of a character to have a fixed or ascertainable market value. They could not be ascertained by computation, either in extent or value. Defendant was not in default for not ascertaining that which, outside of the abandoned contract, he could not ascertain except by an accord or by verdict or its equivalent. In *Bank v. Northam*, 51 Cal. 387, this court held that interest could not be recovered upon an account for goods, wares, and merchandise sold and delivered. In *Brady v. Wilcoxson*, 44 Cal. 239, it was said: "The plaintiffs are not entitled to interest. Their claim was an uncertain and unliquidated demand. The amount due cannot be ascertained from the face of the contract, but is to be settled by process of law. On such demands, interest *eo nomine* cannot be allowed." The case of *Hamer v. Hathaway*, 33 Cal. 117, cited by respondent, was an action of trover, in which the rule as to damages is quite different from that in cases like the one at bar. The rule in such cases was that the plaintiff could recover the value of the property, with legal interest from the time at which the value is estimated. *Douglass v. Kraft*, 9 Cal. 562. Section 3336 of our Civil Code has substantially continued the rule as it existed previously, with the addition that, under certain specified circumstances, no interest can be recovered. In *McFadden v. Crawford*, 39 Cal. 662, which was an action for work, labor, and services, this court allowed interest on the demand from the date of the filing of the complaint, reversing the action of the court below allowing interest from the rendition of the services. The rule thus enunciated finds some support in *Sutherland on Damages*, where it is said: "After demand, or after commencement of suit, accounts generally bear interest. The commencement of suit is a formal demand. Accounts are generally made of items which represent money paid, goods sold and delivered, or services rendered, on request. They are severally demands on which interest may be claimed, though the price had not been fixed by agreement, and must be established by evidence." 1 *Suth. Dam.* 616. The same author adds that "where, however, the account or demand is for particulars, the value or amount of which cannot be measured or ascertained by reference to market rates, and are intrinsically uncertain, or the creditor's demand of payment is excessive or vague, a different case is presented." The distinction mentioned is pointed out in many of the cases, and it is only by bearing it in mind that otherwise apparent conflict can be reconciled. We are not prepared to say, in general terms, that no interest in any case can be recovered in an action upon contract for an unliquidated demand. *Mix v. Miller*, 57 Cal. 356, decided since the adoption of the Code, and *McFadden v. Crawford*, *supra*, decided previously, attest the doctrine that in this state interest is allowable on such demand under some circumstances. These were cases in which the contract had been fully performed by the creditors, the fruits thereof accepted by the debtors without objection, and they were clearly in default, and in the latter case the only question was as to value. But where, as in the case at bar, the amount of the services, their character and value, can only be established by evidence in court, or by an accord between the parties, and are not susceptible of ascertainment either by computation or by reference to market rates, or other known standard, we are of opinion plaintiff is not entitled to interest prior to verdict or judgment.

The cause is remanded, with directions to the court below to modify its judgment in favor of the plaintiff by striking out the interest, and leaving the judgment to stand in favor of plaintiff for \$98,228.49, with interest thereon at 7 per cent. per annum from October 21, 1886, the date of the entry of such judgment, together with costs of suit. The judgment and order are in all other respects affirmed.

THORNTON, J., concurring in the judgment. MCKINSTRY, J., not participating in the decision.

TEMPLE, J., (*dissenting.*) Charles McLaughlin entered into a contract with the Western Pacific Railroad Company to construct and equip the railroad from San Jose to Sacramento for \$5,400,000, payable partly in stock. Having this contract, on the 7th day of January, 1865, McLaughlin contracted with Cox, Myers & Co. to build, construct, complete, and furnish materials for the construction of the road-bed of the railroad from San Jose to Stockton, a distance of 74½ miles, for \$900,000. Before the contract was entered into a preliminary survey had been made, and a profile of the road showing the cuts and fills. Specifications were made as to other work. Prices were attached, showing the estimated cost of the different species of work; the excavations and fills at certain rates per cubic yard, the bridging per lineal foot, etc. There was a stipulation in the contract, however, that the location of the road might be varied by the company, and yet no change should be made in the contract price for the work, whether the actual amount was increased or diminished. It was further stipulated that, in case certain bonds were issued by named counties to aid the corporation to construct the road, "all work done and materials furnished, and all other things required to be done and performed, by and on the part of the parties of the second part by the terms of this indenture of contract, shall be allowed and paid as the work progresses, and materials are furnished from time to time, at the prices and quantities made and fixed by an approximate estimate of the cost of said work, made by * * * chief engineers of said company, dated January 4, 1865, and hereto attached. * * * Said estimates shall be made upon the report of the chief engineer of said company from time to time as the work progresses and materials are furnished as aforesaid, and which said engineer shall examine and report to the parties hereto as the said work progresses and materials are furnished, as aforesaid, giving accurate estimates thereof from time to time, as often as once per month if so required by the parties of the first part." Cox, Myers & Co., in March, 1865, entered into an agreement in writing with the engineer, who was to superintend the work for the company, and make the estimates provided for in the contract, and whose salary was to be paid by McLaughlin, by which they agreed to give to the engineer 10 per cent. of their profits upon their said contract with McLaughlin, in consideration for which said engineer agreed that, as such engineer, he would take pains in the location of the work and in laying it out so as to save as much work as possible to them, and make such changes as would make the work lighter. This agreement was kept secret, and was unknown to McLaughlin and his agents. Estimates were made, as provided in the contract, by the engineer, based upon the alignment and profile, although both had been departed from by alterations made under the advice of the engineer, who had become the secret partner to the extent of sharing the profits with Cox, Myers & Co. The first four estimates so made were paid, less 10 per cent., reserved, within a few days after they were certified. The fifth, for \$14,530.80, was made September 9, 1865, and a portion only was paid, leaving about \$14,000 due. McLaughlin, who had been absent from the state when the previous estimates were paid, then objected to the mode of making the estimates, claiming that they should have been made, not on the profile where the line of the road had been changed, but upon accurate estimates of the work actually done, made from time to time by the engineer. The line of the road had been changed by the engineer so as to greatly diminish the amount of work to be done, yet in making the estimates he ascertained the proportion of the work done necessary to complete the road-bed for a specified distance, and then allowed for that proportion of the work which would have been received if the line had not been changed. It was claimed, for instance, that in the fourth estimate 31 road and farm crossings and \$7,285 of masonry had been included, none of which was constructed; and in the fifth estimate a charge of \$30,000 for tunneling, when the line and grade of the road had been so changed as to avoid the proposed tunnel alto-

gether. This controversy was settled October 2, 1865, McLaughlin paying \$7,000 more only, on the fifth estimate. At that time a supplemental contract was entered into, in which it was provided that thereafter accurate estimates should be made monthly of the work actually done as the basis for the progress payments, and it was stipulated "if the contract is at any time annulled by mutual consent, or the work under it entirely suspended by direction of McLaughlin, then, in such case, (but in no other event except upon the full completion of said contract,) the said Cox and Arnold shall be allowed, for all the work done up to that time, the amounts and quantities shown in said profile for the corresponding sections or portions of said actual quantities of work performed." The contract between Cox and Arnold and the engineer, it is said, was terminated about the time McLaughlin was expected to return from the east, after three or four estimates had been made. After the fifth estimate a new chief engineer was appointed. Three other estimates were made; but between November 20, 1865, and June 5, 1866, no estimate was made, although plaintiffs insisted and repeatedly requested to have them made. May 5, 1866, however, \$9,000 was paid without an estimate. The eighth estimate was made on June 5, 1866, for \$35,254.83. On this, \$2,500 was paid in addition to the \$9,000, leaving \$23,754.83 still unpaid. On the 15th day of June, 10 days after the estimate was made, Cox and Arnold notified McLaughlin's agent that, in consequence of the failure to pay the estimate, they were compelled to suspend work entirely from that date, and would settle with him according to the terms of the contract. McLaughlin, through his agent, promptly replied, denying the right to abandon the contract, and requesting Cox and Arnold to proceed with the work. McLaughlin was, at that time, in New York, endeavoring to place the bonds he had received, or in some other mode to procure money to make these payments.

This court has, on former appeals, unmistakably held that the installments or progress payments, provided for in the contract, are not conditions precedent, the failure to perform which would justify plaintiffs in abandoning the contract, and enable them to sue for profits they would have made had they performed it, or for compensation at conventional rates. It was said that this did not constitute prevention, or excuse the plaintiff from performance. For this breach, plaintiffs had simply their right of action for damages. Counsel now say they do not claim to have established technical prevention, such as this court has said the default to make the payments does not amount to, but they do claim that McLaughlin's failure incapacitated the plaintiffs to perform, and authorized them to consider it a consent to a rescission on the part of McLaughlin, which, if plaintiffs assented to, would justify them in demanding payment at contract rates; that is, it is not technical prevention, but yet is prevention which will have the same effect. I do not understand this distinction. In fact, I think it is trifling with the rulings of the court. This court attached no importance to the word. It simply held that the failure to pay did not authorize Cox and Arnold to abandon the work, and sue on the contract. There certainly was no rescission by mutual consent. McLaughlin is not shown to have been insolvent and unable to perform. He did not entirely refuse to perform his part of the contract. Plaintiff apparently knew he was absent trying to realize upon his securities, to enable him to make the payments. Under such circumstances it seems absurd to claim that, by this temporary failure McLaughlin indicated an intention of abandoning the contract, or of refusing to go on with it. This court has held that this failure was one which did not authorize plaintiffs to cease work and sue on the contract, but that their remedy was an action for damages. Of course, it did not terminate the contract, or authorize plaintiffs to rescind. Undoubtedly, there are cases which hold that a total failure of performance, which indicates a disposition on the part of one party to abandon the contract, or a refusal to go on with it, may be considered as a consent to a rescission; but, where it is known that

the party in default is struggling to perform, it would be as unreasonable as unjust to conclude from a temporary failure a consent to a rescission.

But, if the charge of fraud be considered, it is equally plain to my mind that it constituted such a breach of the contract on the part of the plaintiffs as would of itself render it impossible for them to recover upon the contract. The parties contracted for payments to be made upon the certificates of the engineer. He was to ascertain the amount of the various kinds of work done, and to make the estimates upon which the installments were to be paid. The contract provided for changes in the alignment and grades, which would, of course, only be made upon surveys, and recommendations of the engineer. Cox and Arnold secretly bribed this engineer, by contracting to give him 10 per cent. of all the profits they might make. They say that for this interest the engineer was to take pains to locate the road so as to save as much expense as possible without injury to the corporation. Unfortunately, however, by the terms of the contract, the profits of the contract would be increased, to the advantage of the engineer, as much by changes to the injury of the road as by those which were indifferent or advantageous. Had McLaughlin known of this corrupt bargain, it would plainly have been his duty to end the relation at once, and it is not clear that he would not be liable to the corporation for changes assented to by them only upon the advice of their confidential agent, who had been secretly interested against them by McLaughlin's employees. But I think, in addition to being a fraud for which equity could give relief, it was a clear violation of the contract. The engineer, to some extent, occupied the position of a chosen umpire. He was to ascertain the proportion of the work performed, and upon his certificates the installments were to be paid. Certainly, it was an agreement for a disinterested umpire, and clearly, when one of the parties to the contract made the umpire a secret partner, he disqualified him from acting. He thereby rendered it impossible to perform the contract. The finding that there was no fraud contradicts the other findings of fact, and is not only unsupported by evidence, but is as clean a traverse of all the evidence upon the subject as could be drawn. McLaughlin was injured by being deprived of the services of an impartial engineer and umpire, and by risking the loss of his expenditures on the ground that the corporation would not be bound by alterations assented to under the advice of a corrupted engineer. But, while this is clearly so, it does not follow that plaintiffs could not recover the value of their work which had been received by McLaughlin, to the extent to which McLaughlin had been benefited thereby, and not exceeding the contract price.

In my judgment, the allowance of the amendment setting up the claim for the actual value of the labor performed, was, under the circumstances, an abuse of discretion, which ought to be reviewed by this court. This litigation has been pending for some 16 years, during all of which time plaintiffs had been contending for compensation at the conventional rates fixed in the contract. During all this time, defendant has contended that plaintiffs have been paid the full value of the services rendered and the materials furnished. Defendant, had he desired, could not have made an issue upon that question, because plaintiffs persisted in urging their unfounded claim for the contract rates. Not only so, but this contest has been kept up after most clear and explicit rulings of this court that no such action could be maintained, and intimations that plaintiffs' remedy, if they had any, was for the reasonable value of the labor performed and materials furnished. Now, even one who has a grievance owes some duty to his adversary and to society. Because he has been injured, he is not justified in vexing the wrong-doer with malicious litigation, nor can he persist for years in waging a suit which he cannot maintain, and then, upon being defeated, amend, and recover that which for years he has virtually declined to accept, when the suit he might have brought has been barred by the statute. Here, before this amendment was asked, the suit

upon a *quantum meruit* had been barred seven times over. It may be admitted that, if made in time, such an amendment would have been proper. Courts are now very liberal in allowing amendments. It is often only a question as to whether the plaintiff should be put to the expense of bringing a new suit. But, because the courts are liberal in allowing amendments, parties cannot thereby be deprived of a defense to what is really a new cause of action. If barred when the amendment is asked, it should not be allowed. This was a new cause of action. It was founded upon a different contract from that alleged; it was for services and materials differing in amount and differently classified. One is for actual services, and the other, though not in form, yet in reality, largely for services and materials only constructively done and furnished. The evidence required to sustain the two actions differs materially. On former appeals this court has held that the action was not brought upon the implied promise to pay for the actual value of the work, but was an action upon the contract to recover for the part performed according to an arbitrary and conventional standard found in the specific contract; and the precise ground upon which they claimed the right to recover, was that they had been prevented by the defendant from performing. Prevention constituted a part of their cause of action. Here, if they can recover at all, it is upon the ground that the defendant has been guilty of a breach of the contract on his part, in consequence of which he cannot insist upon the performance on the part of plaintiffs, and that, therefore, plaintiffs can abandon the contract, and sue for the actual value of the service rendered, and the defendant cannot defeat the action because of the non-performance of the specific contract, simply because he was first in default himself. In such a suit the specific contract cuts no figure except as evidence. It is evidence that the work was performed at the instance and request of the defendant; and as the plaintiff cannot, by refusing to perform, recover a greater price for his work than he would have been entitled to had he fully performed, the contract price will constitute a limit to his recovery. The contract may also, in a proper case, furnish evidence, by way of admission, of the value of the services. But in no sense is this an action upon the specific contract. To the contrary, if that can be established as still subsisting, that fact will defeat the action upon the *quantum meruit*.

Admitting, however, that the amendment was properly allowed, and that the claim was not barred by the statute of limitations, is there any evidence whatever in the record to support the finding that the actual value of the work and labor done, in constructing twenty miles of the railroad, was \$275,304.07, or that the actual value of the labor performed and materials furnished in the construction of the twenty-first mile was \$28,214.42? It is a circumstance of some significance that the plaintiff upon the last trial, which was the first under a complaint claiming the actual value, put in no new evidence upon the subject. All his evidence consisted in reading from the testimony given on former trials, where the specific claim was to recover compensation at contract rates for the profile quantities; and, as it is shown without conflict that much of the profile work was never done, it is literally true that, in an action upon a *quantum meruit*, plaintiff has recovered upon proof of the value of labor not done and for materials not furnished. The proof was as to the value of contemplated work delineated upon a profile which the contract stipulated might be departed from, and which, in fact, was not followed, but was intentionally departed from, the work actually done being upon a new survey upon another and a distinct line.

It is claimed, and numerous authorities are cited to the point, that where a specific contract has been partly performed and abandoned, under such circumstances that the contractor may sue for the work actually performed, the contract rate of compensation governs even in the suit for actual value. That such rates generally constitute *prima facie* evidence of the value of the serv-

ices, by the way of an admission of the parties is not disputed; but it would be so only when, under general rules applicable to admissions, in reason and justice, such stipulation is an admission of the actual and reasonable value of the service rendered. There is no iron-clad rule that it should constitute an admission, however plainly it may appear that it was in fact no admission. It is true that, prior to the contract, a profile of the projected road had been made, showing the estimated amount and character of work and materials required; and that, when the contract price was agreed upon, the engineer affixed to the specifications prices for the different kinds of work and materials, which should govern as to progress payments, and which in the aggregate amounted to just \$900,000, the contract price. It was also stipulated that the profile might be departed from, and a new alignment and grade fixed by the corporation; that the road should be constructed according to such changed alignment, but there should be no change in the compensation. The contract price was to be paid, no matter what changes were made. If changes were made, therefore, this amounted to an express stipulation that the payments should not be made upon the basis of the reasonable and actual value, but upon a conventional standard, expressly ignoring actual values. When the plaintiff brought suit upon a *quantum meruit*, he expressly waived the benefit of this stipulation. It is in its very nature inconsistent with a *quantum meruit*. It was a speculating contract, in which both took the chances of making or losing, but each expressly stipulated that the actual amount of work done should not affect the compensation. The evidence shows without contradiction that the profile was widely departed from. Indeed, the diagram exhibited, and the correctness of which as to the alignment and grade is not contradicted by any evidence, shows that where the heavy work was done the coincidences of the profile and the actual location are hardly more than the crossing of different lines. Under such circumstances, the profile was not even *prima facie* evidence of the work actually done. When the changes were shown, it became as irrelevant as would be the profile of a road in China or Timbuctoo. The fact that the two alignments were near each other cuts no figure. The country was hilly; the surface constantly changing. The engineer states, in explanation of his secret engagement with Cox and Arnold, that the change of a few feet would make a material difference in the amount of work to be done.

It is claimed that Arnold and Cox have testified as to the reasonable value. Arnold died before suit was brought upon the *quantum meruit*. His evidence was in regard to the conventional rates which he said was fair compensation for the work. He did not pretend to know the work actually done, and his whole testimony shows that he estimated it from the profile. For instance, he testified, as to the twenty-first mile, that four-fifths of the work had been done, and his mode of arriving at this conclusion was this: The mile could be completed for \$10,000, and the profile rate would be \$50,000. As the location had been altered, this might be true, although but \$1,000 of the work had been actually performed upon this mile. Cox's testimony still more plainly refers to contract rates. He admits he did not know the amount of work actually done, and, when questioned, says: "We were not working by the yard." He fixed the amount due at \$173,000 before he commenced suit at all; and his testimony was read from the evidence given at a former trial when the suit was confessedly for contract rates. Evidently the plaintiffs only intended to testify to the fairness of the contract. But, perhaps, we may suppose they had been taught to believe that the profile afforded the best evidence of work actually performed, since they still insist upon that proposition, and their attorneys here insist, in most elaborate briefs, that the profiles showing work which it was agreed might not be done, and which confessedly was not done, and in a contract which expressly stipulated that compensation should not depend upon the amount of work done or materials furnished,

constitutes the best evidence of work actually done and of materials actually furnished, in a suit not upon the contract, but upon a *quantum meruit*. The learned judge before whom the case was tried is reputed to have based his estimate upon the evidence of defendant's witness, Stangroom, who had made a recent survey and estimate of the work, so far as he thought Stangroom's work reliable; but where, from lapse of time, he thought a present estimate could not be fairly made, he followed the profile. If the learned judge did this, he followed the evidence where he thought it trustworthy; and, where no evidence was forthcoming, he followed the profile, which we have seen was entitled to no weight at all; that is, he found without evidence. The burden was upon the plaintiff. If he were unable to establish his case by competent evidence, he was no worse off than plaintiffs often are; but this fact did not shift the burden. If he cannot prove his case, he cannot recover. But this proposition emphasizes the argument against the propriety of allowing the amendment, and the bringing in of a new cause of action, after time has effaced the evidence necessary to sustain the plaintiff's present contention, or essential to enable the defendant to make a just defense. It is emphatically a case where, having made his own bed, the plaintiff should lie in it. Having persisted in a claim for years after he was distinctly told he could not recover upon that basis, he should not now be permitted to recover upon a new theory, when time has destroyed all evidence.

Holding these views, it is not necessary to review the other points made.

2 Cal. Unrep. 858

COX v. M'LAUGHLIN. (No. 12,220.)

(Supreme Court of California. May 1, 1838.)

EXCEPTIONS, BILL OF—NECESSARY CONTENTS.

Under Code Civil Proc. Cal. § 648, providing that, where an exception to a decision is on the ground of the insufficiency of the evidence to justify it, the objection must be stated, with so much of the evidence or other matter as is necessary to explain it, a bill of exceptions which merely sets forth the other findings of fact, and that such facts are established by the evidence, is not properly a bill of exceptions, stating evidence in compliance with above statute.

In bank. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Code Civil Proc. Cal. § 648 provides "that no particular form of exception is required; but when the exception is to the verdict or decision upon the ground of the insufficiency of the evidence to justify it, * * * the objection must be stated with so much of the evidence * * * as is necessary to explain it, and no more. Only the substance of the reporter's notes of evidence shall be stated." Action by Jerome B. Cox against Kate D. McLaughlin, executrix of Charles McLaughlin, for services rendered and materials furnished in grading a railroad. Judgment for plaintiff. Plaintiff appeals.

D. M. Delmas and Henry E. Highton, for appellant. Wilson & Wilson, (L. D. McKisic, of counsel,) for respondent.

PER CURIAM. This appeal is taken by the plaintiff from the judgment, which was in his favor; and the point is made that a portion of one finding is not sustained by the evidence. The judgment must be affirmed, so far as this appeal is concerned—*First*, because, if we can take the facts stated in the bill of exceptions as the evidence, it fully sustains the finding; and, *second*, waiving the objections that the appeal was not taken in time, there is no bill of exceptions stating the evidence. The bill of exceptions merely sets forth other findings; proceeds to state that such facts were established by the evidence. This is not a statement of so much of the evidence as may be necessary to explain the point made. It is not a statement of evidence at all, but a general conclusion that certain facts were established by the evidence. This is not a

compliance with the statute. It is really an effort to array one portion of the finding against another. The judgment is affirmed, subject to the appeal on the part of defendant.

75 Cal. 639

REINHART v. LUGO *et al.* (No. 12,019.)

(*Supreme Court of California.* April 27, 1888.)

PARTITION—BY JUDICIAL PROCEEDINGS—ISSUES AND FINDINGS.

A complaint in partition alleged that all the parties to the action "hold and are in possession, and are the owners and tenants in common" of the land therein described. Several of the defendants did not appear; others answered, but did not deny anything stated in the complaint as to tracts A, D, and E, therein described. *Held*, that the allegations not denied must be taken as admitted, and findings that none of the defaulting defendants has any interest in the lands described in the complaint, and that neither of the answering defendants claims any interest therein except tracts B and C, "and a judgment that plaintiff and none of the co-defendants have any interest in any of the lands described in the complaint, are erroneous as to tracts A, D, and E."

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; A. BRUNSON, Judge.

Wicks & Ward, for appellant. *Bicknell & White* and *Howard & Roberts*, for respondents.

FOOTE, C. This is an appeal from a judgment rendered in an action for partition. It comes here upon the judgment roll alone. The point is made by the appellant that the findings negative certain allegations of the complaint, which are confessed by the failure of some of the parties to the action to answer them. It is alleged in the complaint that the plaintiff and all the other parties to the action "hold and are in possession, and are the owners and tenants in common," of five certain tracts of land described as "A, B, C, D, and E." Several of the defendants, although duly served with process, did not appear, and a default was taken as to them; the other defendants answered, and denied the allegations of the complaint, so far as any claim was set up in that pleading, to any tenancy in common to the tracts B and C. But they did not deny anything therein stated as to the tracts A, D, and E. Notwithstanding the admission by all the defendants (either by default or failure to deny the allegations of the complaint) as to the tracts of land last mentioned, the trial court found that none of the defendants who made default "has, or at the time of the commencement of this action, had any right or title or interest in or to the lands described in the complaint, or in or to any part thereof." And making a further finding that neither of the defendants who filed answers claimed any interest in the lands mentioned in the complaint, except in the tracts B and C, rendered judgment for the defendants claiming those last-mentioned tracts, that they were owners in severalty,—the "estate of Woodworth, deceased," of the tract B, and P. N. O'Donnell of the tract C; and that the plaintiff and none of the co-defendants had at the commencement of or at the time of the rendition of the judgment any right, title, or interest in any of the lands mentioned in the complaint.

If the rule is to prevail which obtains with reference to ordinary actions, it is plain that the findings of the court, being in direct contradiction of the admitted allegations of the complaint, are nugatory in so far as they affect the rights of the appellant in the tracts A, D, and E. *Burnett v. Stearns*, 33 Cal. 469. And the finding and judgment to that extent being contrary to the facts admitted by the pleadings, and outside of the issues made or tendered, are erroneous. *Gregory v. Nelson*, 41 Cal. 278. It was held in *Hughes v. Devlin*, 23 Cal. 508, which was an action for partition where a "fact was averred in the complaint and not denied in the answer," that it must be deemed to be admitted as true, like any other material fact affecting the rights of the parties, or the form of the remedy to which they might be en-

titled. This would seem to establish the rule that partition suits, as to the point under discussion, are to be governed by the same rule as ordinary actions. This must be so, unless it be held that in such actions no finding or judgment predicated thereon will be sustained unless the finding is sustained by evidence irrespective of the allegations of the complaint, whether denied or not. That is to say, that all parties to such an action are actors and plaintiffs; that each is expected to set up and prove his own claims, but that in no event is the trial court to render a judgment in partition, save upon the proof made before it as to the respective rights of the parties, upon which alone it must base its findings, irrespective of any admissions made by default, or failure to answer, or denials of the allegations in the pleadings. We have not found any case in our reports which militates against the rule laid down in *Hughes v. Declin, supra*, and therefore we must conclude that the judgment of the court below, in so far as it affects the rights of the appellant to have partition of tracts A, D, and E, must be reversed, and a new trial awarded; the judgment to stand, however, in all other respects.

I concur: BELCHER, C. C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment of the court below, in so far as it affects the rights of the appellant to have partition of tracts A, D, and E, must be reversed, and a new trial awarded; the judgment to stand affirmed in all other respects.

77 Cal. 541

MONTEREY COUNTY v. ABBOTT. (No. 11,001

(Supreme Court of California. May 3, 1888.)

1. LICENSE—FROM GOVERNMENT—COLLECTION BY SUIT—PARTIES.

Where a county ordinance imposing a license tax provides that an action to collect the tax shall be commenced in the name of the people, an action in the name of the county cannot be sustained. The failure to take out the required license does not make defendant a debtor to the county, in the sense that an action in the nature of an action of debt can be maintained by the county as the real party in interest, under Code Civil Proc. Cal. § 867, requiring actions to be brought in the name of the real party in interest.

2. SAME—JURISDICTION OF JUSTICE OF THE PEACE.

Under Code Civil Proc. Cal. § 838, providing that in actions in justice's court, if it appear from the answer of the defendant, verified by his oath, that the determination of the action will necessarily involve the legality of any tax, the justice must suspend all further proceedings, and certify the pleadings to the clerk of the superior court of the county, the justice, in an action to recover a license tax, properly suspended proceedings, and certified the proceedings to the superior court, where the answer alleged that there was no law authorizing the ordinance imposing the tax that such ordinance had been repealed; that the county had no power to assess the tax, and that the tax was unauthorized by law, and contrary to the federal constitution.

Department 1. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

Action by the county of Monterey against E. K. Abbott, to recover a license tax for carrying on the business of selling goods, wares, and merchandise not of the manufacture or production of the state, which license tax was required to be paid by an order of the board of supervisors. The answer averred, *inter alia*, "that the court has no jurisdiction of the subject-matter of the action, for the reason that there is no law authorizing or empowering the board of supervisors to pass the ordinance set out in plaintiff's complaint, and that the board of supervisors of Monterey county had no power to pass the said ordinance, and that the said ordinance does not give or grant or confer any power upon the tax collector of Monterey county to collect a license tax from defendant; nor does said ordinance impose any license tax upon said defendant, or impose any penalty or forfeiture for the non-payment of a license tax

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by said defendant, or authorize the collection of any license tax from defendant, or the collection of any penalty or any forfeiture from defendant. That the plaintiff has not the legal capacity to sue, in this, to-wit: that said action is brought under and by virtue of section 8 of the pretended ordinance set out in plaintiff's complaint, and section 3360 of the Political Code of the state of California; which said sections required the tax collector to prosecute all actions for the recovery of a license tax in the name of the people of the state of California. That said section 3360 of the Political Code of the state of California was abrogated by the adoption of the new constitution of the state of California, and that the pretended ordinance of the board of supervisors of Monterey county set out in plaintiff's complaint was repealed by a subsequent ordinance of the said board of supervisors entitled, 'Ordinance No. 2, concerning licenses,' " approved and signed by said board of supervisors on the 1st day of October, A. D. 1883. That plaintiff had not, on the 30th day of March, A. D. 1883, or at any other time, the right or power to levy, assess, or collect a license tax from said defendant, or to require a license from said defendant, or to require or compel said defendant to pay a license for the business described in plaintiff's complaint. That the license tax claimed by plaintiff from defendant is wholly unauthorized by law, and contrary to the provisions of the constitution of the United States, in this, to-wit, that section 18 of the ordinance set out in plaintiff's complaint discriminates against the productions of other states and in favor of the productions of the state of California. The defendant had judgment, and plaintiff appealed.

R. M. F. Soto, N. A. Dorn, and W. M. R. Parker, for appellant. *Geil & Morehouse*, for respondent.

MCKINSTRY, J. It appeared from the answer of the defendant in the justice's court, verified by his oath, that the determination of the action would necessarily involve the legality of the license tax sued for. The justice, therefore, properly suspended proceedings in the action and certified the pleadings to the superior court. Code Civil Proc. § 838.¹

It is contended by appellant that the statement in section 1 of the license order that it is ordained pursuant to the act of March 13, 1883, (adding section 4045 to the Political Code,) is mere surplusage, and that the supervisors had power to pass the ordinance under sections 11 and 12 of article 11 of the constitution. *Ex parte Wolters*, 65 Cal. 269, 3 Pac. Rep. 894; *Ex parte Mount*, 66 Cal. 448, 6 Pac. Rep. 78; *In re Lawrence*, 69 Cal. 608, 11 Pac. Rep. 217; *In re Guerrero*, 69 Cal. 90, 10 Pac. Rep. 261. Section 8 of the ordinance provides that actions to collect license taxes shall be commenced in the name of the people. But appellant contends that this section of the ordinance is void, there being a general law requiring all actions—except as provided in section 369 of the Code of Civil Procedure—to be brought in the name of the real party in interest. (Code Civil Proc. 367.) That here the county was the real party in interest. If by section 12 of article 11 of the constitution the county has power to impose license taxes, and to provide the mode of collecting them, the ordinance does provide the mode shall be by action brought in the name of the people. On the other hand, the failure to take out a license did not of itself make the defendant a debtor of the county in such sense that an ordinary action, in the nature of an action for debt, could be maintained by the county as "the real party in interest." Neither the constitution nor any statute made him such. If, therefore, the action could not be maintained in the name of the people, it could not be maintained at all. Where a right is given and a

¹ Code Civil Proc. § 838, provides that in actions in justice's court, "if it appear from the answer of the defendant, verified by his oath, that the determination of the action will necessarily involve * * * the legality of any tax, * * * the justice must suspend all further proceedings in the action, and certify the pleadings * * * to the clerk of the superior court of the county."

remedy provided by statute, (or ordinance, if valid,) the remedy so provided must be pursued. True, where the right exists at common law, independent of statute, the remedy provided by statute may be regarded as cumulative. *People v. Craycroft*, 2 Cal. 244. But here the obligation is created by statute, and the remedy is derived (if any remedy is furnished) directly or indirectly from statute. Judgment affirmed.

We concur: SEARLS, C. J.; PATERSON, J.

76 Cal. 1

BUTTE COUNTY v. MORGAN *et al.* (No. 12,217.)

(*Supreme Court of California.* April 28, 1888.)

COUNTIES—TREASURER—MISAPPROPRIATION OF FUNDS—EVIDENCE.

The California county government act, § 71, provides that the treasurer shall receive no money unless accompanied by the certificate of the auditor, as provided in section 115, or otherwise as provided by law. Section 115 provides that the auditor must settle the accounts of all persons holding money payable into the county treasury, and certify the amount to the treasurer, and, upon the filing of the treasurer's receipt therefor, give him a receipt, and charge the treasurer with the amount. Pol. Code, § 3761, provides that the auditor must settle with the tax collector, and require from him the treasurer's receipt, or, if the treasurer is collector, require from him an immediate account for any existing deficiency. *Held*, that it is sufficient, under these acts, where the same person is treasurer and collector, to charge him, and his sureties as treasurer, that the auditor settled with him as collector, and handed him the certificate of the amount found due, which receipt was found in the county treasury, and at once credited him as collector, and charged him as treasurer with such sum.

Commissioners' decision. Department 2. Appeal from superior court, Butte county; LEON D. FREER, Judge.

A. L. Hart and A. F. Jones, for appellant. J. C. Gray and F. C. Lusk, for respondent.

HAYNE, C. Action against a county treasurer and the sureties on his official bond. The court below gave judgment for the plaintiff, and the defendants appeal from the judgment, and from the order denying their motion for a new trial. There is no doubt that the defendant Morgan did misappropriate the county funds. He was both treasurer and tax collector. The two offices, though filled by the same person, are separate and distinct, and required separate bonds. County Government Act, §§ 57, 59; *People v. Ross*, 38 Cal. 77. The other defendants are the sureties upon Morgan's bond as treasurer; and the only point made on their behalf is that there is no evidence to show that the misappropriation occurred while he was acting as treasurer, and hence that the suit should have been against the sureties upon the bond as tax collector. There is no conflict in the evidence. The position is that there was not enough to overcome the burden resting upon the plaintiff.

The argument made involves a consideration of the statutory provisions in relation to the duties of the officers. The following is the provision of the county government act in relation to the duties of the treasurer: Sec. 71. "He must receive no money into the treasury unless accompanied by the certificate of the auditor, provided for in section 115, or as otherwise provided by law." The following is the provision of the same act in relation to the duties of the auditor: Sec. 115. "The auditor must examine and settle the accounts of all persons indebted to the county, or holding moneys payable into the county treasury, and must certify the amount to the treasurer, and upon the presentation and filing of the treasurer's receipt therefor give to such persons a discharge, and charge the treasurer with the amount received by him." This act has no provision with reference to the duties of tax collector. It appears to have left that subject to be governed by the provisions of the Political Code in relation to revenue and taxation. That Code, after

providing that the tax collector shall deliver to the treasurer the books and lists showing his proceedings, (sections 3758, 3759, and 3760,) has the following: Sec. 3761. "The auditor must fully compare the list with the assessment book, and, if satisfied that it contains a full and true statement of all taxes due and unpaid, he must foot up the total amount of taxes so remaining unpaid, credit the tax collector who acted under it therewith, and make a final settlement with him of all the taxes charged against him on the assessment book, and must require from him the treasurer's receipt, or if the treasurer is the collector, require from him an immediate account for any existing deficiency." We do not understand that the section requires the auditor to demand that the money be shown to him, or that he shall count it. This is clear enough in the case of a payment by a person other than the treasurer himself. In such case it is manifest that all that the auditor has to do in the first instance is to examine the account and settle the amount due, and give a certificate thereof. The inquiry is simply as to the amount due, and not as to whether the party is in actual possession of the money. After this first operation is over, the party takes the auditor's certificate to the treasurer, and, after delivering the certificate and the money to him, receives his receipt, which he takes back to the auditor, who enters a charge against the treasurer, and a discharge of the person paying. The auditor is not required to go to the treasurer and ask him whether the amount has been actually paid, or, in other words, whether the receipt states the truth. He is authorized to accept the receipt as sufficient evidence of the fact of payment.

Now, when the person to make the payment is the treasurer himself, the only difference is that the formal receipt is dispensed with as an idle ceremony. The auditor is in such case to require the tax collector to "account" for any existing deficiency. But we do not understand that the auditor is, in this case, any more than in the other, to ascertain whether the money is actually in the possession of the party or not. Whether he may do so, or what means he is authorized to use, is not a question arising in this case. He is not bound to do so. He is authorized to rely upon the acknowledgment of the treasurer in the one case, just as he is authorized to rely upon the receipt of that officer in the other. In each case the auditor acts upon the admission of the individual who is treasurer. And we are unable to see that there is any great difference in the value of the admissions. Now, since the payment to the treasurer must precede the other acts, it might be worthy of consideration whether such other acts are essential to the cessation of liability of the party paying,—in other words, whether, if a party having money of the county pays it to the official authorized to receive it, he should have any further responsibility in regard to it. But it is not necessary to consider that question in the present case. If it be conceded that the liability of the party paying continues until he has taken the receipt to the auditor and got him to make the entry on his books, or, in the case of an official with dual functions, until he has acknowledged to the auditor that he has the money as treasurer, and is thereupon discharged as tax collector, it is manifest that when that occurs his liability as tax collector ceases, and his responsibility as treasurer begins. At least that is *prima facie* the case. The evidence in this cause brings it within the above rule. The tax collector produced his books and lists to the auditor, and they agreed upon the amount which was due to the county. The auditor thereupon gave a certificate which stated that "Mr. William J. Morgan, tax collector, has this day the amounts as given below to be paid into the county treasury." The auditor "handed that certificate to Morgan personally, and he took it away with him. And the auditor thereupon credited the tax collector with the amount as paid, and charged the treasurer with it." This certificate was afterwards found in the treasury.

It is not necessary to consider what would have been the result if the defendants had offered evidence showing that the misappropriation had in fact

occurred before Morgan went to the auditor, and that his subsequent proceedings were a sham. No such evidence was offered; and, as above stated, the presumptions are the other way. These presumptions have for a basis the admissions of the defendant Morgan. He accepted without any question the certificate of the auditor, which contained an express statement that he then had in his hands, to be at once paid into the treasury, the amount in question; and he acted upon this statement by depositing it in the treasury. This conduct certainly amounts to an admission that the statement was true. This admission was evidence against the other defendants; for "where the question in dispute between the parties is the obligation or duty of a third person, whatever would be evidence for or against such person is *prima facie* evidence between the parties." Code Civil Proc. § 1851. And in view of the fact that the statute requires the auditor's certificate to accompany the payment into the treasury, the fact that the certificate was found in the treasury gives rise to an inference that the payment accompanied the certificate. We perceive no error in the record, and we therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

76 Cal. 50

MENK v. HOME MUT. INS. CO. (No. 9,890.)

(Supreme Court of California. April 30, 1888.)

1. INSURANCE—MISSTATEMENTS IN APPLICATION—KNOWLEDGE OF AGENT.

In an action on a fire-insurance policy, evidence that the application was made out by an agent of the insurance company, with full knowledge as to the condition of the premises, and that plaintiff did not know what representations it contained, are admissible, under an issue of misrepresentations. The defendants cannot take advantage of misstatements in the application made by their own agent, and known by him to be false.

2. SAME—BURNING OF PROPERTY BY ASSURED—EVIDENCE.

In an action upon a fire-insurance policy, where the defendant alleges that plaintiff burned his own property, evidence on the part of plaintiff showing the loss of other property besides that which was insured, is admissible.

3. SAME—AFFIDAVIT ON PROOF OF LOSS.

In such a case, it is not prejudicial error to permit the plaintiff to read in evidence his affidavit, prepared soon after the fire, making proof of the loss, where he has testified fully as to the facts within his knowledge, and where the effect of such evidence is expressly limited by the court to showing that plaintiff had made the affidavit.

4. SAME—THE POLICY—DESCRIPTION OF PROPERTY—REFERENCE TO APPLICATION.

Where the application for a policy of fire insurance, in describing the property, included the cellar under the building, but in the policy itself the cellar was omitted, and reference was made to the application for a more particular description, *held*, that the cellar was covered by the insurance.

5. NEW TRIAL—MOTION FOR—QUESTIONS PRESENTED.

A general statement in a motion for a new trial, in an action upon a fire insurance policy, that there was no evidence to prove that plaintiff performed all the required conditions of the contract of insurance, is insufficient to allow defendant to make the point that, by the terms of the contract, if the parties could not agree upon the amount of loss, it should be referred to arbitration.

In Bank. Appeal from superior court, city and county of San Francisco, JOHN CALDWELL, Judge.

On rehearing. For former opinion, see 14 Pac. Rep. 837.

Van Ness & Roach, Olney & Byrne, A. B. Dibble, and Byrne & Cross, for appellant. *Gaylord & Searls*, for respondent.

PER CURIAM. This cause was heard and determined in department. A rehearing was granted, and it comes before us again. Upon further examina-

tion we adhere to the former opinion filed, and the judgment and order appealed from are affirmed, for the reasons given in the opinion of department 1, filed August 30, 1887, 14 Pac. Rep. 837.

76 Cal. 92

SAN LUIS OBISPO COUNTY v. DRAKE et al. (No. 12,353.)

(*Supreme Court of California.* May 5, 1888.)

OFFICE AND OFFICERS—FEES AND COMPENSATION—COUNTY RECORDER.

Act Cal. March 31, 1876, (St. 1875-76, p. 608,) providing that the county clerk shall be paid entirely by salary when performing the duties of auditor and recorder, becomes inoperative when those offices are filled by different persons, in which case the recorder is entitled to receive and retain as his compensation the fees allowed to him by act March 29, 1870, (St. 1869-70, p. 438;) such act not being inconsistent with the county government act of 1883, which excepts from its provisions as to fees and salaries, any officer whose salary, or fees in lieu of salary, is already provided by law; nor does it conflict with Const. Cal. art. 11, § 5, wherein is contained no mandate that such officer shall be paid by salary, and not by fees.

In bank. Appeal from superior court, San Luis Obispo county; D. S. GREGORY, Judge.

Action against F. E. Drake, and the sureties on his bond, to recover the fees collected by him as county recorder. Judgment for defendants, and plaintiff appeals.

S. M. Swinnerton, for appellant. McD. R. Venable and C. W. Goodchild, for respondents.

McKINSTRY, J. This action is against F. E. Drake, and the sureties on his official bond, to recover the fees collected and retained by him as county recorder. Drake was the recorder of San Luis Obispo county from January 1, 1883, to January 1, 1885. Prior to the year 1881 the offices of county clerk, recorder, and auditor of San Luis Obispo county were held by the same person. Since 1881 each of the three offices has been legally held by a different person. By the act of March 31, 1876, St. 1875-76, p. 608, it was provided that the "county clerk" should receive a certain annual salary as his only compensation in all three capacities as county clerk, county auditor, and county recorder. After 1881, and while a different person was the incumbent of each of the three offices, the county clerk was entitled to receive no portion of the salary fixed by the law of 1876. That law became inoperative because it was intended to be operative only while the three offices were filled by one person. *Kinsey v. Kellogg*, 65 Cal. 111, 3 Pac. Rep. 405. Was there, then, no law providing for compensation for the county clerk, recorder, and auditor, respectively? The question is answered by the decision in *Stoddard v. Williams*, 65 Cal. 473, 4 Pac. Rep. 452. The statute applicable to the fees of recorder of San Luis Obispo county was the act of March 29, 1870. St. 1869-70, p. 438. Section 182 of the county government act (St. 1883, p. 365) provided: "The provisions of this act, so far as it relates to the fees and salaries of all officers named, * * * shall not affect the present incumbents: provided, that when the salary of any such officer or fees in lieu of such salary, is not now fixed by law, the same shall, as to such officer, take effect immediately." It follows that while the defendant, Drake, was in office, he was entitled to receive and retain for services as recorder the fees allowed by the act of 1870. It is suggested, however, that the act of March 29, 1870, is "inconsistent" with the provisions of section 5, art. 11, of the constitution,—provisions which "require legislation to enforce them,"—and that the act of 1870 "ceased" on the 1st day of July, 1870. But wherein is the act of 1870 inconsistent with legislation which the legislature, to be elected under the constitution, was commanded to enact by section 5, art. 11? There is no mandate in section 5 directing the legislature to provide for the payment of salaries to county officers, nor does it prohibit the legislature from providing that such officers shall be compen-

sated by fees. The legislative construction has been adverse to the view presented by counsel herein. The county government act provides that county surveyors and coroners and public administrators, as well as justices of the peace and constables, shall be compensated only by such fees as are allowed by law. St. 1883, p. 835. See, also, § 182, *supra*. The legislature is directed to provide for the "strict accountability" of county and township officers for all fees which may be collected by them. This, read with the context, may or may not include fees collected for the services of those collecting them. But an officer who is compensated by fees may be made answerable with respect to moneys collected as fees, and may be required to render an account or relation of particulars with respect to charges made by him. It would be giving a forced construction to the clause of the constitution to say it prohibits the legislature from providing for the compensation of any county or township officer otherwise than by salary payable out of the county or township treasury, and that it requires that in every case a county or township officer shall return the fees by him collected for his services into the treasury, receiving his compensation thereof in the form of a stated salary. As we have seen, such has not been the legislative construction of the clause; and, if such had been the intent of the framers of the constitution, it would seem, in view of the history of previous legislation on the subject, that the purpose would have been expressed in apt and appropriate language. Judgment affirmed.

We concur: SEARLS, C. J.; PATERSON, J.; SHARPSTEIN, J.; MCFARLAND, J.

76 Cal. 90

WHEELER v. KASSABAUM. (No. 11,299.)

(*Supreme Court of California*. May 5, 1883.)

1. REFELVIN—DAMAGES—SUFFICIENCY OF EVIDENCE.

In an action of claim and delivery for a branding-iron belonging to plaintiff, and damages for its detention, plaintiff testified that a contract to sell all his cattle of that brand fell through because the iron could not be delivered to the purchaser, but admitted that two days later the purchaser took the cattle without any "complaint about the branding-iron," and that the iron was not specified in the contract; and claimed that he suffered \$500 damages in having to gather up the cattle, without showing that such damages were caused by defendant's failure to give up the iron. *Held*, that there was no evidence to support a finding of \$500 damages.

2. APPEAL—FROM AN ORDER DENYING NEW TRIAL—REVIEW OF COMPLAINT.

The sufficiency of a complaint cannot be considered on an appeal from an order denying a new trial.

Department 1. Appeal from superior court, Mariposa county; JOHN M. CORCORAN, Judge.

Action by William Wheeler against Charles Kassabaum, to recover possession of a branding-iron, \$500 damages claimed to have been caused by defendant's retention of the iron; and to obtain a decree to perpetually enjoin defendant from using the brand, which was made up of the letters "D. H." It appeared that plaintiff had purchased all, or nearly all, the cattle owned by defendant, in 1870, most of which were branded with the "D. H." iron, and plaintiff claimed to own and possess the sole right to the use of the brand after the sale, and had it recorded in the county clerk's office as his. Some time after the above sale, plaintiff delivered to defendant the branding-iron to be used by defendant in branding the increase of certain cattle owned by plaintiff, and conveyed by him to defendant as a security for a debt due from plaintiff to defendant. Afterwards, said cattle and increase were delivered by defendant to one McFarlane, as receiver, as ordered by the court, and after the sale of a sufficient number to pay plaintiff's obligations, the remainder were delivered back to plaintiff, but, as alleged by plaintiff, the iron was never returned; in support of which allegation he offered the testimony of several witnesses. In respect to the \$500 damages alleged, the only testi-

mony offered was that of plaintiff himself, as follows: "After making the trade, I went down and paid defendant \$5,000 for the cattle and D. H. brand, and he delivered me the stock, and I had the brand recorded in Merced county that day, as my brand. It has been recorded here in Mariposa county. I went to defendant and told him I wanted the iron to brand increase, and he told me that two D. H. irons were under the foot of his bed; I went and got the iron. After the redelivery of the cattle to me by the receiver, I demanded this iron D. H. of defendant; he refused to do so; he didn't deny having it; I didn't get it. I don't know whether defendant has ever branded any cattle with this brand or not, since the redelivery of these cattle to me. In April last, I made an agreement to sell my cattle; they were sold and are sold now; I sold them to Adolph Zirker; they are not all delivered; we have delivered them as far as we could find them; I think there must be 50 or 75 head out. The first agreement with Zirker, in April, was that he should take the brand; this agreement fell through because I could not deliver the branding-iron, and then, two or three days afterwards, on another agreement, I sold him my whole stock. Zirker made no complaint about the branding-iron; it was with me in the first agreement. The first agreement is now in force—the agreement that he should have the entire stock. There was but one agreement; I have been damaged by having to gather the cattle. I have a D. H. iron; I have had it two or three years; it is one I had made. I have suffered \$500 damages since I sold to Zirker, in having to gather the stock. The first contract between me and Mr. Zirker was that Mr. Zirker was to take the cattle as they run—was to take the whole brand; and I couldn't do it. The branding-iron wasn't specified in the contract. I could have delivered him the iron that I have, but that wouldn't have been delivering him the whole brand." The cause being tried without a jury, judgment was rendered for plaintiff that the iron be delivered by defendant, etc., and for \$500 damages, as claimed. Defendant appeals.

L. F. Jones, L. N. Jones, and Fox & Kellogg, for appellant. *G. G. Goucher and J. W. Congdon*, for respondent.

McKINSTRY, J. There is no evidence in the transcript to sustain the finding of \$500 damages. The order denying a new trial must therefore be reversed. There are other portions of the judgment which are not justified by the evidence or findings, but as a judgment falls upon the entry of an order granting a new trial, it is not necessary to indicate such portions of the judgment. The appeal from the judgment has been dismissed, and the sufficiency of the complaint cannot be considered on the appeal from the order denying a new trial. *Hayne*, New Trials & App. § 1; *Mason v. Austin*, 46 Cal. 385; *Jacks v. Buell*, 47 Cal. 162; *Onderdonk v. City of San Francisco*, 17 Pac. Rep. 678, filed April 19, 1888. It may further be suggested that the real question between the parties hereto was not the right to the possession of a branding-iron, but was as to the right to use a certain brand. If the right was exclusively in the plaintiff, equity alone could afford him effectual relief. Order reversed, and cause remanded, with directions to the court below to enter an order granting a new trial.

We concur: **PATERSON, J.; TEMPLE, J.**

MOLASKEY v. PEERY. (No. 11,387.)

(*Supreme Court of California.* May 4, 1888.)

1. SPECIFIC PERFORMANCE—LACHES—EFFECT OF JUDGMENT IN EJECTMENT.

By one and the same verbal contract P. sold to M. a lot of land, and lumber with which to build a house on the same, agreeing to execute a deed for the lot when the same, together with the lumber, was paid for. M. entered into possession under

the contract, and made improvements valued at \$120. About six years thereafter, P. recovered possession of the premises in an action of ejectment, and made improvements thereon valued at \$325. Three years after such recovery, M. brought his action for specific performance of the contract to convey; there being \$40 still owing on the purchase price of the lot and lumber, and the lot having largely increased in value. *Held* that, the lot not having been paid for, the delay justified the refusal of a decree for performance; the action of ejectment, though not a determination of the defendant's equitable rights under the contract, being evidence that such delay was not consented to.

2. SAME—PROOF OF PAYMENT OF PURCHASE PRICE.

In an action by a vendee to enforce specific performance of a contract for the sale of land, on an issue as to whether the purchase price of such land had been paid, the testimony of the defendant was clear and positive that it had not, and the evidence of plaintiff consisted of his own testimony that it had, and of certain credits made on the books of defendant, which defendant testified were made on account of certain lumber purchased by plaintiff, as well as on account of the purchase price of the land. *Held*, that a finding that the purchase price of such land had not been paid, was sustained by the evidence.

3. PAYMENT—APPLICATION.

Where a payment made on account is sought to be credited to the earliest charge on the books of account, it must appear what item in such account was charged first in order of dates.¹

Department 1. Appeal from superior court, Santa Cruz county; J. H. LOGAN, Judge.

Action by Henry Molaskey, as vendee, against J. W. Peery, to enforce specific performance of a verbal contract for the sale of a lot of land. Judgment for defendant. Plaintiff appeals.

Chas. B. Younger, for appellant. *W. D. Story*, for respondent.

MCKINSTRY, J. This action, commenced November 14, 1883, was brought by plaintiff, as vendee, to enforce a specific performance of a verbal contract for the purchase of a lot of land, made in January, 1875. The contract, as found by the court, was "that on or about January 1, 1875, plaintiff and defendant entered into a verbal agreement, whereby defendant sold and delivered to plaintiff certain lumber to build a house with, and at the same time, and as part of such verbal agreement, sold to plaintiff the lot of land described in the complaint, for the sum of \$20; that the sale of the lumber and the lot was one agreement, and defendant therein agreed that, upon the payment of the sums due for the lumber (which was to be used in building a house on the lot) and the \$20 for the lot, that he would execute a deed for said lot, to which plaintiff assented." The court found, further, "that about January 15, 1875, plaintiff entered into possession of said lot and received said lumber under said agreement, and thereafter erected a dwelling-house on said lot with said lumber, and cleared off the said land, and made other improvements on said lot. That thereafter plaintiff paid to defendant \$20 as principal, and \$16 as interest, on account of his indebtedness for lumber and said lot, and demanded a deed for said lot, which defendant refused, and ever since has refused to comply with. The plaintiff's said improvements were of about the value of \$120; the value of the lumber aforesaid was \$70. That plaintiff resided on said land with his family until December 29, 1881. That plaintiff has not paid for said lot of land, and the sum of \$40 was due from plaintiff to defendant on said lumber and said lot when this action was commenced." It is contended by appellant that the evidence does not sustain the finding that he had not paid the purchase price. But the testimony of the defendant is clear and positive, and, if true, the court was justified in finding as it did.

Appellant further contends that the evidence being that a payment made by him of \$20 was credited on the general account against him, the law will apply the payment to the charge first made in defendant's books; but, if the rule

¹See note at end of case.

and its application herein be conceded, it does not appear that the first item, in order of dates, charged against the plaintiff, was \$20 for the lot.

As the lot had not been paid for when this suit was brought, the delay in commencing the action justified the court in refusing a decree. There is uncontradicted evidence that the land contracted to be sold in January, 1875, for \$20, was worth \$150 when the suit was brought, and the court found that the defendant, after his recovery of possession in December, 1881, had erected improvements thereon of the value of \$325. January 29, 1878, the present defendant brought an action of ejectment against the plaintiff herein for the recovery of the possession of the lot in controversy in this action, wherein he recovered a judgment in June, 1878. Under an execution issued on that judgment, the defendant herein was placed in possession of the lot on the 28th day of December, 1881, and he has ever since been in possession thereof. The present plaintiff was not required to file a cross-complaint in the ejectment, nor to demand a specific performance therein. The judgment in ejectment was not of itself a determination of the equitable rights of the plaintiff herein, if any he had. But the commencement and prosecution of the ejectment is evidence that the present defendant did not consent to any delay in payment for the lot by the present plaintiff after the 27th of January, 1878,—a date nearly six years prior to the commencement of this action. Judgment and order affirmed.

We concur: SEARLS, C. J.; PATERSON, J.

NOTE.

PAYMENTS—APPLICATION OF. A debtor, owing two or more debts to a creditor, to whom he makes a payment, has the right to direct to which debt it shall be applied. *Pennsylvania, etc., Co.'s Appeal*, (Pa.) 7 Atl. Rep. 70; *Leeds v. Gifford*, (N. J.) 5 Atl. Rep. 795; *Mack v. Adler*, 22 Fed. Rep. 570; *Nichols v. Knowles*, 17 Fed. Rep. 494, and note; *Manufacturing Co. v. McAlpin*, 5 Fed. Rep. 737; *Schuelenburg v. Martin*, 2 Fed. Rep. 747; *Miles v. Ogden*, (Wis.) 12 N. W. Rep. 81; *Railway Co. v. Mellen*, (Mich.) 6 N. W. Rep. 845; *Byrnes v. Claffey*, (Cal.) 10 Pac. Rep. 321; *Mackey v. Fullerton*, (Colo.) 4 Pac. Rep. 1198. In the absence of such direction, the creditor may apply the payment to whichever debt he pleases. *Pennsylvania, etc., Co.'s Appeal*, (Pa.) 7 Atl. Rep. 70; *Leeds v. Gifford*, (N. J.) 5 Atl. Rep. 795; *Pardee v. Markle*, (Pa.) Id. 42; *Corliss v. Grow*, (Vt.) 2 Atl. Rep. 388; *Manufacturing Co. v. McAlpin*, 5 Fed. Rep. 737; *Schuelenburg v. Martin*, 2 Fed. Rep. 747; *Byrnes v. Claffey*, (Cal.) 10 Pac. Rep. 321; *Mackey v. Fullerton*, (Colo.) 4 Pac. Rep. 1198. A mere understanding of the parties that any funds in the hands of either should be applied "on the balance of indebtedness, whichever way it might be, at the end of each year," in the absence of an actual application does not have the effect of an application, or of a promise to pay such balances. *Gage v. Dudley*, (N. H.) 9 Atl. Rep. 786. If neither party has exercised the right of appropriating the payment, the court will make the appropriation. *Pennsylvania, etc., Co.'s Appeal*, (Pa.) 7 Atl. Rep. 70; *Leeds v. Gifford*, (N. J.) 5 Atl. Rep. 795; *Pardee v. Markle*, (Pa.) Id. 42; *Hannon v. Engelmann*, (Wis.) 5 N. W. Rep. 791; and will generally apply it to that debt which is least secure. *Leeds v. Gifford*, (N. J.) 5 Atl. Rep. 795; *Pardee v. Markle*, (Pa.) Id. 36; *Coons v. Tome*, 9 Fed. Rep. 532; *Small v. Older*, (Iowa.) 10 N. W. Rep. 734; *Robie v. Briggs' Estate*, (Vt.) 9 Atl. Rep. 593; or to the undisputed indebtedness. *Magarity v. Shipman*, (Va.) 1 S. E. Rep. 109; or according to the intent of the parties where that can be determined with reasonable certainty. *The Martha*, 29 Fed. Rep. 708. Payments made on an open account will be applied to the items thereof in the order of their priority. *Pardee v. Markle*, (Pa.) 5 Atl. Rep. 36; *Mack v. Adler*, 22 Fed. Rep. 570; *Manufacturing Co. v. McAlpin*, 5 Fed. Rep. 737; *Schuelenburg v. Martin*, 2 Fed. Rep. 747; *Hersey v. Bennett*, (Minn.) 9 N. W. Rep. 590; *Hannon v. Engelmann*, (Wis.) 5 N. W. Rep. 791; but not if the earlier items are secured, and the latter ones are not. *Schuelenburg v. Martin*, 2 Fed. Rep. 747; nor if the parties have agreed to a different application of such payments. *Mack v. Adler*, 22 Fed. Rep. 570.

76 Cal. 87

KERNS v. MCKEAN. (No. 11,207.)

(*Supreme Court of California.* May 5, 1888.)

EVIDENCE—BOOKS OF ACCOUNT.

In an action by the grantee of a vendor to recover possession of land, on account of non-payment of purchase money, an account-book of the vendor containing a

charge against and credits in favor of defendant is not admissible to show that the purchase price had not been paid; the book not being shown to be a book of original entries, and it not appearing that such entries were made at the date of the transactions recorded, or were correct of the knowledge of the person making the same at the time they were made.

Department 1. Appeal from superior court, Santa Cruz county; J. H. LOGAN, Judge.

Action to recover possession of a tract of land, brought by Thomas Kerns, assignee of one Patterson, against E. I. McKean. Judgment for plaintiff. Defendant appeals.

Garber & Bishop and *J. A. Barnham*, for appellant. *Chas. B. Younger*, for respondent.

McKINSTRY, J. This is an action for the recovery of the possession of a certain tract of land. One Patterson, being the owner of the premises herein demanded, entered into a written contract with one Sanford, since deceased, for the sale to the latter of the land for the consideration of \$3,336, with interest,—\$500 by exchange of lands at the making of the agreement, and the balance to be paid in four equal annual installments. Sanford, the purchaser, was also to pay all taxes. And it was further agreed that if any default should be made in any payment of principal, or interest, or taxes, the whole principal and interest should become due at the election of Patterson, who, upon such default, was authorized to declare the agreement and rights of Sanford thereunder forfeited and ended, by depositing a written notice of such forfeiture in the office of the county recorder, etc. At the trial of the present action the plaintiff, grantee of Patterson, as evidence that Sanford had not complied with his agreement by paying the full sum of \$3,336 and interest, introduced "the account-book of Patterson of the Corralitos rancho, wherein the accounts of Sanford and others with Patterson were kept by Patterson, and all the entries therein were made by and in the handwriting of one Hanna, who was Patterson's book-keeper at the time." The objections of the defendant were overruled, and the plaintiff put in evidence the following entries from the book:

"LA MOTTE.

A. P. SANFORD *in acc't with Corralitos Rancho.*

1867, Oct. 25.	To purchase of 240.60 acres,	-	-	-	\$3,336
Oct. 25.	By exchange of land,	-	-	-	500
1868, Dec 19.	" cash on acc't,	-	-	-	500
1871, May 20.	" " " "	-	-	-	200"

The non-payment of moneys to be paid by Sanford upon the contract of purchase was a fact of a nature to be proved by the usual evidence of it. The performance or non-performance of such a specific agreement is not a fact within the reason of the rule, supposed to arise out of necessity, which permits—at least when the party is not competent as a witness—matter to be proved by books of account. *Nickle v. Baldwin*, 4 Watts & S. 290; *Lyman v. Bechtel*, 55 Iowa, 437, 7 N. W. Rep. 673. Books of account were admissible when the nature of the subject was such as not to render better evidence attainable. 1 Greenl. Ev. § 117. A book kept in tabular form, by the defendant, of the days on which plaintiff worked, was held not admissible in evidence to show that the plaintiff did not work on certain days. *Morse v. Potter*, 4 Gray, 292. Under peculiar circumstances an entry in the books of a third person may be admissible, as part of the *res geste*, when the third person is dead,—possibly sometimes when he is still living. But the evidence here offered was inadmissible under any rule. Patterson had a clerk. The entries were made by Hanna, Patterson's book-keeper. And although, as shown by the statement on motion for new trial, Hanna was examined as a witness, it does not appear that he was questioned with respect to the entries; that he testified that they were made at the date of the transactions they purport to

record, or that the entries he made were correct of his knowledge when he made them. Nor was it shown that the book was a book of original entries. The offer of the book was an attempt to establish a negative favorable to the cause of the plaintiff, by affirmative declarations of a third person, when it appeared such third person was within the jurisdiction and actually present at the trial. It was an attempt to establish that some money was not paid, by what was claimed to be evidence that other money was paid. But the evidence offered to prove the fact from which the inference of the other fact was to be drawn—whether the mere offer would or would not estop the plaintiff—was not such as was admissible against the defendant. For the error indicated a new trial should have been granted below. Judgment and order reversed, and cause remanded for a new trial.

We concur: SEARLS, C. J.; PATERSON, J.

76 Cal. 103

PARKER v. REAY. (No. 9,844.)

(*Supreme Court of California. May 7, 1883.*)

1. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ACTION FOR ASSESSMENT.

An action for the amount of an assessment properly and separately made, under Laws Cal. 1871-72, § 8, subd. 4, providing that, where a street terminates at right angles in another, the expense of work done on one-half the width of the street opposite such termination shall be assessed on the lots in each of the quarter blocks adjoining and crossing the same, etc., can be sustained as to the amount of such proper assessment, though an invalid assessment, under another subdivision, is joined in the cause.

2. NEW TRIAL—NOTICE OF MOTION—SPECIFICATION OF PARTICULARS.

Under Code Civil Proc. Cal. § 659, providing that the notice of a motion for a new trial on the ground that the evidence is insufficient to justify the verdict must specify the particulars in which the evidence is alleged to be insufficient, a notice of motion alleging that the evidence is insufficient to support the first finding of fact, etc., is not a specification of the particulars in which the evidence is insufficient within the meaning of the section.

Department 1. Appeal from superior court, city and county of San Francisco. CHARLES HALSEY, Judge.

Action by C. H. Parker against Jos. W. Reay to recover the amount of a tax assessed on defendant's lot under Laws Cal. 1871-72, § 8, subds. 3, 4. Subdivision 3 provides that the expenses of work done on main street crossings shall be assessed upon the four quarter blocks adjoining and cornering on the crossings; and each lot, or part of lot, in such quarter blocks fronting on such main street, shall be separately assessed according to its proportion of frontage on said main street and subdivision 4 provides that, where a street terminates at right angles in another main street, the expense of the work done on one-half the width of the street opposite the termination shall be assessed upon the lots in each of the two quarter blocks adjoining and cornering on the same, etc. Defendant contended that the assessment made under subdivision 3 was void; and, having been united in the cause with an assessment under subdivision 4, the whole action must fail, although the assessment under said subdivision 4 was proper in all particulars. Judgment for plaintiff, and defendant appeals.

George E. Lawrence, for appellant. *D. H. Whittemore*, for respondent.

PATERSON, J. 1. The assessments levied against lot 13 are separately made, and particularly defined in the assessment list. The lot was properly assessed the sum of \$647.41 for the construction of gutter-ways and macadam. The other assessment, \$62.90, for the crossing on Scott and Tyler streets, should have been made against the east one-half of the lot, and the diagram ought to have shown what portion was assessed. St. 1871-72, § 8, subd. 3, p. 810. This portion of the assessment was void, and the demand therefor

was invalid; but the assessment for macadam and gutter-ways, having been made separately and for the proper amount, and the proper demand having been made, as shown by the return, the motion for a nonsuit was properly denied, notwithstanding the invalidity of the assessment for work on the crossing.

2. The specifications as to the insufficiency of the evidence are too general. That "the evidence is insufficient—*First*, to sustain the first finding of fact; *second*, or the the second finding of fact; *third*, or the third finding of fact," etc.,—is not a specification of "the particulars in which such evidence is alleged to be insufficient," within the meaning of section 659, Code Civil Proc. *Eddeibuttel v. Durrell*, 55 Cal. 277. We cannot, therefore, consider the point made by the appellant that the evidence does not support the finding as to the amount due and unpaid.

3. The findings supported the judgment. Judgment and order affirmed.

We concur: SEARLS, C. J.; MCKINSTRY, J.

PARKER v. ROPER. (No. 9,845.)

(*Supreme Court of California.* May 7, 1888.)

Department 1. Appeal from superior court, city and county of San Francisco; CHARLES HALSEY, Judge.

George E. Lawrence, for appellant. *D. H. Whittemore*, for respondent.

PATERSON, J. Copies of the briefs filed in No. 9,844 have been filed in this case, but the points made by appellant there are not applicable here. In this case, the record of which is similar in other respects to that in *Parker v. Reay*, *ante*, 124, (No. 9,844,) lot 14, the lot assessed, is a corner 50 vara, and was assessed only for gutter-ways, and for macadamizing the roadway. The assessment proceedings seem to have been regular, and the lot, being a corner lot, was properly assessed for the work done. Judgment and order affirmed.

We concur: SEARLS, C. J.; MCKINSTRY, J.

76 Cal. 109

HOGINS v. SUPREME COUNCIL OF CHAMPIONS OF THE RED CROSS.
(No. 9,999.)

(*Supreme Court of California.* May 7, 1888.)

1. INSURANCE—MUTUAL BENEFIT INSURANCE—ACTION ON CERTIFICATE—FAILURE TO COMPLY WITH CONDITIONS.

In an action on a beneficiary certificate issued by a temperance order it appeared that assured died from the excessive use of liquor; that he agreed in his written application for the certificate to comply with all the requirements of the order, as a condition precedent to his being entitled to the benefits of the certificate; that the certificate contained a clause in substance and effect the same as the application. *Held*, that plaintiff could not recover.

2. SAME—ACTION ON CERTIFICATE—PROOF OF FORFEITURE.

In an action on a beneficiary certificate issued by an order to which assured belonged, it is not necessary, in order to set up a forfeiture of such certificate, to show that assured was suspended or expelled from such order.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Action by Catharine Hogins, wife of Daniel Hogins, against the Supreme Council of the Champions of the Red Cross, on a beneficiary certificate issued by such order on her husband's life. Judgment for defendant. Plaintiff appeals.

R. B. Mitchell, for appellant. *Arthur Rodgers*, for respondent.

PATERSON, J. This is an action to recover from the defendant the amount of \$1,000 on a beneficiary certificate issued by the Grand Encampment of the Champions of the Red Cross of California upon the life of appellant's husband.

The defense is breach of the conditions of the contract of insurance. Judgment was rendered in the court below in favor of the defendant. The Champions of the Red Cross is a temperance order or fraternity. The order originally consisted in this state of a Supreme Council, a Grand Encampment, and subordinate encampments. The insurance system was under the supervision of the Grand Encampment, which issued the certificates. On October 20, 1881, the Grand Encampment went out of existence, and defendants assumed payment of all policies then in force. The system of insurance is called the mutual life benefit system, and every full member, who had taken the three degrees of a subordinate encampment, and had complied in every particular with all the laws, rules, and requirements of the order, was entitled to participate in this insurance from \$1,000 upward, according to the number of members. On September 26, 1879, Daniel Hogins, a member in good standing of Castle Encampment No. 68, San Francisco, made application in writing for a certificate, payable at his death to his wife, appellant herein, and said certificate was regularly issued on October 2, 1879, and after having been regularly countersigned as required by the laws of the order, was, on October 10, 1879, delivered to him, and by him thereupon delivered to appellant. The court found that "on July 9, 1883, the said Daniel Hogins commenced drinking spirituous liquors as a beverage, and did thereafter continue upon a drinking spree, and use whisky, brandy, and other alcoholic stimulants as a beverage, and on Friday, July 13, 1883, at about 7 o'clock P. M., he died, his death being hastened by the excessive use of such liquor." After the issuance of the policy, and until his death, no charges were preferred against Hogins. His monthly dues and assessments on his certificate were paid as fast as they became due. In his written application for a certificate Hogins agreed "that a compliance with all the laws, regulations, and requirements which now or hereafter may be enacted by our said order is the express condition upon which I am to be entitled to participate in the mutual benefit life system." The certificate itself contained this clause: "This certificate is issued upon the express condition that said Daniel Hogins shall in every particular, while a member of our said order, comply with all the laws, rules, and requirements thereof." The controlling and distinguishing feature of this order is its requirement of daily abstinence from the use of liquors as a beverage by its members. It is the fundamental principal in every degree. In order to become a member of the order, or entitled to a beneficiary certificate, the applicant was required to take all the degrees, and pledge himself upon taking each one that, so long as he was a member of the order, he would wholly abstain from the use of all alcoholic liquors as a beverage. Violations of this pledge were punished by suspension. The system of insurance is clearly intended to be confined exclusively to temperance people. The applicant Hogins so understood it. In his application he expressly agreed that he should not be entitled to the benefits of the system unless he complied with all the laws, regulations, and requirements of the order. The clause quoted from the certificate does not, perhaps, literally express the meaning intended, but it is quite clear what was meant and intended by the parties. It does not say that payment is contingent upon the express condition, but such was clearly the intent. Appellant claims that the condition is for the issuance merely, but the conditions are in their nature matters to occur in the future. "That said Daniel Hogins shall in every particular, while a member of our said order, comply with all the laws, rules, and requirement thereof," shows beyond controversy that his conduct after the issuance of the certificate was to be the condition of payment. His application shows clearly that such was his intention and contract, and we think that the application and the certificate may be read together for the purpose of showing that the clause in the certificate is an express condition precedent to the payment of the insurance. "In all contracts of insurance certain statements are

made, certain stipulations are entered into, and certain provisos, conditions, and by-laws are introduced or referred to in a more or less explicit manner. As a general rule, if these statements, stipulations, etc., are contained in or expressly made a part of the policy, they become warranties, and are so denominated in the law of insurance. * * * By a warranty the insured stipulates for the absolute truth of the statement made, and the strict compliance with some promised line of conduct, upon penalty of forfeiture of his right to recover in case of loss should the statement prove untrue, or the course of conduct promised be unfulfilled. The warranty is an agreement in the nature of a condition precedent, and, like that, must be strictly complied with. * * * Any statement or stipulation upon the literal truth or fulfillment of which depends the validity of the contract, whether appearing as a condition, or warranted or modified otherwise, amounts to a warranty." May, Ins. §§ 160, 161. The same principles apply to all kinds of insurance.

We do not think that suspension or expulsion was necessary by the order to forfeit the policy. In *Knights of Honor v. Johnson*, 78 Ind. 111, the certificate contained this clause: "Providing he be in good standing when he dies." It was held simply in that case that it was not shown that the member was not in good standing when he died. We see nothing in *Bidwell v. Insurance Co.*, 3 Sawy. 261, which holds that unless the certificate refers to the written application therefor that the application forms no part of the contract. As we construe the clause in the certificate it is in substance and effect the same as the clause in the application which we have referred to, and was so intended by all parties. It is said that the defendant can always refuse to pay the certificates, on the ground that the second part of the obligation, namely, "to do all things in his power to promote the cause of temperance," has not been kept. It would be very difficult indeed for the beneficiary to prove how much was in the power of the deceased in the way of promoting the temperance cause, and the failure on behalf of the insured to prevent another from taking a drink might be claimed by the defendant as a forfeiture, etc. It is sufficient to say here that Hogins agreed, among other things, not to drink alcoholic liquors, and that he willfully broke the condition in violating the fundamental and controlling principle of his obligation and of the order. Judgment affirmed.

We concur: SEARLS, C. J.; MCKINSTRY, J.

76 Cal. 119

HARBIN v. BURGHART *et al.* (No. 12,373.)

(Supreme Court of California. May 12, 1888.)

1. SCHOOLS AND SCHOOL-DISTRICTS—RIGHT TO PURCHASE SCHOOL LANDS—FALSE STATEMENTS IN APPLICATION.

In an action to determine whether plaintiff or defendant was entitled to purchase a portion of school lands, it appeared that defendant was in adverse possession of the lands, within the meaning of Pol. Code Cal. § 3495, relating to the purchase of school lands at the time of plaintiff's application; that plaintiff's application stated "there was no occupation of such lands adverse to any that he had." *Held* that, such statement being untrue, plaintiff's application was invalid, and he was not entitled to purchase.

2. SAME—RIGHT TO PURCHASE SCHOOL LANDS—AFFIDAVIT OF ACTUAL SETTLEMENT.

Where defendant, in an action to try the right to purchase certain school lands, states in the affidavit accompanying his application that he is an actual settler thereon, as is required by Pol. Code Cal. § 3495, referring to the purchase of school lands, when in reality he did not go on the land, or even see it, until two months after his application, he deprives himself of all right to purchase.

Department 1. Appeal from superior court, Tehama county; CHARLES P. BRAYNARD, Judge.

Action by M. P. Harbin against Burghart and others to determine the right to purchase certain school lands. All the defendants save Henry L. Gold were

dismissed from the action, and to him the court awarded the right to purchase. Plaintiff appeals.

Chipman & Garter, for appellant. *John F. Ellison*, for respondents.

PATERSON, J. This is an action brought to determine which of the parties has the right to purchase a portion of section 36, township 28 N., range 2 E., M. D. M., school lands. All the defendants except Gold have been dismissed from the action. Gold's application to purchase was filed in the office of the surveyor general, January 23, 1884, and is in proper form. Plaintiff filed his application to purchase in the same office on the 21st of March, 1884, and on the following day filed with the surveyor general a protest against the approval of Gold's application. Thereupon the surveyor general certified the contest to the superior court of Tehama county. The court below decided that defendant Gold is entitled to have issued to him a certificate approving his application to purchase the lands in controversy. The defendant did not go upon the land until about the 18th or 20th of May following his application, and never saw the land until that time, but about the 10th or 12th of March he sent two men upon the land to build a house for him thereon, which they completed a few days thereafter. About the 1st of June following the defendant took possession, and remained there continuously for six months. He testified that he filed his application in good faith, intending to purchase the land for a home and as a place for business; that he knew the land was unfit for cultivation; that as soon as convenient after filing his application, and in pursuance of his intention to reside there, he had the house built, and, as soon as the weather and the quantity of snow upon the ground would permit, he moved his stock upon the place, and resided there until heavy storms came in the fall. The court found that the land is unfit for cultivation, and also found that the defendant Gold was an actual settler.

1. At the time the plaintiff's application to purchase the land was made, March 21, 1884, the defendant was in adverse occupancy of the land, within the meaning of section 3495, Pol. Code. In his application the plaintiff stated that there was "no occupation of such lands adverse to any that he had." This statement being untrue, his application is invalid, and he is not entitled to purchase the land. *Mosely v. Torrence*, 71 Cal. 318, 12 Pac. Rep. 430; *Gavitt v. Mohr*, 68 Cal. 50; 10 Pac. Rep. 337.

2. The statute in force at the time the defendant filed his application to purchase, required the applicant to make an affidavit that he was a citizen of the United States; * * * that he was an actual settler on the lands; that there was no occupation of such lands adverse to any that he had, etc. In his application to purchase, and his affidavit in support thereof, the defendant Gold alleged that he was an actual settler on the lands. This statement was false, for he testified at the trial that the first time he went on the land, or ever saw it, was about May 18, 1884, four months after he filed the application referred to, and that he had no improvements or cabin on the land until about the middle of March, two months after his application. An applicant for the purchase of land from the state must set out in his affidavit the facts required by the statute to be stated therein, (*McKenzie v. Brandon*, 71 Cal. 209, 12 Pac. Rep. 428,) and unless the matters of fact which are required by the statute to be alleged in the affidavit are proved at the trial of contests like the one at bar, no right accrues to the party alleging the same, (*Plummer v. Woodruff*, 72 Cal. 29, 13 Pac. Rep. 51.) The finding of the court that the defendant Gold was an actual settler upon the lands is not supported by the evidence. It is directly in conflict with the testimony of the defendant.

Judgment and order reversed, with directions to the court below to dismiss the action; each party to pay his own costs.

We concur: SEARLS, C. J.; MCKINSTRY, J.

JACOBS v. WALKER. (No. 9,873.)

(Supreme Court of California. May 19, 1888.)

1. SCHOOLS AND SCHOOL DISTRICTS—RIGHT TO PURCHASE SCHOOL LANDS—ACTION TO DETERMINE—COMPLAINT.

In an action to determine the right to purchase certain school lands, it appeared that defendant obtained a certificate for the purchase of the land; that plaintiff afterwards filed an application and affidavit in due form to purchase the same, and also filed a verified protest in writing, with the surveyor general of the state, against the issue to defendant of any further evidence of title to any part of the lands; that plaintiff's complaint recited facts showing that his affidavit complied in all respects with the requirements of Pol. Code Cal. § 3495. *Held*, that the complaint states a cause of action, and need not set forth the grounds of plaintiff's protest filed in the surveyor general's office.

2. SAME—RIGHT TO PURCHASE SCHOOL LANDS—ORDER OF SURVEYOR GENERAL.

In an action to determine the right to purchase certain school lands, initiated under an order for reference from the surveyor general of the state to a district court of the county in which the lands are situated, the certified copy of the order need not show that the same was entered in a record-book in his office, notwithstanding Pol. Code Cal. § 3414, enacts that, on an officer making such a reference, he must enter the order in a record-book in his office, where it appeared that the surveyor general's certificate showed that the instrument was "a copy of a document on file" in his office. Following *Eads v. Clarke*, 9 Pac. Rep. 666.

3. SAME—RIGHT TO PURCHASE SCHOOL LANDS—CERTIFICATE FOR PURCHASE.

A certificate for purchase of school lands, issued by the surveyor general, is not conclusive evidence in favor of the holder against another person contesting the right of the holder to purchase such lands.

Commissioners' decision. Department 1. Appeal from superior court, Mendocino county; ROBERT MCGARVEY, Judge.

This was an action brought by Abner D. Jacobs against J. B. Walker to determine the right to purchase certain school lands. Judgment for defendant. Plaintiff appeals.

T. J. Carothers, for appellant. *I. A. Cooper*, for respondent.

FOOTE, C. This is an action to determine a contest as to which of the parties has the better right to purchase from the state certain school lands, and was initiated under an order of reference from the surveyor general of the state of California to the superior court of Mendocino county. At the time the order was made, the defendant had applied to purchase the land in dispute, his application had been approved, and a certificate therefor issued by the register of the state land-office. Some time after that, the plaintiff filed, in due form, an application and affidavit to purchase the same lands to which defendant held a certificate, and filed a verified protest in writing with the surveyor general of the state against the issuance of any further evidence of title to any part of said lands to the defendant. The lands had been, on the 15th day of March, 1876, certified over as state school lands by the United States land office. The surveyor general made the order of reference, upon the plaintiff's demand, on the 7th day of July, 1884, which was annexed to and made a part of the complaint. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained. The plaintiff declining to amend his pleading, judgment was given for the defendant, from which this appeal is prosecuted.

The principal point urged for the reversal of the judgment is that the court below was in error in holding the defendant's certificate of purchase to be conclusive as against the plaintiff. It has been repeatedly decided in this state, by the supreme court, that such a certificate is not conclusive, and that, after it has issued, a contest as to the right to purchase may be made. *Gilson v. Robinson*, 68 Cal. 542, 10 Pac. Rep. 193; *Christman v. Brainard*, 51 Cal. 534; *Cunningham v. Crowley*, Id. 128; *Woods v. Sawtelle*, 46 Cal. 389. We think the complaint recites facts which show that the affidavit made by the plaintiff

upon his application to purchase, complied in all respects with the requirements of section 3495 of the Political Code. It was unnecessary to state in the complaint the grounds of the plaintiff's protest filed in the surveyor general's office. The last point, viz., that the surveyor general's certificate did not show that he ever entered any order of reference in a record-book in his office, as required by section 3414 of the Political Code, is untenable, under the rule laid down in *Eads v. Clarke*, 68 Cal. 481, 9 Pac. Rep. 666.

The complaint stated facts showing a cause of action, and the judgment should be reversed, with directions to the trial court to overrule the demurrer, with leave to the defendant to file an answer within a reasonable time.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, with directions to the trial court to overrule the demurrer, with leave to the defendant to file an answer within a reasonable time.

76 Cal. 56

ROBINETT v. CONNOLLY, Sheriff. (No. 11,372.)

(Supreme Court of California. May 1, 1888.)

ATTACHMENT—RIGHT OF SHERIFF TO FEES AND EXPENSES.

Under St. Cal. 1871-72, p. 778, which provides that a sheriff shall not be required to release attached property until his expenses for keeper's fees are refunded, a defendant in attachment, who settles the suit after a keeper has been put in charge of the attached property, and receives from the plaintiff an order directing the sheriff to release the levy upon payment of his fees, cannot obtain the property until he has paid the sheriff his keeper's fees.

Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

This is an action of claim and delivery, brought by Thomas Robinett against Patrick Connolly, to recover certain chattels which the latter, as sheriff, had seized under a writ of attachment, brought by one Shain, against Robinett. After the levy, and while the attached property was in possession of a keeper appointed by the sheriff, Robinett settled the claim of his attaching creditor, and received from him an order directing the sheriff to release the attached property upon payment of his fees. Robinett presented this order to the sheriff, and demanded the property, which the sheriff refused to deliver until his keeper's fees were paid; whereupon, without paying such fees, Robinett began this action, in which judgment was rendered against him, and he appeals.

John J. Coffey, (W. H. Tompkins, of counsel,) for appellant. *Matt. I. Sullivan*, (D. McClure, of counsel,) for respondent.

McKINSTRY, J. The plaintiff in the action *Shain v. Robinett* could not require of the sheriff (defendant herein) to release the property by that officer attached therein, except upon payment of his keeper's fees. St. 1871-72, p. 778. Shain did not pretend to direct the sheriff to release the attachment except on the condition which the law attaches to every direction to release an attachment. Robinett would have acquired no right to demand possession of the property from the sheriff by virtue of his settlement with Shain had that settlement not provided for the payment of the keeper's fees; but it was part of the agreement of settlement that Robinett should pay the sheriff's fees. The sheriff may refuse to perform official work in advance unless his fees are paid, but, though he has not demanded them in advance, the statute continues his lien for keeper's fees until they are paid. Judgment and order affirmed.

We concur: SEARLS, C. J.; PATTERSON, J.

75 Cal. 96

TUGGLE v. MINOR. (No. 11,210.)

(Supreme Court of California. May 7, 1888.)

1. ACCOUNT STATED—WHAT CONSTITUTES.

Defendant signed the following memorandum: "On my return from * * * I will settle the above account. * * *" The last item in the account was indorsed, "This last item to be investigated as to amount." It appeared that defendant agreed as to the amount, excluding the last item. No subsequent investigation of this item was shown. *Held*, that the account became stated as to the admitted amount, and plaintiff could recover, on an account stated, only that amount.

2. LIMITATION OF ACTIONS—ACKNOWLEDGMENT.

Where a debtor signs the following memorandum on account stated: "This last item to be investigated as to amount. On my return * * * I will settle the above account with * * * personally,"—the subsequent indorsement, "This agreement renewed this day," is sufficient to take the case out of the statute of limitations, under Code Civil Proc. Cal. § 360, providing that no promise is sufficient evidence of a new or continuing contract by which to take the case out of the operation of the statute of limitations unless contained in some writing signed by the party.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

B. McKinne, for appellant. *J. P. Meux* and *P. D. Wiggington*, for respondent.

PATERSON, J. On the 6th day of October, 1879, the defendant rendered to the plaintiff an account made out entirely in his own handwriting, showing a balance of \$13,871.70, due from the defendant to the plaintiff. The following is a copy of the account so presented, with the memorandum afterwards written on it, October 4, 1881:

"EXHIBIT A.
(Copy of Account.)

Sales of Summit:							
Gave away	2,410 shares,						
Sold	2,590 shares,	-	-	-	-	-	\$ 2,938 65
	5,000 shares.						
Sales of Bechtel:							
Gave away	250 shares,						
Sold	4,750 shares,	-	-	-	-	-	27,910 00
	5,000						
Tioga stock:							
Gave away	166 $\frac{2}{3}$ shares,						
Sold	1,833 $\frac{1}{3}$ shares,	-	-	-	-	-	5,176 75
	2,000						\$36,025 40
Total realized,		-	-	-	-	-	\$36,025 40
One-half is,		-	-	-	-	-	\$18,012 70
Less paid,		-	-	-	-	-	5,000 00
							\$13,012 70
Advanced:							
Bechtel Asst.,		-	-	-	\$1,500		
Less							
Cash,		-	-	-	\$683		
$\frac{1}{2}$ of Bodie,		-	-	-	458	\$1,141	
						\$ 359	

This last item to be
investigated as to amount.

"On my return from New York I will settle the above account with P. Tugle, personally. B. B. MINOR.

"October 6, 1879.

"October 4, 1881: This agreement renewed this day. B. B. MINOR."

The court found that the account as presented was, on the 6th of October, examined by the plaintiff and defendant, and thereafter, and before the commencement of this action, the account, as stated, was accepted and agreed to by both parties; that on the same day, by an indorsement on the account, the defendant agreed to pay said account as so stated, and renewed the agreement on the 4th of October, 1881, in writing. The account and the indorsement thereon show quite clearly that the items were all agreed to as correct, excepting the last item, and the testimony makes it clear that such is the fact. The plaintiff testified that on the 3d of October, 1881, he went to the defendant's office and asked him what he was going to do about paying; that he, defendant, spoke of his prospects and said he would pay in a very short time, within a month, he thought, the whole of it; that on the 4th of October, 1881, he carried the account back to the defendant, and requested him, for fear that it might be barred by the statute of limitations, to renew it; that thereupon the defendant wrote the second indorsement found upon the statement; and that when the account was presented, plaintiff and defendant looked over it, and agreed upon the amount, \$13,012.70, as being correct. The defendant testified that he gave the plaintiff the paper referred to; that he told plaintiff he would settle with him personally on his return from New York, the understanding being that the settlement was contingent upon the success of the defendant in the east; that the payment was to be made only if he (defendant) made any money out of the Bodie lawsuit; that the suit was decided adversely to defendant in November, 1881; that the plaintiff kept calling upon him for the money, and defendant told him he must wait till "this Bodie business was wound up;" and nothing was said to him about the correction of this last item when the agreement was renewed on the 4th of October, because the settlement was understood to be conditioned upon success in the litigation referred to. J. P. Meux testified on behalf of the plaintiff that he called upon the defendant in New York on the 27th of March, 1880; that the defendant stated he had a settlement with the plaintiff of their accounts; took the account in his hands, looked at it, and stated that it showed what he owed the plaintiff; that he hoped to consummate the sale of a mine within a day or so and pay up.

It is claimed on behalf of the appellant that the account was stated on the 6th day of October, 1879, for the whole amount alleged in the complaint to be due, and "if any one of the claims of undefined amount is to be omitted, the statement of the account is disproved, and the action founded upon such statement of account fails." But it has been held that when all of the items of an account are admitted to be correct except particular ones which are left by the parties for future adjustment, the account becomes stated as to those items which are admitted to be correct. *Wiggins v. Burkham*, 10 Wall. 129; 2 Greenl. Ev. § 126, approved in *Terry v. Sickles*, 13 Cal. 430. Of course an account cannot be stated with reference to a debt payable on a contingency. 2 Chit. Pl. (11th Amer. Ed.) 962. The court, however, found that there was no contingency, but an absolute promise to pay. It was for the court, upon all the evidence in the case, to determine the meaning of the word "settle." It is a word which may mean one thing under certain circumstances and another under other circumstances. *Auzerais v. Naglee*, 15 Pac. Rep. 371. These matters were determined in favor of the plaintiff by the court below. It is further claimed that there is no evidence of a written promise sufficient to take the case out of the statute of limitations; that the account was stated, if at all, on October 6, 1879, and the complaint was not filed till November 28, 1881, more than two years thereafter. Section 360, Code Civil Proc., provides:

"No acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby." It has been held that an acknowledgment need not be made in express words, but may be implied from any act or statement which necessarily and directly admits or presupposes the existence of the debt, and the obligation to pay it, (1 Smith, Lead. Cas. 6th Amer. Ed. 877;) and that "the purpose of section 360 of the Code of Civil Procedure is to establish a rule, not with respect to the character of the promise or acknowledgment from which a promise may be inferred, but with respect to the kind of evidence by which the promise or acknowledgment shall be proved." *Biddel v. Brizzolara*, 56 Cal. 374. In all cases the question is to be determined from the evidence, and upon all the circumstances surrounding the transaction. But we think there can be no doubt that by the use of the word "settle," in the first indorsement upon the account, the defendant meant that he would pay the account subject to an investigation as to the last item named. It was an absolute agreement to pay at least all of the items except the last. By the second indorsement this agreement to pay was renewed in express terms.

The court found upon all the material issues. It was unnecessary for the court to find further facts upon the defendant's counter-claim, because it is stated in said counter-claim "that the foregoing mutual dealings and accounts are those out of which the alleged account stated, set forth in the complaint, arose." We see no error in the rulings of the court at the trial.

The last item named in the account is indorsed in writing: "This last item to be investigated as to amount." As stated above, plaintiff testified that defendant agreed upon the amount of \$13,012.70. It does not appear that any investigation was afterwards had in relation to the last item, and we think the evidence insufficient to show any absolute promise on the part of the defendant to pay that portion of the account. The plaintiff is entitled to recover the sum of \$13,012.70, with interest thereon at the rate of 7 per cent. per annum from the 6th day of October, 1879, and costs of suit.

The cause is remanded to the court below, with directions to modify the judgment accordingly.

We concur: SEARLS, C. J.; MCKINSTRY, J.

73 Cal. 247

DAVIS v. BUTTON. (No. 12,564.)

(Supreme Court of California. May 7, 1888.)

MASTER AND SERVANT—NEGLIGENCE OF MASTER—EVIDENCE—SUFFICIENCY.

In an action for killing plaintiff's intestate, it appeared that deceased, being a competent engineer, with the knowledge and consent of one J. B., entered a locomotive engine for the purpose of assisting in the running; that, crossing a bridge, the same gave way, precipitating the locomotive, and killing deceased. Evidence showed that defendant was aware of the defective state of the bridge, and did not prevent the running; that J. B. was foreman, conductor, and assistant superintendent of the line, and started trains; that he alone organized the trip; that defendant knew the train would be moved under J. B.'s general supervision; and that, there being no regular engineer on the line, he believed J. B. would secure the services of one. *Held*, that there was sufficient evidence of J. B.'s authority to employ an engineer, and there being no contributory negligence on the part of deceased, and conflicting evidence as to deceased's knowledge of the defective state of the bridge, the plaintiff could recover.

In bank. Appeal from superior court, San Bernardino county; JAMES A. GIBSON, Judge.

Martha Davis, administratrix of the estate of Harrison Davis, deceased, brought an action against R. W. Button, the owner of a motor railway line, to recover damages for the killing of her intestate. Verdict for plaintiff. Defendant appeals.

H. C. Rolfe, (Chas. R. Redrick, of counsel,) for appellant. Frank F. Oster, Harris & Gregg, and Byron Waters, (William G. Webb, of counsel,) for respondent.

MCKINSTRY, J. There was sufficient evidence that, on the day mentioned in the complaint, when a train upon the railroad of defendant "was about to make a trip from said Colton to said city of San Bernardino, over said motor road," Harrison Davis, the deceased, entered the engine of said train for the purpose of running the engine, or of assisting the engineer in the management and control of the engine, with the knowledge and consent of John Button; further, that the deceased was a competent engineer. The evidence clearly showed that the bridge that gave way was weak, and inadequate to support the locomotive and car attached to it. There was a substantial conflict in the evidence as to whether Harrison Davis knew or had reasonable notice of the weakness of the bridge or its inadequacy. When the bridge and locomotive fell Harrison Davis was killed. Spring was asked to run the engine by John Button on the occasion referred to. John Button himself "fired up" the engine. Spring could not start the engine, and requested Davis to do it, John Button being present. Spring and Davis had previously run the engine with the knowledge of John Button and of defendant. Did John Button have power to authorize the deceased to manage the engine, or to assist Spring in managing it? John Davis testified that he was "foreman, conductor, and assistant superintendent" of the line. He gave the signal for the train to start, went with it, and collected money of the passengers to pay for the cost of the coal and oil consumed on the trip. John Button also testified that he was the mover in getting up the trip that night. "It was got up by nobody's authority except my own." But there was testimony of a statement of defendant, made after the accident, that he was told "they were going to run up that night, and that he made no reply; he did not tell them to run it or not to run." The day before the accident the defendant told a witness that the train would probably not run to San Bernardino the next night; that he had a gang of men at work on the bridge. The witness thought the defendant said the trip would depend upon the completion of the work. Another witness testified that, the day before the accident, he heard John Button ask defendant if the train should run that evening; to which defendant replied: "John, I think it better not run this evening; I think it not advisable,"—or something to that effect. On the day of the accident, and previous to it, the defendant had taken iron rods to the bridge, and given them to workmen there, with directions to insert them in the bridge, and tighten them by means of bolts. After leaving them, the workmen inserted the rods, but did not "tighten" the rods, as they might have been, because they had no wrench to force down the bolts upon the nuts. The defendant did not forbid the running of the train on the evening when the deceased was injured, although he knew it was contemplated. There can be no doubt that John Button was employed in some capacity, and the defendant knew the train would be moved under John's general supervision. As yet, no engineer had been regularly employed, and defendant had every reason to believe that John Button would secure the services of one. In view of the circumstances, the evidence shows that John Button had power to authorize the deceased to run the engine. We cannot say, upon the evidence, that the jury erred in finding that Davis was not guilty of contributory negligence.

Counsel for appellant contends that the court below erred in giving certain instructions to the jury. We cannot consider the argument in support of this point. It does not appear that exceptions were taken to any portions of the instructions of the court. Judgment and order affirmed.

We concur: SEARLS, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.

76 Cal. 113

SWINNERTON v. MONTEREY COUNTY. (No. 11,136.)

(Supreme Court of California. May 10, 1888.)

TAXATION—RIGHT OF COLLECTORS TO COMMISSIONS.

St. Cal. 1871-72, p. 178, enacts that tax collectors of M. county shall receive a certain commission for collecting taxes, and St. Cal. 1871-72, p. 419, enacts that the sheriff of the said county should receive for collecting them a commission at a higher rate than that allowed by the previous act. It appeared that, at the time of the passing of the acts, the sheriff was *ex officio* the tax collector; that subsequently the offices were separated, and regular tax collectors appointed. *Held*, that such subsequently appointed tax collectors were entitled to retain the greater commission.

Department 1. Appeal from superior court, Monterey county; JAMES F. BREEN, Acting Judge.

S. M. Swinnerton brought an action against Monterey county for damages for breach of contract. Judgment for defendant. Plaintiff appeals.

S. M. Swinnerton, pro se. R. M. F. Soto and Hermann & Soto, for respondent.

McKINSTRY, J. W. V. McGarvey was tax collector of Monterey county for two years from the first Monday in March, 1878, and U. Hartnell held the same office from the first Monday of March, 1880, to the first Monday of January, 1883. The plaintiff herein, an attorney at law, claims to have entered into a contract with the defendant whereby he was employed to collect commissions unlawfully retained by the tax collectors of the county,—the county agreeing to pay him for such service 30 per cent. of the amount he should recover and collect; that, under such employment, he commenced actions against tax collectors McGarvey and Hartnell, and their respective bondsmen, to recover commissions illegally retained by them; but that, after the commencement of said actions, the board of supervisors (by order in regular form) directed the district attorney to dismiss the actions, which was done, and that the county thereby prevented him from earning the 30 per cent. he would have recovered had he been permitted to prosecute the suits. Passing all other questions, the plaintiff ought not to recover in this action if he could have recovered nothing for the county in case he had prosecuted to judgment the actions against McGarvey and Hartnell. He could have recovered nothing unless the commissions sued for were illegally retained or paid to the tax collectors named. There is no dispute here as to the amounts retained by the two tax collectors; and it must be conceded that if the act of March 16, 1872, (St. 1871-72, p. 419,) fixed the compensation of the tax collector when McGarvey and Hartnell were in office, each of them was entitled to retain or to receive the sum by each retained. The act of March 1, 1872, (St. 1871-72, p. 178,) provided that the tax collector of Monterey should receive for collections of state and county taxes 4 per cent. on the first \$10,000; 2 per cent. on all amounts over \$10,000, and less than \$20,000; and 1½ per cent; on all moneys over \$20,000. By the act of March 16, 1872, it was enacted that the sheriff of Monterey should receive 6 per cent. on the first \$10,000 collected for state and county taxes; 4 per cent. on all over \$10,000, and less than \$20,000; and 2 per cent. on any amounts more than \$20,000. The last act repealed all acts in conflict therewith. When the acts mentioned were passed, the sheriff of Monterey county was *ex officio* the tax collector. Subsequently, and before the incumbency of McGarvey or Hartnell, the offices were made separate. It was urged by appellant that the percentages to be received by McGarvey and Hartnell, as tax collectors, were determined by the act of March 1, 1872. The contention is based on the proposition that in the act of March 16, 1872, the "sheriff" is named as the recipient of the percentages; but the sheriff was the tax collector. The offices of sheriff and tax collector, though held by the same person, were separate and distinct offices. *People v. Ross*, 38 Cal. 76; *Peo-*

ple v. Kelsey, 34 Cal. 470; *Lathrop v. Brittain*, 30 Cal. 680. The act of March 16th fixed the percentages to be allowed the tax collector for collecting the taxes,—fixed them no less because it called the tax collector “sheriff.” The title of an act does not control the plain meaning of the body of the act. A statute must be construed with reference to the objects to be accomplished by it. A thing clearly within the intention of a statute is within the statute. *Pierpont v. Crouch*, 10 Cal. 315; *Emery v. Reed*, 65 Cal. 351, 4 Pac. Rep. 200; *Burr v. Dana*, 22 Cal. 20; *Kinsey v. Kellogg*, 65 Cal. 114, 115, 3 Pac. Rep. 405. Judgment affirmed.

We concur: PATERSON, J.; TEMPLE, J.

76 Cal. 116

HOOKER v. BANNER *et al.* (No. 9,886.)

(*Supreme Court of California.* May 10, 1888.)

LANDLORD AND TENANT—LEASES—STIPULATIONS—EFFECT OF REMOVALS.

A lessee was permitted to make changes in the premises leased, on condition that he would restore them, and afterwards his lease was twice renewed, with stipulations that any changes made by the tenant should be replaced, and the premises left in their original condition. *Held*, that such stipulations included the changes made under the first lease, and the lessor, being obliged to make the restoration, may recover therefor.

Department 2. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

Action by C. G. Hooker against Pincus Banner and Samuel Banner, composing the firm of Banner Bros. Plaintiff recovered judgment, and defendants appeal.

Naphtaly, Freidenrich & Ackerman, for appellants. *John H. Dickinson*, for respondent.

SHARPSTEIN, J. The appellants were lessees of the respondent under a lease which contained a stipulation that they should not make any alteration in the premises without the consent of the lessor. During the continuance of the lease the lessor gave the lessees permission to make some alterations, on condition that the lessees, upon leaving the premises, would restore them to their original condition. Pursuant to said permission the lessees did make such alterations as they had obtained permission to make upon the aforesaid condition. Before the expiration of said lease, appellants procured another lease, to take effect on the expiration of the former. The second lease contained the following clause: “And any alteration or changes made in the property by the parties of the second part shall be replaced, and the property left in its original condition.” At the expiration of the last-mentioned lease another was executed between the parties, containing the clause last above quoted. Appellants continued to occupy the premises until the expiration of the last-mentioned lease, and for one month thereafter, when they abandoned the premises without restoring them to the condition they were in at the date of the first lease, and refused so to restore them, although requested by respondent to do so, whereupon plaintiff restored them to their original condition himself, and brings this action to recover the sum expended in doing so, and the damages sustained by the loss of the use of the premises while the same were being so restored. Judgment was entered in favor of respondent, and from that, and an order denying appellants’ motion for a new trial, they have appealed to this court. Their contention here is that, if they made the alterations upon the condition that they would restore the premises to their original condition, such alterations being made before the expiration of the first lease, they took the premises under the second and subsequent lease in the condition in which they were at the dates of said leases, respectively, and

were only bound to leave them in the condition in which they were at said respective dates; and that the clause in the later leases, which provided that any alterations or changes made in the property by them, should be replaced, and the property left in its original condition, does not relate back to the date of the first lease. In view of the fact that the alteration and changes were made under an agreement by appellants that they would restore the premises to their original condition, we think the clause in the leases which succeeded the first had reference to alterations and changes made while appellants were holding under the first lease, and that the judgment and order should be affirmed.

We concur: MCFARLAND, J.; THORNTON, J.

76 Cal. 106

BAGNALL v. ROACH. (No. 9,889.)
(Supreme Court of California. May 7, 1888.)

1. **NEW TRIAL—SURPRISE—REJECTION OF EVIDENCE.**

Plaintiff has no right to a new trial on the ground of surprise, where, relying on his supposed right to testify, and making no provision to sustain his case by other evidence, his testimony is rejected under a statutory prohibition.

2. **EXECUTORS AND ADMINISTRATORS—CLAIM FOR MONEY IN DECEDENT'S HANDS—EVIDENCE.**

In an action against an administrator for money alleged to have been received for plaintiff's use by defendant's intestate, and deposited by her with other moneys in her own name in a savings bank, where plaintiff fails to show when such deposit was made, or how much of the money deposited remained in the bank at the time of intestate's death, though it appears that intestate had, prior to her death, received money to plaintiff's use, he is not entitled to recover.

3. **SAME.**

In such case, where there was no direct proof that any of plaintiff's money was ever deposited in intestate's name, the court properly excluded intestate's bank-book, where such book would merely have shown that deceased at some time made a deposit in her own name.

Department 1. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Joseph Bagnall brought an action against Philip A. Roach, as administrator, to recover a sum of money alleged to have been received by defendant's intestate, and deposited by her in her own name in a savings bank. Judgment for defendant. Plaintiff appeals.

Jos. Rothschild and Cobb & Moore, for appellant. *Wright & Cormac and H. D. Talbot*, for respondent.

PATERSON, J. Julia King died in the city and county of San Francisco on the 8th of April, 1883. The defendant, Roach, public administrator, obtained letters of administration on her estate. The deceased left some money deposited in the Hibernia Savings Bank in her own name. The amount does not appear. The plaintiff claims that at least a thousand dollars of this money belongs to him. On the 18th of May, 1883, he presented his claim in due form, and duly verified, to the defendant, as administrator, for allowance; but the defendant refused to allow the same, or any part thereof. At the trial, plaintiff expected to be a witness, and was called by his counsel to testify to the material facts going to establish his claim. Under the provision of section 1880, Code Civil Proc., his proposed testimony was rejected. This ruling of the court is not assigned in the statement as error, and cannot be considered.

Appellant now claims that, "having relied on his right to testify in the cause, he made no provision to sustain his case by other evidence. The fault, he claims, was that of his attorney in not advising him of the statute prohibiting him from testifying; and he did not know of this prohibition till too late

to find other testimony. The attorney believed that in such a cause of action he could testify. Having been denied this privilege, he was thrown, as it were, *hors de combat*, and the newly-discovered evidence entitled the plaintiff to a new trial." The discovery which plaintiff and his counsel made seems to have been one of law, rather than one of fact or evidence. It is sufficient to say, furthermore, that there is nothing in the record to identify any affidavits used on motion for a new trial.

The findings of the court, attacked by the appellant, are fully warranted by the evidence. Assuming it to be true, as stated by appellant, that "the evidence shows that the defendant's intestate received from the plaintiff, or for his use, or on his account, at least \$250, and which sum the decedent deposited in her own name in the Hibernia Savings Society," there is nothing to show when such deposit was made, or at least nothing to show how much, if any portion, of the money which was deposited remained in the bank at the time of her death. It devolved upon the plaintiff to prove to the satisfaction of the court, not only that money had been deposited in her name which belonged to him, but that it remained on deposit, and how much remained on deposit. This he failed to do, evidently through mistake of law respecting his right to testify in the case.

It was not error to exclude the bank-book offered in evidence. This book, if admitted, would have shown simply that the deceased had deposited money at some time in her own name. This proposition was not controverted, in fact was not denied in the answer. There is no direct proof that any money of the plaintiff was ever deposited in the name of Julia King; but the fact, if it be a fact, that Julia King deposited in her own name, and mingled with her own money, the money of plaintiff several years or months, or even several weeks, before her death, raises no presumption that the money on deposit, or any part of it, at the time of her death, is the money of the plaintiff. At least, the court below was not bound to infer or presume one fact from the existence of the other. The court was not satisfied. "That evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict." Section 1835, Code Civil Proc. Judgment and order affirmed.

We concur: SEARLS, C. J.; MCKINSTRY, J.

76 Cal. 125

DENGLER *et al.* v. MICHELSEN *et al.* (No. 9,879.)

(Supreme Court of California. May 12, 1883.)

1. LANDLORD AND TENANT—ASSIGNMENT OF LEASE—LIABILITY OF ASSIGNEE FOR RENT. The assignees of a lease are not liable to the lessor for rent where he had failed to deliver possession of the property for 20 days after the lease began to run, though requested to do so, and they had notified him that they abandoned the contract, and when they had never in fact occupied the premises.
2. SAME—RENT—LIABILITY OF ASSIGNEE OF LEASE—REASSIGNMENT. The assignee of a lease discharges himself from subsequent liability for rent, by a reassignment to the original lessee.

Department 2. Appeal from circuit court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Action by P. Dengler and Frank Breiling against Edward Michelssen, Benjamin W. Brown, and Daniel Roth, composing the firm of Michelssen, Brown & Co., to recover rent on certain premises. Judgment for defendants, and plaintiffs appeal.

L. H. Van Schaick, (*Justin Jacobs*, of counsel,) for appellants. *O'Brien & Morrison*, for respondents.

McFARLAND, J. This is an action to recover money averred to be due on a certain lease. Judgment went for defendants in the court below, and plain-

tiffs appealed. The facts found by the court are substantially these: About August 31, 1878, plaintiffs leased (by written indenture) to one E. B. Burdick a certain piece of land and premises in San Francisco, known as "lot 31 in block 58," for the term of one year from September 1, 1878. Burdick was to pay as rent \$110 per month, payable every six months in advance. Defendants furnished to Burdick \$660, with which Burdick, at the time of the execution of the lease, paid the rent to plaintiffs for the first six months; and on September 3, 1878, Burdick made and delivered to defendants an instrument in writing as follows: "In consideration of fifty dollars received from Michelssen, Brown & Co., I hereby transfer lease from P. Dengler and Frank Breiling of lot 31, block 58, bounded by * * *. Further, said Michelssen, Brown & Co. agree to lease to me the above-mentioned property, or as much of said building as the undersigned requires for the manufacture of artificial butter." But other parties were in possession of the leased premises as tenants of plaintiffs, from whom plaintiffs had received rents to at least September 20, 1878; and plaintiffs failed and refused to deliver possession of said premises to either Burdick or defendants, during said the first 20 days of September, although requested so to do, and failed and refused to put defendants into possession for two months after said September 1st. Whereupon defendants declined to have anything further to do with said premises, and so notified plaintiffs; and within the first six months for which the rent had been paid they reassigned said lease to said Burdick. Neither Burdick nor defendants were ever in possession; and defendants have lost the \$660 which they advanced to Burdick for the first six months' rent. Immediately after the expiration of the first six months, on the — day of March, 1879, plaintiffs commenced an action against Burdick for the amount of rent named in the lease for the next six months; but in January, 1882, they, for some reason, dismissed that action, and commenced this present action against defendants for said amount. And the evidence being substantially conflicting as to the facts found, we would not be justified in disturbing the findings. It is evident that the judgment in favor of defendants is right. Assuming that the instrument above copied was such an assignment of the lease as would establish a privity between plaintiffs and defendants, (which is doubtful, because it was not a transfer of the whole estate,) still, it is clear that defendants discharged themselves from liability from any subsequent laches by assigning over to Burdick. *Johnson v. Sherman*, 15 Cal. 290; 1 Tayl. Landl. & Ten. § 452. Moreover, the failure of plaintiffs to put defendants, or their assignor, in possession of the leased land, justified the defendants in abandoning the premises. *Skaggs v. Emerson*, 50 Cal. 6; *Camarillo v. Fenton*, 49 Cal. 207; and this would be an answer to appellants' contention that the court erred in its refusal to allow plaintiffs to amend their complaint at the trial so as to charge defendants as original lessees, instead of assignees, upon the theory that Burdick procured the lease for them, even if such refusal could be considered as error. Judgment and order denying a new trial affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

76 Cal. 121

PEOPLE *ex rel.* DUNN, Comptroller, v. VAN NESS. (No. 9,707.)

(Supreme Court of California. May 12, 1888.)

1. IMMIGRATION—FEES OF COMMISSIONER.

Pol. Code Cal. § 2955, which provides that the commissioner of immigration shall collect a certain sum for every person examined in reference to leprosy, "which sum, except \$4,000 a year and expenses of office, shall, when required for such purpose, be paid by the commissioner into the state treasury, to be used in the maintenance, when necessary, of such lazarettos or lepers' quarters as shall be constructed under

this law," requires the commissioner to pay into the treasury all the fees collected, less \$4,000 and office expenses, which the state should use for the maintenance of lepers' quarters when required for that purpose.

2. LIMITATION OF ACTIONS—WHEN RUNS AGAINST THE STATE—DEMANDS AGAINST PUBLIC OFFICERS.

Code Civil Proc. Cal. § 338, prescribing three years as the limit within which actions on liabilities created by statute must be brought, applies to actions brought by the state for sums collected and held by a public officer, which the statute required him to pay into the public treasury.

2. SAME—WHEN BEGINS TO RUN—DEMANDS IN FAVOR OF THE STATE AGAINST PUBLIC OFFICERS.

Where a public officer is required by statute to collect and pay into the public treasury certain sums, but no particular time is mentioned in the statute for turning over such sums, the statute of limitations in reference to an action against such officer to compel him to pay over these funds begins to run at the expiration of his term of office, and a subsequent demand for them creates no new cause of action so as to interrupt the statute.

Department 2. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

John C. Roche, (T. C. Van Ness, in pro. per.,) for appellant. Geo. A. Johnson, Atty. Gen., and Laughorne & Miller, for respondent.

McFARLAND, J. The sections of the Political Code from 2949 to 2969 provide in detail for the examination of immigrants coming to this state by sea, to discover if any of them are afflicted with the disease of leprosy. The office of commissioner of immigration is created. Such commissioner is authorized to examine all vessels arriving at any port of the state, and to take charge of all persons found to have said disease, and place them in suitable lazarettos or lepers' quarters, to be provided by the board of supervisors "when-ever necessary for that purpose." That part of said sections which particularly affects the decision of the case at bar is contained in section 2955, and is as follows: "For his services in making such examination and inspection the commissioner of immigration shall demand and collect from the master, owner, or consignee of such vessel the sum of 70 cents in United States gold or silver coin for each and every person so examined or inspected, which sum, except \$4,000 a year and expenses of office, shall, when required for such purpose, be paid by the commissioner into the state treasury, to be used in the maintenance, when necessary, of such lazarettos or lepers' quarters as shall be constructed under this law." Defendant was commissioner of immigration from March 25, 1876, to January 20, 1880. During the early part of his term he paid some fees into the state treasury; but in 1878 he notified the offices of the attorney general, state treasurer, and state comptroller that, upon examination of the law, he had concluded that the fees belonged to him, that those already paid into the state treasury should be refunded to him; and that he would not pay to the state any more of such fees. After that he ceased to pay any of said fees into the state treasury: and nothing more was done about the matter until more than three years after he had gone out of office, when the comptroller made a demand upon him for the fees, and stated an account of his alleged indebtedness therefor, under section 437, Pol. Code, and on April 10, 1883, had this present action, in form an action of debt, instituted to recover them. Defendant answered, denying the indebtedness, and pleading the statute of limitations. The court found that the excess of fees received by defendant during his said term of office, over his salary and office expenses, was \$2,382.87, for which sum, together with statutory damages, judgment was entered. It was not proven or found that any lepers' quarters were ever constructed or maintained, or that any money was "required for such purpose." Appellant contends that, upon any view of the law, the judgment should not have been for a greater amount than \$371.86; but we do not consider it necessary to examine the various points made under that contention.

That part of section 2955, Pol. Code, above quoted, is, no doubt, somewhat cloudy. It would be an absurdity to hold it to mean, either that the commissioner was to have as his own all fees collected before the state required them to construct and maintain lepers' quarters, or that he should retain them indefinitely until the state should so want them, (which might not be for a quarter of a century after the expiration of his term of office,) and that then he or his heirs should pay them all over. The only rational construction is that the intent of the legislature was that the commissioner should pay into the state treasury all the fees collected, less \$4,000 a year and office expenses, which should be used by the state for the maintenance of lepers' quarters when required for that purpose; and this construction we take to have been established by the case of *People v. Bunker*, 70 Cal. 212, 11 Pac. Rep. 703.

Whether or not there was any general law requiring the appellant to pay over the fees collected by him monthly, or at other stated times, he could have been compelled to do so at reasonable periods during his incumbency of the office. At all events, "there can be no doubt that he was legally bound to pay them over upon the expiration of his term of office. In such a case no necessity for any demand existed. The party was in default by his own act, and a debtor" to the state for the amount due. *San Francisco v. Heynemann*, 71 Cal. 153, 11 Pac. Rep. 870. A cause of action therefore existed in favor of the people against appellant at the time of the expiration of his term of office; and this action, having been commenced more than three years thereafter, is barred under subdivision 1, § 338, Code Civil Proc. The demand made by the comptroller did not create any new cause of action. *People v. Melone*, 15 Pac. Rep. 294. The statute of limitations is as applicable to actions like the one at bar, brought by the state, as to those brought by private persons; and public officers and their bondsmen cannot be harassed by suits brought after the statutory periods of limitation have expired. (It may be noted that section 2969, Pol. Code, which now provides that the commissioner shall make payments of fees into the state treasury monthly, was not passed until March, 1883.)

The judgment and order denying a new trial are reversed, and the court below is directed to give judgment for defendant.

We concur: THORNTON, J.; SHARPSTEIN, J.

76 Cal. 156

PEOPLE *ex rel.* BRITTON v. PARK & O. R. Co. *et al.* (No. 9,733.)

(Supreme Court of California. May 16, 1888.)

NUISANCE—INJUNCTION TO RESTRAIN—MAINTAINABLE BY INDIVIDUAL, WHEN.

Where the title to a certain park was vested in the city of San Francisco, for the use and benefit of the public, and the city granted to the defendant a right of way for its track over a remote portion of the park, which did not interfere with the free passage or use thereof in the customary manner, the right of way and track were not such a nuisance as would enable an individual to maintain an action in behalf of the public to abate and enjoin the same.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINER, Judge.

George A. Johnson, Atty. Gen., (Taylor & Haight and P. F. C. Sander, of counsel,) for the People. McAllister & Bergin, for respondents. Wm. Craig, for intervenor.

SEARLS, C. J. This action was brought to abate an alleged nuisance, and to procure an injunction. Defendants had judgment in the court below, from which, and from an order denying a new trial, plaintiff appeals. The action was instituted by the attorney general, in the name of the people of the state of California, on the relation of J. Britton, a citizen of the state, and a resi-

dent and tax-payer of the city and county of San Francisco, against the Park & Ocean Railroad Company and the Pacific Improvement Company. The latter defendant was, at the commencement of the action, engaged for the other defendant in the construction of the railroad sought to be condemned as a nuisance, and abated as such. The city and county of San Francisco was permitted to intervene in the cause, and filed its complaint of intervention, in which it substantially joined with the defendants in its statement of facts and in resisting the relief sought by the plaintiff. Golden Gate park is one of the public parks within the limits of the city and county of San Francisco. It extends from Stanyan street on the east to the Pacific ocean on the west, and is bounded on the south by H street. The railroad in question commences on Stanyan street, runs south along the same a short distance, curves to the west across the south-east corner of the park to H street; thence west along said last-named street to a point near the ocean; thence north across the park; thence across private property to its terminus on the ocean beach, near the Cliff House, a distance in all of four miles. The city of San Francisco, under the act of congress of March 3, 1851, presented its claim for confirmation of its title to the pueblo lands to the commissioners, and in due course of proceedings a decree was entered in the circuit court of the United States for the district of California, confirming the claim of the pueblo. From this decree an appeal was taken to the supreme court of the United States, pending which two acts of congress were passed relinquishing the title of the United States to the lands described in the decree of confirmation, namely, the act of July 1, 1864, (13 U. S. St. at Large, p. 333, § 5,) Act March 8, 1866, (14 U. S. St. at Large, p. 4.) Under the provisions of this last act of congress the city authorities adopted what is known as "Order No. 800," providing for the disposition of the lands not theretofore disposed of, the title to which was confirmed under these several acts of congress; and this order was approved and confirmed by the act of the legislature of March 27, 1868, (St. 1867-68, p. 379.) Under the provisions of this order, No. 800, Golden Gate park was laid out and established. Under an act of the legislature approved April 4, 1870, to provide for the improvement of public parks in the city of San Francisco, a board of park commissioners is provided for specially to take charge of Golden Gate park and other parks in the act designated. Under the provisions of this act, park commissioners were appointed, and from time to time the office has been filled by the respective appointees of the governor, as provided for in the act of the legislature. Thus the title to the property, originally in the pueblo of San Francisco, stands confirmed by the decree of the United States circuit court, the acts of congress above referred to, and the act of the legislature of this state already mentioned. The expense of maintaining and improving the park is borne by the tax-payers of the city and county of San Francisco. The Park & Ocean Railroad Company is a corporation organized under the laws of this state, and the road in question was constructed on the streets mentioned by and with the consent and authority of the board of supervisors of the city and county of San Francisco, and, so far as it runs through the park, by leave, consent, and authority of the park commissioners. The authority from the former is to be found in an order or ordinance, and that from the latter is contained in what purports to be a lease for a term of three years, which is in consideration of an annual rental of \$100, and which binds the company to erect and maintain, at its own expense, and at such points as the commissioners shall designate, waiting-rooms of such form and dimensions as may be specified by the latter; and to do various other things therein mentioned.

The facts are found at considerable length, and negative the theory that the railroad, as constructed, interferes with the use or enjoyment of the park by the public. The complaint prays "that the embankments of earth, road-beds, railroads, and walls of masonry hereinbefore described be, by the

judgment and decree of this honorable court, determined to be nuisances." Section 3479 of the Civil Code defines a nuisance as follows: "Anything which is injurious to the health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance." A purpresture exists where one incloses or makes several to himself that which ought to be common to many. The title to the Golden Gate park, under the several acts cited, is in the city and county of San Francisco. But it is dedicated to the use of the public. The city holds it in trust for the public use. The right of the public is to have the free use and enjoyment of the park as such. Whatever materially interferes with and unlawfully abridges this right of the public it is their right to have corrected. The unlawful construction of a railroad, a statue, or any building upon the park is a purpresture. But every purpresture is not a nuisance. It may, or may not, be a nuisance. In the case of a park, if it unlawfully obstructs the free passage or use, in the customary manner, of such park by the public, it is a nuisance and may be abated as such by a court of equity. If it falls short of this, the remedy is not by the people, who are not injured, but by the holder of the legal title. *People v. Davidson*, 30 Cal. 333. Whether or not an encroachment upon a public or private right is a nuisance, is a question of fact to be determined by a jury, or by a court sitting as such. *People v. Davidson, supra*; *Requena v. Los Angeles*, 45 Cal. 55; *Blanc v. Klumpke*, 29 Cal. 156. As a matter of fact, then, did the railroad of the defendant "unlawfully obstruct the free passage or use, in the customary manner," by the public of the park? The findings upon this point clearly negative this question. They are as follows: "The defendant railroad company operates its said railroad by means of steam dummies; and where the said railroad crosses the roadway which leads from said park to the ocean beach, the same crosses beneath said roadway by means of and through a tunnel or covered way, which is constructed in such a manner as in nowise to impede, obstruct, or affect the free, comfortable, and safe use of said roadway going from said park to said ocean beach. The road-bed of the defendant railroad company, where the same passes through said park, passes through a portion thereof that always has been and is now unused, with the exception of about one-half acre at the south-east corner of said park, which said half-acre was, until the construction of said road, used for the purposes of a temporary nursery, which portion so covered by the road-bed of the defendant the said railroad company, does not exceed an acre and one-half of an acre. That all the lands within said park occupied by said defendant railroad company have always been and now are generally unfrequented by visitors to the park, except at one portion thereof, where the road leading out of said park at the north-west corner thereof goes to the ocean beach; and all of the same, except said excepted portion thereof, always has been and is in a state of nature, that where said railroad traverses the westerly portion of said park, the surface of the park is composed of sands, there being in some places great depressions, and in other places elevations of the same, and the same cannot now be comfortably or freely or easily used or enjoyed by reason of its sandy nature and its natural conformation; and the construction, maintenance, and operation of said railroad, as the same is constructed, operated, and maintained in, upon, and over the same, in nowise affects or obstructs the free and comfortable use and enjoyment, in the customary manner, of said park, or any portion thereof, by all persons frequenting the same. That the people of the state of California have not been and are not prevented from going in safety or comfort from one part of said park to another part thereof." A railroad in a public park, constructed and managed as in the case at bar, may be a nui-

sance, calling for the intervention of the supreme power of the state to conserve the rights of the general public; or it may be a medium of ingress, egress, and transportation essential to the full enjoyment by the people of the privileges and blessings accorded them in the creation and dedication of such park. We deem the findings conclusive of the case, and are of opinion they are supported by the evidence. We say they are conclusive for the reason that, if the erections complained of do not amount to a nuisance, the people cannot maintain this action; and whether or not defendant was authorized to construct and maintain its road does not concern plaintiff. For any and all intrusions upon the park which work no injury to the public, the city and county of San Francisco, as the trustee holding the legal title, can alone maintain an action. It may well be that, if the railroad has been constructed upon its property without authority, it will elect to recover it in ejectment and hold it, as in case of a mere purpresture it may do. At any rate, plaintiff, not being vested with the title, and having no rights in the premises beyond that of seeing to it that the people are not wronged by being deprived of their rights in and to the park as such, is not in a position to obtain relief.

A number of minor points are made by appellant, but which, upon examination, we do not deem sufficient to warrant a reversal. The judgment and order appealed from are affirmed.

We concur: MCKINSTRY, J.; PATERSON, J.

76 Cal. 131

TIVNEN v. MONAHAN. (No. 11,303.)

(Supreme Court of California. May 14, 1888.)

1. FORCIBLE ENTRY AND DETAINER—WHEN CAUSE OF ACTION ACCRUES—DEMAND OF POSSESSION.

A notice to remove from and deliver up possession of a building on the premises in question is not a sufficient demand under Code Civil Proc. § 1160, subd. 2, which provides that every person is guilty of a forcible detainer "who in the night-time, or during the absence of the occupant of any lands, unlawfully enters upon real property, and who, after demand made for the surrender thereof, for the period of five days refuses to surrender the same to such former occupant;" and until such demand no right of action accrues.

2. SAME—FINDINGS—SUFFICIENCY OF EVIDENCE.

In an action for forcible entry, it appearing that plaintiff had purchased a building on leased premises from the tenant without the knowledge of the owner, placing his buggy in the same, and allowing goods of the tenant to remain, and that, after the expiration of the lease, the owner of the premises, in plaintiff's absence, entered upon the same, opened the doors of the building, threw out the goods therein, and threw down a fence erected after the expiration of the lease, a finding "that plaintiff was never in the peaceable possession of the premises," and "that defendant did not, with force or violence or with strong hand, enter upon or break into said building or premises," is justified by the evidence.

3. SAME—TRIAL—EVIDENCE—HARMLESS ERROR.

In an action for forcible entry, it appearing that plaintiff has never made demand for possession, as required by Code Civil Proc. § 1160, subd. 2, and the court having rightly found "that plaintiff was never in the peaceable possession of the premises," and "that defendant did not, with force or violence or with strong hand, enter upon or break into said building or premises," the admission in evidence of a deed of the premises in question from defendant to another, made prior to the commission of the alleged wrong, if error, is harmless, and no ground for reversal of judgment.

Commissioners' decision. Department 2. Appeal from superior court, Sonoma county; J. TEMPLE, Judge.

Action for forcible entry and unlawful detainer, brought by John Tivnen against Patrick Monahan. Judgment for defendant, and plaintiff appeals.

Wm. E. McConnell, for appellant. G. A. Johnson, for respondent.

BELCHER, C. C. Action for forcible entry and detainer. The complaint contains two counts. In the first, it is alleged that the plaintiff was in the actual

possession of a certain building, and that on or about the 16th day of February, 1884, the defendant, with force and violence and with strong hand, broke and entered into the building, and took, and has ever since held, possession thereof. In the second, it is alleged that the plaintiff was, and, for more than five days had been, in the peaceable and actual possession of the lot on which the building before mentioned stood, and that during his temporary absence therefrom the defendant unlawfully entered upon and took possession of the premises, and, after demand made by plaintiff for the surrender thereof, refused, for the period of more than five days, and still refuses, to surrender the same. The case was tried by the court without a jury, and, among other things, the court found that for more than five years the defendant had claimed in good faith to be the owner of the premises in controversy, and for himself, and as the duly-appointed guardian of his minor daughter, to whom he conveyed the property in March, 1882, had exercised acts of dominion over the same; that plaintiff was never in the peaceable possession of the premises; that plaintiff claimed to be the owner of the premises, but had never been in possession or occupation of any portion thereof, except a building which a tenant of defendant erected thereon, and sold to plaintiff in December, 1883, without the knowledge of defendant, and into which plaintiff placed his buggy, and then caused the same to be locked up; that defendant did not, with force or violence or with strong hand, or unlawfully, enter upon or break into the building or premises; that defendant did not at any time receive any written or other notice or demand from plaintiff to deliver up to him the possession of the said premises, but did receive a notice to remove from and deliver up to plaintiff the possession of the said building, which he refused to do; and that plaintiff had sustained no damage. Upon the findings, judgment was entered in favor of the defendant, and the appeal is from that judgment, and an order denying a new trial.

It will be observed that the first cause of action set out in the complaint is for a forcible entry into a house under subdivision 1 of section 1159 of the Code of Civil Procedure, and the second cause of action is for a forcible detainer of real property under subdivision 2 of section 1160 of the same Code. The last-named section provides that every person is guilty of a forcible detainer "(2) who, in the night-time or during the absence of the occupant of any lands, unlawfully enters upon real property, and who, after demand made for the surrender thereof, for the period of five days refuses to surrender the same to such former occupant." The finding that plaintiff did not at any time make demand that defendant surrender up to him possession of the real property involved in the second count is not assailable; but such a demand was necessary in order to constitute a cause of action. We may therefore omit any further consideration of this part of the plaintiff's case.

It is claimed that the findings "that plaintiff was never in the peaceable possession of the premises," and "that defendant did not, with force or violence or with strong hand, enter upon or break into said building or premises," were not justified by the evidence. We think the evidence quite sufficient to justify these findings. At most, the plaintiff's possession was a scrambling one. He had no actual peaceable possession of the building or lot; and the testimony wholly failed to show that defendant broke or entered into the property with force, violence, or strong hands.

In the progress of the trial the defendant offered in evidence a deed from himself to his daughter, dated March 8, 1882, conveying the lot in controversy. The plaintiff objected to the deed being received in evidence, on the ground that it was irrelevant and immaterial. The court overruled the objection, and the plaintiff reserved an exception. If we admit that the ruling was erroneous, the appellant will in no way be aided. In view of the findings, the error was entirely harmless; and the rule is that for harmless and immaterial errors judgments are never reversed. There are no other points

requiring consideration, and we therefore advise that the judgment and order be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

76 Cal. 136

OGLESBY *et al.* v. HOLLISTER *et al.* (No. 12,447.)

(Supreme Court of California. May 14, 1888.)

1. LIMITATION OF ACTIONS—ADVERSE POSSESSION—WHAT CONSTITUTES.

O. and R. purchased a tract of land as tenants in common, O. paying the entire purchase price under an agreement allowing R. to pay his proportion within a stated time, and providing that, out of any sales made, O. should be first reimbursed. No sales were made, and R. never paid his part of the purchase price. Thereafter R. executed to H. a mortgage on the undivided one-half of said tract. Pending foreclosure of the mortgage a tax deed of such undivided one-half was made to O., above named, and recorded the same day. It appearing that O. had remained in open, peaceable, and exclusive possession of the entire tract since receiving the tax deed, a period of nine years, fencing the same, paying taxes, receiving rents, and accounting to no one therefor; that the tract was popularly known as O.'s blocks; and that he had repeatedly entertained propositions to purchase, and attempted to sell, the entire tract,—*held*, that such facts were notice that O. was in possession, claiming title to the whole, and that, although the tax deed was void on its face, the claim of H. was barred.¹

2. SAME—ADVERSE POSSESSION—EVIDENCE.

Though a tax deed void on its face does not affect the title, and its record gives no notice to any one; receiving such deed is an act which may be considered in determining whether one taking thereunder meant to claim adversely.

3. TENANCY IN COMMON AND JOINT TENANCY—OBLIGATION OF TENANT IN COMMON TO PAY TAXES ASSESSED TO CO-TENANT.

A tenant in common who has paid the entire purchase price, and is in possession, collecting the rents and profits and not accounting therefor, is under no obligations to pay the taxes assessed to his co-tenant.

In bank. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

This is an action to quiet title brought by D. F. Oglesby and F. W. Oglesby, assignees of the heirs at law of A. A. Oglesby, against Hannah A. Hollister and others, executors and heirs at law of W. W. Hollister. Judgment for plaintiffs, and defendants appeal.

E. B. Hall, J. W. Taggart, and R. B. Canfield, for appellants.

The possession of one co-tenant is presumed to be the possession of all until actual ouster; and the *onus* of proving such ouster is on the party alleging it. *Ord v. De la Guerra*, 18 Cal. 75; *Müller v. Myles*, 46 Cal. 539; *Packard v. Johnson*, 57 Cal. 180; *Trenouth v. Gilbert*, 63 Cal. 407; *Mauldin v. Cox*, 67 Cal. 387, 7 Pac. Rep. 804; *Wilson v. Atkinson*, 68 Cal. 590, 10 Pac. Rep. 203. In an alleged ouster of his co-tenant, the acts and declarations of a party in possession are to be construed more strongly against him than where there is no priority of title. *Freem. Co-tenancy*, §§ 221–229; *Ord v. De la Guerra*, 18 Cal. 75; 6 *Wait, Act. & Def.* 458. A conveyance alone, without possession taken under it, can never amount to an ouster. *Freem. Co-tenancy*, § 226. The so-called tax deed, being void on its face, constituted no color of title, and its admission was error. *Sedg. & W. Tr. Title, Land*, § 762; *Bernal v. Gleim*, 33 Cal. 676; *Packard v. Moss*, 68 Cal. 126, 8 Pac. Rep. 818; *Mulcahy v. Florer*, 8 N. W. Rep. 166.

¹ As to what constitutes adverse possession, see *McLaughlin v. Del Re*, (Cal.) 16 Pac. Rep. 881, and note.

W. C. Stratton, for respondents.

Color of title is any writing which purports to convey title to land by apt words of transfer clearly defining the extent of the same. *Wood*, Lim. § 259; *Hall v. Law*, 102 U. S. 461. Color of title, even under a void and worthless deed, is evidence of adverse possession against all the world. *Tyler*, Ej. pp. 870-874; *Tryon v. Huntoon*, 67 Cal. 325, 7 Pac. Rep. 741; *Swift v. Mulkey*, 12 Pac. Rep. 76; *Wilson v. Atkinson*, 68 Cal. 590, 10 Pac. Rep. 203; *Lake County v. Mining Co.*, 66 Cal. 17, 4 Pac. Rep. 876; *Blackw. Tax Titles*, *290, and cases cited.

McKINSTRY, J. An action to quiet the title to block of land No. 56½ in the city of Santa Barbara. It was commenced February 16, 1887. On the 8th day of April, 1873, A. A. Oglesby and W. F. Russell became the owners at law, as tenants in common, of blocks Nos. 56½ and 70½ by virtue of a deed of conveyance thereof executed by Frissius and Hernster. Russell paid no part of the purchase money, and on the same day he and A. A. Oglesby entered into the agreement and executed the instrument following: "Whereas, A. A. Oglesby and W. F. Russell have purchased blocks Nos. 56½ and 70½ in the town of Santa Barbara for their joint and equal benefit, and said A. A. Oglesby furnished all the purchase money: now it is hereby understood and agreed that they, each of them, withhold the property from sale for the period of one year from date, unless sooner sold by mutual agreement; and out of any sale the said Oglesby shall first receive \$1,600 in United States gold coin, with interest thereon at the rate of 1 per cent. per month, and then the balance of property be equally divided between them; but, notwithstanding, the said W. F. Russell may, at any time within the year, afterwards pay his share of the purchase money, with the interest thereon, without agreeing to a sale." No part of W. F. Russell's share of the purchase money has ever been paid, nor has any portion of the property been sold or conveyed except as herein stated. Prior to the conveyance from W. F. to D. H. Russell, hereinafter mentioned, W. F. Russell mortgaged the undivided one-half of the lands described to W. W. Hollister. On the 20th of September, 1875, W. F. Russell conveyed his right, title and interest in the lands to D. H. Russell. W. F. Russell died March 26, 1877, and D. H. Russell, named as grantee in the deed aforesaid, was appointed administrator of his estate. On the 13th day of July, 1877, W. W. Hollister commenced an action to foreclose his mortgage, wherein D. H. Russell, as owner of the equity of redemption, and D. H. Russell, as administrator, were made parties defendant. While said action was pending, and on the 13th day of May, 1878, the tax collector of Santa Barbara county made and delivered to A. A. Oglesby a tax deed purporting to convey an undivided one-half of said block of land, No. 56½, which deed was acknowledged and recorded on the same day. In the suit brought by W. W. Hollister, a decree foreclosing his mortgage and the rights of defendant in the mortgaged premises was entered, and thereunder the premises mortgaged were duly sold. Said Hollister became the purchaser at such sale, and, no redemption being had, received a sheriff's deed, conveying all the interest of the estate and heirs of W. F. Russell, and the interest of D. H. Russell, in the mortgaged premises; which deed was made, executed, and recorded March 28, 1879. A. A. Oglesby died July 14, 1884; W. W. Hollister died August 8, 1886. The plaintiffs acquired the title of which A. A. Oglesby died seized in the two blocks of land, by deeds from all his heirs, made and recorded January 24, 1887. The defendants are the heirs of W. W. Hollister and the executors of his estate.

Plaintiffs claim that the ancestor of their grantors disseized his co-tenant of block 56½, and remained in adverse possession of the same, asserting title to the whole thereof, until the date of his death, and that their grantors and they have been in adverse possession since that date. They aver that D. H. Russell was ousted from the possession on the 13th of May, 1878, the date of

the tax deed. The court below found: "(6) That when said tax deed was issued to said A. A. Oglesby, and recorded, he ousted said D. H. Russell and W. W. Hollister and the whole world from the said real property, and thereafter was in the exclusive possession of the same under a claim of title to the whole thereof exclusive of other right; and, ever since said tax deed was issued to said Oglesby, the whole of said block has been assessed to him and his successors, and he and they have claimed title to the whole of said block No. 56 $\frac{1}{2}$, and held possession adverse to said D. H. Russell and W. W. Hollister and to the defendants and the whole world; and, ever since the 13th day of May, 1878, and for more than five years before the commencement of this action, said A. A. Oglesby and his successors and the plaintiffs have been, and plaintiffs now are, in the actual, open, notorious, peaceable, quiet, and exclusive possession of the whole of said block No. 56 $\frac{1}{2}$; and during all of that time they have paid all assessments and taxes of every kind which have been levied, assessed, or taxed against said block or any part thereof or interest therein. (7) That said W. W. Hollister, at the time said mortgage was made to him by said W. F. Russell, had notice, by reason of the records in the office of the county recorder of the county of Santa Barbara, of the equities of said W. F. Russell and said A. A. Oglesby."

Appellants contend the findings are not sustained by the evidence. If there is evidence to sustain the finding that A. A. Oglesby and his successors were in adverse possession of lot 56 $\frac{1}{2}$ for more than five years prior to the commencement of this action, such adverse possession conclusively establishes a previous ouster the precise date whereof is immaterial. It is said by respondent that the record of the tax deed gave constructive notice to W. W. Hollister of its contents and of the fact that A. A. Oglesby was claiming title thereunder to the undivided half of the block No. 56 $\frac{1}{2}$, which had belonged to D. H. Russell. But the tax deed was void on its face, and did not affect the title. Civil Code, § 1158. Its registration gave no notice to any person. *Sawyer v. Adams*, 8 Vt. 172; *Mesick v. Sunderland*, 6 Cal. 315. Nevertheless, the attempted assessment under which the sale for taxes was made was an attempted assessment of D. H. Russell's undivided one-half interest in block 56 $\frac{1}{2}$. No duty was imposed upon A. A. Oglesby to pay the taxes on that half. We may assume that a tax deed, void on its face, constitutes no color of title in such sense that it extends an actual possession of part of the land described in it to the limits of such description. Here A. A. Oglesby had and continued in the actual possession of the whole of block 56 $\frac{1}{2}$; whether for himself alone, or for himself and D. H. Russell, is a different question. His attempted purchase of his co-tenant's title, and the taking of a deed purporting to convey the same were acts indicating his purpose to claim the whole title adversely to his co-tenant. *Pillow v. Roberts*, 13 How. 472, 477. One tenant in common can disseize another. But, *prima facie*, the possession of one is also that of the other. An ouster or disseizin is not to be presumed from the mere fact of sole possession; but it may be proved by such possession, accompanied by a notorious claim of exclusive right. *Ricard v. Williams*, 7 Wheat. 121. The difference between that and other cases is that acts which, if done by a stranger, would *per se* be a disseizin, are, in cases of tenancies in common, susceptible of explanation consistently with the real title. Acts of ownership are not, in tenancies in common, necessarily acts of disseizin. It depends upon the intent with which they are done, and their notoriety. *Prescott v. Nevers*, 4 Mason, 326. Where a possession commences with the consent of the owner,—which is the presumption when one tenant in common is in sole possession,—there can be no disseizin or adverse possession until there has been a disclaimer by the assertion of an adverse title, and notice thereof to the owner, either direct or to be inferred from notorious acts. *Wood, Lim.* 507. Nevertheless, the real question, was there an ouster and consequent disseizin of the co-tenant? depends upon the circumstances of each case. It is a ques-

tion of fact to be submitted to the jury wherever there is any substantial evidence of an ouster. *Id.* 507, 509, 510. It has very frequently been held that the exclusive possession by one tenant in common for a great number of years, without any accounting to or recognition of right in his fellow-commoner, or any evidence explaining why the co-tenant neglected to assert his right, is evidence from which the jury may infer actual ouster and adverse possession. *Lefavour v. Homan*, 3 Allen, 355; *Freem. Co-tenancy*, § 442, and cases there cited. It may be conceded, however, for the purposes of this decision, that in this state the fact of exclusive possession or pernaney of the profits by one tenant, however long continued, and although there has been no assertion of right by the co-tenant, and there is no explanation of his silence, is not of itself sufficient proof of ouster or disseizin. *Miller v. Myles*, 46 Cal. 535. Yet the fact is not immaterial, and if possession has been accompanied by acts indicating an adverse claim of title of so notorious a character as to satisfy a jury that a person, ordinarily attentive to his interests, in the position of the co-tenant, would have notice of the adverse claim, a finding of adverse possession will be sustained. While the exclusive and uninterrupted possession and reception of the profits for a long period may not be sufficient evidence of adverse holding, it is some evidence, because it accords with ordinary experience that men do not sleep on their rights, and property-owners usually manifest some regard for their property rights. Nor should the circumstance that neither D. H. Russell nor his grantor or successor ever paid or offered to pay the purchase money for one-half of the blocks be entirely ignored in considering the question of adverse possession. There enters into the notion of a title acquired by adverse possession the element of acquiescence or abandonment of his title by the party who fails to assert it for the statutory period. The jury may have believed that D. H. Russell and his successors intended to abandon a legal right to possession which, upon every equitable consideration, ought not to have been insisted upon; that they did not intend to assert a title to one-half of the land after a failure to pay Oglesby for it within the time limited by the agreement between him and W. F. Russell. The intent of A. A. Oglesby and his successors to claim adversely being shown, would not less evidence suffice to establish notice of such adverse intent to persons in the position of defendants and their predecessors than is necessary in ordinary cases of tenancies in common? Even if W. F. Russell obligated himself to pay to Oglesby one-half the purchase price, it was never paid; Oglesby did not attempt to enforce its payment by legal process. Under such circumstances Russell and his successors would naturally have regarded acts of ownership by Oglesby, otherwise susceptible of explanation as in accord with the relation of tenants in common, as evidence that Oglesby intended to claim the whole title against the tenant in common who had paid nothing. At the trial below there was evidence that A. A. Oglesby was, as found by the court, "in the open, notorious, peaceable, quiet, and exclusive possession of the whole of block 56½." There was evidence that in the year 1874 or 1875 he fenced each of the blocks separately; that from 1882 the block 56½ was exclusively in the occupation of said Oglesby and his tenants up to his death, he receiving the whole of the rents, accounting to no person for any part thereof, and not being called on to account therefor; evidence that he had repeatedly entertained propositions for the purchase of the whole of the land, and attempted to sell the whole, as owner of the whole; evidence that the blocks were generally known as "Oglesby's blocks," and that, since his attempted purchase of the co-tenants' interest at the tax sale, he and his successors have paid all taxes and public charges assessed against block 56½. Taking the evidence as a whole, we cannot say that the court below was not justified in deciding that the acts and conduct of Oglesby and his successors with respect to the property were of so open and notorious a character as that their co-tenants should be held to have had notice that he and his successors were in possession claim-

ing the entire title. But W. F. Russell did not absolutely obligate himself to pay one-half of the purchase money. In a certain event he had the privilege to do so within a definite period, and, from the nature of the transaction, time was of the essence of the contract. Russell risked nothing by the arrangement. If the price of the blocks went up, and he and Oglesby agreed upon sales during the first year, he would get one-half of the excess beyond the price paid by Oglesby, or, if he did not agree, he could at his option secure the equitable title by paying one-half of such price. The written contract contains a declaration of an express trust on his part. He received the legal title to one-half in trust that he would convey in case of sales by mutual assent, as therein provided for, or that, within a year "afterwards," he would, at his option, take the beneficial interest himself on paying to Oglesby one-half of the purchase price advanced by him. Civil Code, § 857. As the legal title was already in him, there would be no transfer of it in case he paid the money; but, upon such payment, he would become vested with the entire ownership, legal and equitable. As the lands were not sold to third persons, and Russell did not purchase himself, the purposes of the trust failed. At the most there remained in Russell and his successors the bare legal title to an undivided one-half of block 56½, Oglesby, who was entitled to the entire beneficial use of the property, being in possession. This right, which would constitute a defense to an action of ejectment by defendants, and the possession under it, the successors of the latter had the right to have quieted in the present action. Even if it could be held that time was not of the essence of the contract of 1873, the result would be the same, since the money which W. F. Russell had the option to pay was not paid when this action was commenced—14 years after the contract was made. After this great lapse of time defendants could not secure the equitable rights of plaintiffs by paying the money. And they do not offer to pay it. Judgment and order affirmed.

We concur: SEARLS, C. J.; PATERSON, J.; THORNTON, J.; MCFARLAND, J.; SHARPSTEIN, J.

77 Cal. 646

LATHAM *v.* BLAKE *et al.* (No. 9,912.)

(Supreme Court of California. May 14, 1888.)

EXECUTION—PROPERTY SUBJECT TO—JUDGMENTS.

Under Code Civil Proc. Cal. § 542, subd. 5, providing that debts and property incapable of manual delivery may be attached, by leaving with the person owing the debt a copy of the writ, and a notice that the property is attached; and section 688, providing that such property may be taken on execution the same as upon writs of attachment,—a judgment, being the mere evidence of debt, and not the debt itself, cannot be levied on as such, and sold under execution.

Department 1. Appeal from superior court, city and county of San Francisco; J. M. ALLEN, Judge.

Action on a note by William B. Latham, Jr., against P. H. Blake and others. Judgment was rendered for the plaintiff. Subsequently one Page recovered a judgment against the plaintiff, Latham, and levied upon and sold the latter's judgment against Blake. The purchaser at such sale was one George W. Osborn. After Osborn had made his purchase, the court directed a sale to issue in favor of Thomas B. Rowe, assignee of the plaintiff, Latham, to satisfy the judgment of Latham against Blake and others. From the court's order of sale, Osborn, the purchaser of the judgment, appeals.

W. H. Fifield, for appellant. Lewis & Dibble and Hanes & Mitchell, for respondent.

SEARLS, C. J. This is an appeal from an order of the court below, directing an order of sale to issue, in favor of Thomas B. Rowe, assignee of plaintiff, upon a decree rendered in said court on December 31, 1879, in favor of

William B. Latham, Jr., plaintiff, against P. H. Blake *et al.*, defendants. The decree was for the payment of a large sum of money, which was adjudged to be due from Blake to Latham, and which was declared to be a lien upon certain premises described in said decree. It was further decreed therein that the premises be sold to satisfy said indebtedness, and that the defendants be barred and foreclosed of all right, estate, and interest in the premises. After the rendition of said decree, to-wit, on May 6, 1881, one E. A. S. Page recovered, in another department of said court, a judgment for money against the said William B. Latham, Jr. An execution was issued upon said last-mentioned judgment, which was afterwards returned partly satisfied. An *alias* execution was issued March 8, 1882, for the unpaid balance on said judgment. This *alias* execution was, on March 9, 1882, levied upon the before-mentioned judgment and decree in favor of Latham against Blake and others, by delivering to and leaving with the said Blake personally a copy of the writ, together with a notice in writing "that all moneys, goods, credits, effects, debts due or owing, or any other personal property in possession or under control of" said Blake, belonging to the defendants in the writ, or either of them, were attached, and not to pay over or to transfer the same to any one but the sheriff. Pursuant to notice duly given, the said judgment and decree was sold at public auction on March 15, 1882, to George W. Osborn, for the sum of \$603.05, and the execution in the case of Page against Latham was returned satisfied. A certificate of sale was issued to Osborn, March 16, 1882. On May 25, 1882, on motion of said Osborn's attorney, an order was granted by the judge of the department in which the said judgment and decree in favor of Latham against Blake and others was recovered, reciting that it appeared to the court that the said Osborn had "succeeded to the ownership of the judgment" in the cause, and directing that an order of sale be issued by the clerk for the use of said Osborn. An order of sale was thereupon issued May 26, 1882, directing a sale of the premises described in said decree to satisfy the adjudged indebtedness. The premises were sold, under said order, June 22, 1882, and were purchased in parcels by the said Osborn for the aggregate sum of \$1,630. The sheriff issued a certificate of sale to the purchaser in due form; and afterwards, on December 28, 1882, a sheriff's deed was executed, which was recorded September 14, 1883. Latham executed an assignment, in due form, of the judgment and decree against Blake, to Thomas B. Rowe, on October 13, 1884. On November 11, 1884, Rowe filed in the superior court a petition entitled in the action of *Latham v. Blake*, setting forth in brief the facts as to the levy and sale of the judgment therein under the execution in *Page v. Latham*, alleging that the order of sale was issued without "authority from this plaintiff or any one authorized by him;" that he was the absolute owner of the judgment; that the order of sale was recited therein to have been made for the benefit of Osborn, and at his instance; and that the said Latham on October 13, 1884, "assigned and transferred all his right, title, and interest in and to the said decree to the petitioner, who was averred to be the lawful owner thereof;" and praying that the proceedings taken by said Osborn under said decree be vacated and set aside, and that an order of sale issue in favor of the petitioner. Notice was served upon Osborn that a motion would be made for the issuance of such order of sale to Rowe, and to set aside the sale and return made upon Osborn's application, upon the ground that such prior order was unauthorized by the judgment creditor or his assignee, or any person interested in the decree, and was issued and executed against the objection of the judgment creditor, and that Osborn had no interest in the decree. No notice was served on Blake, or any other of the defendants in *Latham v. Blake*, nor did any of them appear in the proceedings. The application was heard on the records, minutes, and papers in *Latham v. Blake* and *Page v. Latham*, showing the above-recited facts, and upon certain affidavits of Osborn and Latham. Osborn's first affidavit set forth his purchase of the judgment in *Latham v.*

Blake under execution in *Page v. Latham*, and alleged that the price paid was a fair price therefor, on account of certain alleged supposed defects; that, at the sale under the order of sale issued upon said judgment and decree, Latham was present, and asserted his right to the same; that the affiant was compelled to buy in the property; that he had received his certificate of sale and deed with the knowledge of Latham, who had never offered to repay to the affiant any part of the sum paid by him for said judgment and decree, and that under his deed the affiant entered into possession and made certain improvements with Latham's knowledge, and had ever since remained in possession, and paid the taxes on the land. Latham, in his affidavit, averred, "on information and belief," that in purchasing said judgment and decree, and in his subsequent proceedings, Osborn was acting at the instigation and for the benefit of Blake, and was using his money, and that the price paid for the judgment and decree was not a fair price, but that the same was fully worth \$5,000. In a second affidavit, Osborn denied that he was acting, in these transactions, at the instigation or for the benefit of Blake, or with his money, but averred that he was acting for himself, and was using his own money. Upon the hearing of Rowe's application, the court simply made an order that "an order of sale issue herein in favor of Thomas B. Rowe," saying nothing of the previous order of sale, and sale thereunder. It is from this order that the present appeal was taken.

The important question involved in the appeal is this: Did the sale of the judgment and decree against Blake to Osborn, under the execution against Latham, the judgment creditor, operate as an assignment so as to vest in Osborn such right or title to the judgment as to entitle him to enforce it? If not, the order of the court below should be affirmed; for, although the order under which the execution issued in favor of Osborn recited that he "had succeeded to the ownership of the judgment" in *Latham v. Blake*, it is apparent from the record that he only became such owner by virtue of his purchase thereof on an execution sale against Latham. He counted upon his ownership of the judgment, thus acquired, in opposing the motion and order from which he appeals. We need not pause to give expression to such views as we might entertain were the question an open one. The former decisions of this court have eliminated from it so many of the considerations which address themselves to the mind that the whole subject is embraced within very narrow limits. In *McBride v. Fallon*, 65 Cal. 301, 4 Pac. Rep. 17, it was held, in substance, (1) that a judgment is but the evidence of a debt; (2) that it is the debt itself, and not the judgment, which may be taken under a writ of attachment or upon execution; (3) that a judgment cannot be levied upon as such, and sold under execution. The decision does not expressly declare that the debt, of which the judgment is the evidence, may not be reached by execution, but plainly indicates that, if it can be so reached, it is only by the modes provided for reaching debts and credits, and other property not capable of manual delivery, which may be attached on execution in like manner as upon writs of attachment. Code Civil Proc. § 688. This character of property can only be attached as provided by subdivision 5, § 542, Code Civil Proc.; that is, by leaving with the person owing such debts, etc., a copy of the writ, and a notice that the debts owing by him to the defendant are attached in pursuance of such writ.

The court further holds that, the Code having thus provided a mode of procedure in such cases, it is exclusive. We suppose this last conclusion is based upon the theory that as the statute gives a right unknown to the common law, and prescribes the method for its enforcement, no other can be followed. In the later case of *Dore v. Dougherty*, 72 Cal. 232, 13 Pac. Rep. 621, in which the levy upon the judgment was made precisely as in the present case, and the judgment was sold there as here, the court held that the judgment was not, under the statute, subject to levy and sale. We need not repeat the rea-

soning of the court in this last case. As we understand them, the two cases cited cover and are conclusive of the subject of the contention in the case at bar. Whatever right Osborn obtained by virtue of his garnishment of the debt due from Blake to Latham, he may perhaps enforce by the appropriate method. To sell the judgment was not the method under our statute, as interpreted by this court. The order appealed from is affirmed.

We concur: MCKINSTRY, J.; PATERSON, J.

76 Cal. 134

BLAIR *et al.* v. LUNING. (No. 11,154.)

(Supreme Court of California. May 14, 1888.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—VALIDITY OF ASSESSMENT.

Under act Cal. April 1, 1872, § 9, providing that after a contractor has fulfilled his contract the street superintendent shall make an assessment to cover the amount due on work performed, an assessment by a street superintendent, which was partly for work done and partly for work on a sidewalk which had never been performed is not void, as in excess of the superintendent's power.

Department 2. Appeal from superior court, city and county of San Francisco; F. M. CLOUGH, Judge.

Action by M. Blair and William W. Chase, partners, against Nicholas Luning to foreclose an alleged lien for street work performed. Defendant claimed that the assessment for the work, by reason of act Cal. April 1, 1872, § 9, providing that after a contractor has fulfilled his contract the street superintendent shall make an assessment to cover the amount due on work performed, was void, in that it included in its terms work upon a sidewalk which had never been performed. Judgment for plaintiffs, and defendant appeals.

Langhorne & Miller, for appellant. *Chas. H. Parker*, for respondents.

McFARLAND, J. This is an action to foreclose a lien for certain street work in the city and county of San Francisco, viz.: "Reconstructing the sidewalks on Hyde street, from Broadway to Pacific street, and for planking the roadway thereof." Judgment went for plaintiffs, and defendant appeals.

The only point made by appellant is that the assessment was absolutely void because no work was done on the sidewalks. It appears from the findings that the specifications in the sealed proposals required certain work to be done on the sidewalks "where not already constructed;" but it turned out that all the sidewalks had already been constructed, and therefore no work was done on them. The authorities cited by appellant are mostly cases where the board of supervisors or street superintendent failed to give the notices, or to comply with other conditions precedent, which were necessary to confer the power to make contracts and assessments for street work. In these and some other cases cited the objections went to the jurisdiction, and the assessments were held to be void. But in the case at bar the thing complained of (if, indeed, it furnished any just cause of complaint at all) was a mere error, and the remedy was an appeal to the board of supervisors under section 12 of the act of April 1, 1872, (St. 1871-72, p. 815.) The assessment was not void for want of jurisdiction. *Himmelmänn v. Hoadley*, 44 Cal. 276, and cases there cited; *Hewes v. Reis*, 40 Cal. 264; *Boyle v. Hitchcock*, 66 Cal. 129, 4 Pac. Rep. 1143. Judgment affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

76 Cal. 153

THOMPSON *et al.* v. WILLIAMS *et al.* (No. 9,980.)

(Supreme Court of California. May 15, 1888.)

CORPORATIONS—SPECIAL MEETINGS OF DIRECTORS—NOTICE.

Civil Code Cal. § 320, relating to corporations, provides that "when no provision is made in the by-laws for regular meetings of the directors, and the mode of call-

ing special meetings, all meetings must be called by special notice in writing, to be given to each director by the secretary, on the order of the president, or, if there be none, on the order of two directors." The by-laws of a corporation contained a provision for regular meetings, and at such a meeting, certain directors being absent, the board adjourned until the next day without fixing an hour, nor was notice of the adjourned meeting given the absent directors. *Held*, that the adjourned meeting was a special meeting, and that its action in levying an assessment was null for want of notice to all the directors.

Department 2. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Action by I. H. Thompson, G. G. Allen, Sarah Giles, E. B. Pond, and Fanny Hutchinson, against Frank Williams, Frank P. Stevens, A. G. Bell, and People's Ice Company, to restrain defendants from selling plaintiffs' shares in said corporation, under a levy of assessment alleged to be illegal. The People's Ice Company is a California corporation, and the plaintiff Allen, together with one J. S. Thompson, and defendants Williams, Stevens, and Bell, constituted its board of directors. Its by-laws provided, among other things, that regular meetings of the directors (of whom there were five) should be held on the second Monday of October each year, without notice; that on and for a long time previous to the second Monday (8th) of October, 1883, the office of the company was at No. 414 O'Farrell street, in San Francisco. On October 8, 1883, three of the directors (the defendants) met at the office of the company and resolved the removal of the company's office from 414 O'Farrell street to 314 Mission street, in said city, and adjourned the meeting to October 9, 1883, at that place. They then met at that place, and levied the assessment in question. The injunction was issued as prayed for, from which the defendants appeal. Civil Code Cal. § 320, relating to corporations, provides that "when no provision is made in the by-laws for regular meetings of the directors and the mode of calling special meetings, all meetings must be called by special notice in writing, to be given to each director by the secretary, on the order of the president, or, if there be none, on the order of two directors."

Estee & Wilson, for appellants. *Cowdery & McCutchen*, for respondents.

THORNTON, J. Each director must have special notice of the regular meetings of the board of directors of the corporation defendant, unless provision is made in the by-laws for such meetings. Civil Code, § 320. Conceding that the provision in the by-laws was sufficient to give notice to the director of the regular meeting of the 8th of October at 414 O'Farrell street, and that the removal of the office, resolved at that meeting, to 314 Mission street, was valid, still, as it does not appear that the hour of the day on the 9th of October on which the adjourned meeting was to be held on the last-named day was fixed at the meeting of the 8th, and no notice of such adjourned meeting was given the directors Allen and Thompson, who were not at the meeting on the 8th, we must hold the assessment levied at the meeting on the 9th was levied substantially without notice, and without authority. To hold that the adjourned meeting of the 9th, the hour of which was not fixed or declared by the meeting of the 8th of October, was a part of the meeting of the board of the 8th, and therefore no further notice of it was required, would be to sanction an evasion of the law in regard to notice to the directors of the meeting of the board. An inspection of the minutes of the meeting of the 8th would give no information to the directors not attending that meeting of the time to which that meeting had been adjourned. In fact, it does not appear that the board as a board ever did fix the hour on the 9th at which the adjourned meeting was to be held; and, as it does not so appear, we must, in construing the facts as found, hold that the board, on the 8th, did not fix the hour at all. Under these circumstances we cannot hold that the meeting on the 9th, at which the assessment was levied, was anything more than a special meeting, of the calling of which the non-attending directors, Allen and Thompson, had

no notice or knowledge of any kind. The assessment was therefore levied without authority and was a nullity. See *Manufacturing Co. v. Vassault*, 50 Cal. 534. The judgment must be affirmed. So ordered.

We concur: McFARLAND, J.; SHARPSTEIN, J.

76 Cal. 145

MILLER v. CALIFORNIA INS. CO. (No. 11,280.)

(Supreme Court of California. May 15, 1888.)

1. MARINE INSURANCE—PERILS OF THE SEA—EXPLOSION OF BOILER.

Where a vessel becomes unmanageable by reason of the explosion of her boiler, and within a few minutes thereafter sinks, such loss is not within the meaning of "perils of the sea" as defined in Civil Code Cal. § 2199, which declares that "perils of the sea are from storms and waves; rocks, shoals, and rapids; other obstacles, though of human origin; changes of climate; the confinement necessary at sea; animals peculiar to the sea; and all other dangers peculiar to the sea;" nor as understood in the law of marine insurance generally.

2. SAME—ACTIONS ON POLICIES—PLEADING—COMPLAINT.

In an action on a marine insurance policy, which covered "all other losses," not excluded by the policy to which insurers are liable by the rules and customs of insurance in San Francisco, the complaint failed to allege that by such custom of San Francisco insurers were liable for losses caused as was the loss sued for. *Held*, that the plaintiff cannot, on that clause in the policy, recover.

Department 1. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Action on a policy of insurance, brought by M. J. Miller against the California Insurance Company, for the loss of the steamer Pilot. A general demurrer was entered and sustained, and judgment rendered for defendant, from which plaintiff appealed.

A. E. Bolton and Barham, Halstead & Bolton, for appellant. *E. W. McGraw*, for respondent.

PATERSON, J. 1. This is an action brought on a policy of marine insurance issued by the respondent on the steamer Pilot. The risks insured against were as follows: "Touching the adventures and perils which this insurance company is content to bear and take upon itself in this policy, they are of seas, fires, pirates, assailing thieves, jettison, barratry of the master or mariners, (unless the assured be owner or part owner of the vessel,) embezzlement and illicit trade excepted in all cases, and all other losses and misfortunes that shall come to the hurt, damage, or detriment of the said vessel, or any part thereof, to which insurers are liable by the rules and customs of insurance in San Francisco, excepting such losses and misfortunes as are excluded by this policy. * * * It is also agreed that in case of insurance on a steamer this company is not liable for any injury, derangement, or breakage of the machinery or bursting of the boilers unless occasioned by stranding." The complaint alleges that on May 25, 1883, "the boiler on said vessel exploded, and said vessel became then and there unmanageable, and swung around on the water, and within a few minutes thereafter sank and became a total wreck, and was wholly and totally lost to the owner thereof, and was abandoned by the owner to defendant. There is no allegation in the complaint that under the customs of insurance in San Francisco insurers are liable for explosions of boilers, or damages resulting therefrom. A demurrer to the complaint was filed on the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was sustained, and, plaintiff declining to amend, judgment was entered for defendant.

Passing over the question as to the sufficiency of the allegation in the complaint to show that the destruction of the vessel was caused by the bursting of the boiler, or by any other means admitted to be such as would make the company liable, and conceding that the complaint shows the loss to have oc-

curring by reason of the bursting of the boiler without any fault of the plaintiff, these inquiries remain: *First*, is the explosion of the boiler a peril of the sea within the first clause above quoted? and, *second*, if it be a peril of the sea, are not the damages resulting therefrom excepted under the special provision of the policy which is quoted above, and which relates to the bursting of the boilers? Perils of the sea are defined by our Civil Code to be "storms and waves; rocks, shoals, and rapids; other obstacles, though of human origin; changes of climate; the confinement necessary at sea; animals peculiar to the sea; and all other dangers peculiar to the sea." Civil Code, § 2199. The bursting of a boiler is not within any of the first six causes named. Is it a danger peculiar to the sea? Perils of the sea have been defined to be "all perils, losses, and misfortunes of a marine character, or of a character incident to a ship as such." *T. & M. I. Co. v. H. F. & Co.*, House of Lords, July 14, 1887. In that case it was said: "The damage to the donkey-engine was not through its being in a ship at sea. The same thing would have happened had the boiler and engines been on land, if the same mismanagement had taken place. The sea, waves, and wind had nothing to do with it. * * * It is, I think, impossible to say that this is damage occasioned by a cause similar to perils of the sea on any interpretation which has ever been applied to that term. It will be observed that Lord ELLENBOROUGH limits the operation of the clause to marine damage. By this I do not understand him to mean only damage which has been caused by the sea, but damage of a character to which a marine adventure is subject. Such an adventure has its own perils, to which either it is exclusively subject, or which possess, in relation to it, a special or peculiar character. To secure an indemnity against these is the purpose and object of a policy of marine insurance. * * * But the explosion of the boiler on board the Panama had no marine character at all. It might have happened in precisely the same way, and done the same kind of damage, if a similar engine had been in use for the purpose of moving manufacturing machinery on shore." These views seem to express very clearly the proper meaning of the seventh clause of section 2199, *supra*. In support of the contention that an explosion of the boiler is a peril embraced within the list of perils insured against by this policy, appellant cites *Administrators of Perrin v. Insurance Co.*, 11 Ohio, 169, and *Insurance Co. v. Glasgow*, 9 Mo. 413. In the Ohio case the risks insured against were described in the policy as follows: "Of the seas, rivers, fires, enemies, pirates of the rivers, assailing thieves, and all other losses and misfortunes which shall come to the damage of said steam-boat according to the true intent and meaning of said policy." It was there held that the loss occasioned by the bursting of a boiler was a loss within the policy, but we do not understand the court to have held in that case that such a loss was a loss by peril of the seas. In *Telegraph Co. v. Insurance Co.*, 6 Q. B. Div. 57, the Ohio case was quoted approvingly, yet it was there held that the bursting of a boiler was a peril not within the general term "perils of the sea." In *Insurance Co. v. Glasgow*, *supra*, it seems that the policy was the same as in the Ohio case. In all the cases cited it was held simply that the loss was one which came within the insurance clause providing against "all other perils, losses," etc. In the case before us the general clause is, "and all other losses and misfortunes that shall come to the hurt, damage, or detriment of the said vessel, or any part thereof, to which insurers are liable by the rules and customs of insurance in San Francisco, excepting such losses and misfortunes as are excluded by this policy." Our conclusion is that the loss complained of herein is not within either the meaning of the term "perils of the sea" as defined in our Civil Code, or as understood in the law of marine insurance generally; and, of course, if the loss be one which falls under the general clause of the policy, it is sufficient to say that there is no allegation that by the customs of insurance in San Francisco insurers are liable for explosions of boilers, or damages resulting therefrom.

2. The construction we place upon the clause of the policy above quoted renders it unnecessary to consider whether the damages are not in any event excepted under that provision of the policy relating to the bursting of boilers. It is proper to say, however, that a clause precisely the same in language was considered by the court of appeals in *Strong v. Insurance Co.*, 31 N. Y. 103. It was there held that the language is to be understood to mean that the company is not to be liable for damage resulting to the vessel or otherwise on account of the bursting of the boilers, unless occasioned by stranding. Judgment affirmed.

We concur: SEARLS, C. J.; MCKINSTRY, J.

76 Cal. 164

STEWART *et al.* v. ROBINSON. (No. 11,061.)

(Supreme Court of California. May 16, 1888.)

1. ATTORNEY AND CLIENT—ACTION FOR FEES—EVIDENCE.

In an action for attorney's fees, which defendant had agreed to pay provided plaintiff procured from the secretary of the interior a rehearing in a land case, telegrams and a letter from the secretary to the plaintiff, stating that such rehearing would be granted on a certain day, are admissible to prove that the hearing was granted.

2. SAME—ACTION FOR FEES—PRACTICE IN INTERIOR DEPARTMENT.

In such case, plaintiff adduced in evidence, to prove that a rehearing was granted, telegrams and letters from the secretary of the interior to plaintiff, appointing a day for the rehearing, and announcing the final decision in the case. *Held*, plaintiff was properly allowed to show that the proceedings of the department were all conducted by communications.

Department 2. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Action by William M. Stewart and William F. Herrin, law partners, against Alfred Robinson, for attorney's fees. Judgment for plaintiffs, and defendant appeals.

Wm. Matthews, for appellant. *Wm. F. Herrin*, for respondents.

SHARPSTEIN, J. The parties entered into an agreement in writing, in which, among other things, it was stipulated that the plaintiffs should make a proper application to the secretary of the interior to obtain a rehearing of a matter which had been heard and decided adversely to the interest of the defendant by said secretary, and that, in the event of such rehearing being granted, the defendant should pay to plaintiffs \$1,500. The plaintiffs brought this action to recover said sum, for which a judgment was entered in their favor against the defendant, who appeals therefrom, and from the order denying his motion for a new trial. The record states that "it was admitted by the defendant that the plaintiffs had used their best efforts, and with legal skill, to obtain the rehearing mentioned in the said contract; that proper application was made by the plaintiffs, accompanied with a brief presenting all that could be presented to obtain a rehearing from the secretary of the interior; and, if said rehearing was in fact granted by the secretary of the interior, they were entitled to recover; and it was admitted by plaintiff that, unless such rehearing was granted by said secretary, the plaintiffs were not entitled to recover." The evidence admitted to prove that a rehearing was granted, was objected to, and it is upon the exceptions of the defendant to rulings of the court upon said objections that we now have to pass. To prove that a rehearing was granted, the plaintiffs introduced in evidence two telegrams and a letter from the secretary, notifying the plaintiff Stewart that oral argument would be heard in the case on certain stated days. Stewart further testified that on the 21st or 22d of October, 1883, he made an oral argument in the case before the secretary, after which he addressed the following communication to the commissioner of the general land-office:

"DEPARTMENT OF THE INTERIOR,

"WASHINGTON, Dec. 13, 1883.

"*The Commissioner of the General Land-Office*—SIR: I have considered a motion for review of the decision rendered by me on the 14th day of April, 1883, in the matter of the survey of the Rancho Santiago de Santa Ana. Upon the hearing of the motion in October last, the whole case was fully presented and submitted upon oral and written arguments. I have attentively considered such arguments, and have examined with care my decision of April last, and am of the opinion that I should adhere to such decision. If I am in error, the parties claiming the disputed territory are not without remedy in the court. The matter of the survey has been pending many years, and the rights of a large number of persons, settlers upon the lands, are involved in the contest. I therefore desire you to proceed with the matter, under my former decision, as speedily as possible. The papers submitted upon the motion for review are herewith transmitted.

"Very respectfully,

H. M. TELLER, Secretary."

The record states that the communication was read in evidence without objection, and it seems to show that a rehearing had been granted, and that the first decision was adhered to. There was evidence tending to prove that the proceedings of the land department, from the secretary of the interior down to the register and receiver, are all conducted by communications, and that all the communications relating to the rehearing of this matter were introduced in evidence on the trial of the case. We think that evidence to prove the practice of the department was properly admitted, and that the evidence admitted justified the finding that a rehearing was granted. Judgment and order affirmed.

We concur: McFARLAND, J.; THORNTON, J.

76 Cal. 149

FANNING v. BOHME *et al.* (No. 9,864.)

(Supreme Court of California. May 15, 1888.)

MUNICIPAL CORPORATIONS—ACTION FOR STREET ASSESSMENTS—EVIDENCE.

In an action to foreclose a street assessment where the warrant, assessment, etc., have been introduced in evidence under St. Cal. 1871-72, p. 815, § 12, providing that the same shall be *prima facie* evidence of the regularity and correctness of the assessment and all prior proceedings, it appeared that a certain street had been graded about 20 years before; and that the difference between the official grade and the existing grade nowhere exceeded 1½ feet. *Held*, that this was not sufficient to overcome the presumption under Code Civil Proc. § 1963, subd. 15, that official duty has been regularly performed.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

J. M. Wood, (J. C. Bates, of counsel,) for appellant. Frank & Eyre, (Milton S. Eisner and Mark J. Platshak, of counsel,) for respondent.

SEARLS, C. J. This is an action to foreclose a street assessment for grading Vallejo street, from Montgomery to Kearny street, in the city and county of San Francisco. Under the provisions of an act of the legislature approved April 1, 1872, (St. 1871-72, p. 806,) it is provided that "where any public street shall have been graded, or graded and macadamized, or graded and paved, for the distance of two or more blocks on each side of any one or more blocks or crossings of a street which is not improved," then and in such cases the board of supervisors were authorized, upon the recommendation of the superintendent of public streets, to order such unimproved block to be graded. Under these circumstances the board ordered the block in question graded, without a petition therefor, as is required where the adjacent blocks are not graded. The main question at the trial turned upon the fact as to whether

that portion of Vallejo street between Sansome and Battery, one of the two blocks next east of the block in question, had or had not been graded before the date of the recommendation of said superintendent. The court below found in favor of plaintiff upon all the facts essential to a recovery, except upon this one, as to which the finding was, that the block of Vallejo street between Sansome and Battery, had not been graded. This finding is assailed by appellant, as being unwarranted by the evidence.

At the trial plaintiff introduced in evidence the assessment, diagram, warrant, and affidavit of demand, with proof of recordation of such documents, being in form and substance sufficient, *prima facie*, as is admitted, to entitle plaintiff to recover. Section 12, St. 1871-72, p. 815, (street law of San Francisco,) prescribes the rule of evidence as follows: "The said warrant, assessment, and diagram shall be held *prima facie* evidence of the regularity and correctness of the assessments, and of the prior proceedings and acts of the said superintendent of public streets, highways, and squares, and of the regularity of all the acts and proceedings of the board of supervisors upon which said warrant, assessment, and diagram are based." It must be conceded that, if the evidence adduced by defendant was sufficient to overcome the *prima facie* case founded upon the performance of the acts specified by statute, then the board of supervisors had no jurisdiction to order the work done. That portion of Vallejo street involving the block in question, and being between Sansome and Battery streets, runs along the base of Telegraph Hill, and the original surface was about 60 feet above the grade of the street at Sansome, and about 14 feet above at Battery street. The official grade of this portion of the street, prior to 1868, was 30 feet above base at Sansome and 10 feet above at Battery street. In the last-named year the official grade was reduced to 28 feet above base at Sansome. The evidence on the part of defendant tended to show that in 1865, 1866, or 1867 the property owners on the block in question graded it by excavating and removing the hill so as to make the street passable for teams, and apparently supposed they had brought the street to the official grade. There cannot be said to be any substantial conflict in the testimony. It shows that the block of Vallejo street between Battery and Sansome varies in places from the official grade; that it is generally upon or very near such grade, but that, at one point, it is one foot nine inches above grade, at sundry points a few inches above, and at one or two points a trifle below, grade. The highest point above grade, judging from its position on the diagram presented, must be under or at the edge of the sidewalk, if such there be. When we take into account that this street was graded some 20 years since; that, so far as appears, it has never been paved; that at the date of the trial it had been in use as a public street more than 15 years; that the rock cutting was in some places hard, and at others soft; that it had been worn out in places and filled in by the deposit of material for that purpose, and that most of the inequalities may be accounted for from this cause, coupled with the fact that it is so nearly accurate,—we are of opinion the street was substantially graded, and that the court below should have so found. A moment's reflection must teach us two things: *First*, that, were it so graded, the use in a great city for a number of years, without being paved, must inevitably produce inequalities of surface. This result is as certain as the laws of nature, of which it is a sequence. There is a presumption "that official duty has been regularly performed." Code Civil Proc. § 1963, subd. 15. The proper officers, in the discharge of their official duty, decided that this portion of Vallejo street had been graded. This presumption is open to rebuttal; but when the witnesses who were expressly employed to find departures from the official grade find no wider departure than that described in the evidence, we are of opinion the presumption should still remain, and that the finding of fact should have been that Vallejo street, for the block from Sansome to Battery street, had been graded prior to October 16, 1876.

We entertain some doubt as to the correctness of the ruling of the court below in excluding the testimony of the witness Fanning. His opinion as an expert was not admissible, but it may well be that he possessed knowledge of facts which were proper, and within the purview of the questions propounded. If so, he should have been heard. We should not reverse the judgment for this cause alone, for the reason that counsel for defendant should have so narrowed his question as to eliminate from it the idea that he was calling for the mere opinion of the witness. Upon the whole record we think the order appealed from should be reversed, and a new trial had. Ordered accordingly.

We concur: MCKINSTRY, J.; PATERSON, J.

76 Cal. 166

ORO M. & M. CO. v. STARR. (No. 11,099.)

(Supreme Court of California. May 16, 1888.)

FRAUDULENT CONVEYANCES—WHO MAY ATTACK—PURCHASERS.

Plaintiff purchased personal property, paid for it, but left it with the vendors who afterwards, being insolvent, assigned all their "assets and property" to defendant, one of their creditors, in consideration of his canceling his claim and assuming their other liabilities, and defendant took possession, the schedule accompanying his bill of sale not mentioning the property in question. *Held*, under Civil Code Cal. § 3440, providing that "every transfer of personal property is conclusively presumed, * * * if not accompanied by an immediate delivery, * * * to be fraudulent and void" against purchasers, that, as defendant was not a purchaser, the sale was valid as to him.

Department 2. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Action by the Oro Mining & Milling Company against L. M. Starr. Section 3440 of the Civil Code, referred to in the opinion, is as follows: "Every transfer of personal property, other than a thing in action, or a ship or cargo at sea or in a foreign port, and every lien thereon other than a mortgage, when allowed by law, and a contract of bottomry or *respondentia*, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or incumbrancers in good faith subsequent to the transfer."

E. W. McGraw, for appellant. *T. Z. Blakeman* and *R. B. Saffold*, for respondent.

McFARLAND, J. This action is for the value of certain personal property. Judgment went for plaintiff, and defendant appeals. The material facts are substantially these: The plaintiff, a mining corporation, contracted, in 1881, with Pendergast, Smith & Co., who owned and conducted the *Ætna* Iron Works, in San Francisco, for the construction by the latter for the former of a five-stamp battery, complete. When the work was done, plaintiff was not ready to use the battery, and it was agreed that plaintiff should pay for the property, and that Pendergast, Smith & Co. should keep it on storage for plaintiff until the latter should call for it. Thereupon plaintiff paid the full price, which had been agreed upon for the battery, and left it in possession of Pendergast, Smith & Co. Plaintiff also furnished some lumber which was used in covering some part of the property. Afterwards, in 1882, Pendergast, Smith & Co. incorporated under the corporate name of the *Ætna* Iron Works Company, and continued the business, the battery remaining on storage as before. In 1883 this company became financially embarrassed. Its

principal creditor was the defendant, L. M. Starr; and, in consideration that he would cancel the indebtedness to him, and would settle with the other creditors, the said *Ætna Iron Works Company*, on June 12, 1883, by a written instrument, sold, assigned, and transferred all its property to said defendant, Starr, who immediately went into possession. The instrument or bill of sale described the property as follows: "All assets, credits, book-accounts, books, papers, property, and leasehold interest of said corporation." There was also a schedule of the property sold which did not mention the said five-stamp battery, or any part of it. The battery remained on the premises, and went into the possession of defendant, Starr. In the early part of 1884 the plaintiff, desiring to use the battery, demanded it of the defendant Starr, who refused to deliver it, saying that he had bought and claimed everything about the *Ætna Iron Works*. The court found the value of the property to be \$1,050. The points made by appellant that various findings of fact are not justified by the evidence cannot be maintained. There was considerable evidence to justify each finding.

The main point made by appellant is that, as against him, the sale by Pendergast, Smith & Co. to plaintiff was void, under section 3440, Civil Code, because it was not accompanied by an immediate delivery of the property, or followed by actual and continued change of possession. It is clear, however, that appellant cannot invoke this rule as a creditor. He can do so only as a purchaser under his bill of sale. But he was not a purchaser of the property in litigation. The sale of the battery in 1881 was, as between Pendergast, Smith & Co. and plaintiff, complete; and the title passed absolutely to the latter. When, therefore, they (or their successor, the *Ætna Iron Works Company*) afterwards sold and assigned to appellant their "assets" and "property" they did not sell, nor by any proper construction can they be held to have undertaken to sell this battery, which was no part of their assets or property. And this is made still more clear by the fact that it was not included in the schedule. If their creditors had attached the property in their possession, or they had sold it to an innocent purchaser, then the rule of section 3440 might have been applicable. But appellant is here claiming as a purchaser property which he never purchased, and under a written transfer by which it was not transferred. There are no other points necessary to be particularly noticed.

Judgment and order denying a new trial affirmed.

We concur: THORNTON, J., SHARPSTEIN, J.

(2 Cal. Unrep. 860)

MCDONALD v. HUFF. (No. 11,064.)

(Supreme Court of California. May 19, 1888.)

1. VENDOR AND VENDEE—CONTRACT—DELIVERY OF DEED.

A mortgagor agreed in writing to execute a deed to the mortgagee, and leave it in escrow, to be delivered upon default by him in paying an agreed sum less than the amount due, provided the mortgagee gave a receipt in full. The deed was accordingly left as an escrow. Default was made, but, before the mortgagee accepted the deed, the mortgagor demanded it back, and conveyed to another. *Held* that, as the mortgagee had not signed the agreement, and therefore could never have been compelled to accept the deed, the mortgagor was at liberty to withdraw it at any time before it was accepted; nor did the contract become an executed one from the mere fact that the mortgagee forbore suit upon the mortgage until it was barred by the statute of limitations.

2. MORTGAGE—WHAT CONSTITUTES—ESCROW.

A deed left by a mortgagor as an escrow, to be delivered upon default in payment by him of a sum fixed upon in satisfaction of all indebtedness, does not become operative until default, and creates no lien on the land.

Department 1. Appeal from superior court, Humboldt county; J. P. HAYNES, Judge.

Action to quiet title, brought by John E. McDonald against John Huff and R. F. Herrick. Judgment for plaintiff, and defendants appeal.

S. O. Houghton, (Archer & Bowden, of counsel,) for appellants. S. M. Buck, for respondent.

TEMPLE, J. In 1882, plaintiff had a judgment against the defendant Huff, and also held a note given by him, secured by a mortgage. He threatened to foreclose the mortgage, and finally agreed with Huff that Huff should convey to plaintiff the mortgaged premises, in consideration whereof the plaintiff would release Huff from all the indebtedness. The agreement was reduced to writing, and is signed by Huff only. In it Huff recites his indebtedness of \$3,500 on the mortgage and \$600 on the judgment, and then proceeds as follows: "And whereas, I am at present unable to pay said sums at present, in full, in cash, but am desirous to satisfy said demands; and whereas, the said John E. McDonald is willing that I should make to him a conveyance of the land described in said deed, and in consideration of said conveyance release and discharge me from all of said indebtedness, and from all indebtedness due and owing from me to him; and whereas, the said John E. McDonald is also willing that I should retain said land, and that said deed of conveyance be held in escrow by R. H. McDonald, of the Pacific Bank, of San Francisco, Cal., until November 21, 1882, and that in case I pay to said John E. McDonald on or before said November 21, 1882, the sum of three thousand and eighty (\$3,080) dollars, then the said deed is to be redelivered to me, and the said John E. McDonald give me a receipt in full of all demands against me, and said deed to be of no force or effect, and convey no title to said John E. McDonald. Now, then, I direct that said R. H. McDonald, with whom said deed is deposited, hold the same in escrow until the 21st of November, 1882, and in case I pay to said John E. McDonald or any agent or assign of him, said sum of \$3,080 on or before said November 21, 1882, then the said R. H. McDonald redeliver and return to me said deed. And in case I fail to make payment to said John E. McDonald, or his agents or assigns, of said sum of \$3,080 on or before November 21, 1882, then the said R. H. McDonald is hereby authorized to deliver to said John E. McDonald the said deed of conveyance on the said John E. McDonald executing to me a receipt in full of all demands against me by him and depositing the same with the said R. H. McDonald to be delivered to me by the said R. H. McDonald." On the same day Huff executed the deed and deposited it with R. H. McDonald. McDonald executed no instrument in writing obligatory in himself to accept the deed and release the debt, nor did he bind himself not to bring suit to foreclose. In fact, however, he did not foreclose, but acquiesced in the agreement. Huff did not pay the \$3,080, or any portion of it, on the 21st of November, or at any time, nor did McDonald execute the receipt or demand his deed. The deed still remained with R. H. McDonald until the 16th day of March, 1883, when it was delivered to plaintiff's attorney for plaintiff, the attorney executing a receipt in full of all demands against said Huff, which was left with R. H. McDonald for Huff. It is not found that the attorney had any authority from John E. McDonald to give the receipt or to accept the deed. Prior to the delivery of the deed, however, to-wit, on the 21st of February, 1883, Huff demanded of R. H. McDonald that he surrender and deliver up to him, Huff, the deed that had been left in escrow, and the agreement or instructions accompanying it, which demand not being complied with, Huff gave notice in writing to R. H. McDonald, February 28th, of his withdrawal of said instrument and conveyance. Huff also conveyed the land to defendant Herrick for an expressed consideration of \$5,000, which deed was duly recorded before R. H. McDonald delivered the first deed. Herrick, it is found, however, took with full knowledge of all the facts.

This action is brought to have the deed to Herrick canceled, and to quiet plaintiff's title. By the terms of the contract of escrow the deed was not to become operative until Huff had made default in paying the \$3,080 and Mc-

Donald had executed a receipt in full of all demands against Huff. And if no such default were made, the deed was not to become operative at all. This is the rule generally in regard to instruments placed in escrow. It could not operate then to create a lien upon the land, and we do not see how any question can arise upon the claim that as a mortgage it is void because providing for a forfeiture without foreclosure. Nor can it be held, as respondent claims, that when Huff failed to pay, R. H. McDonald held the deed as agent for plaintiff. Plaintiff had not bound himself to forbear suit, to remit a portion of the debt, or to accept the deed in payment. Until he did the latter by executing a release and delivering it he was not entitled to the deed. The contract was a conditional sale of land in consideration of an existing indebtedness, with the privilege on the part of the vendor to satisfy the indebtedness within a stated period, in which event the contract of sale would be void. There is no question of the statute of frauds as to the vendor, as his contract was in writing. But it is a serious question as to whether the purchaser was bound. He verbally agreed to give further time on his indebtedness, and to accept a sum less than the amount due, in full satisfaction of his debt. This undertaking was not in writing, and not a contract which varied the terms of his written agreement. Evidently he was not bound by it, but might have brought suit to foreclose at any time, notwithstanding the agreement. Nor do we think it can be held that it became an executed contract, from the mere fact that the plaintiff did forbear to bring suit until the lien of the mortgage was lost by reason of the statute of limitations. The indebtedness was not barred. The contract signed by Huff was a new promise. The plaintiff, even after the 21st of November, when the privilege of the vendor to pay had expired could not have been compelled to accept the deed and release all the indebtedness of Huff to him. That being the case, we think Huff was at liberty to withdraw his deed from escrow at any time before it had been accepted by the plaintiff.

It follows that the judgment must be reversed, and it is so ordered.

We concur: PATERSON, J., MCKINSTRY, J., SEARLS, C. J.

76 Cal. 208

SPARROW v. RHOADES. (No. 11,331.)

(*Supreme Court of California.* May 19, 1888.)

EJECTMENT—DEFENSES—ILLEGAL CONSIDERATION.

Under a general denial, in an action of ejectment, it is competent for defendant to show that the deed from him to plaintiff, upon which the latter rests his title, was founded on a consideration illegal by statute, and therefore void, as such evidence tends to show that the title was still in defendant, and that plaintiff was not entitled to possession.

Commissioners' decision. Department 2. Appeal from superior court, Sonoma county; JOHN G. PRESSLY, Judge.

This is an action in ejectment, brought by E. D. Sparrow against A. A. H. Rhoades to recover possession of two tracts of land. Plaintiff bases his claim upon two deeds executed by defendant, under the following circumstances: To one of these tracts defendant had a perfect title; to the other he had no title, having simply settled upon it with a view to its pre-emption, it being public land of the United States. The plaintiff desired to purchase the tract to which defendant had title, and the sum of \$1,000 was agreed upon as the purchase price. Of this only \$300 were to be paid in cash, and the balance to be paid as follows: The defendant was to convey or sell to plaintiff the public land to which defendant had merely a right of pre-emption; and after the conveyance the plaintiff was to go into possession of the land, settle upon it, in the course of time acquire a patent, and then transfer it to defendant as, and for the sum of \$700, the balance of the consideration. The agreement

was but partially executed, although the defendant conveyed the property, and thereupon the plaintiff brought this action. The court below held, that inasmuch as the consideration of the deeds was entire, and in part illegal, the deeds were void *ab initio*, and transferred nothing to the plaintiff, and thereupon rendered judgment in favor of the defendant. From this judgment the plaintiff appeals.

Henley & Cates, (R. M. Swain, of counsel,) for appellant. *Geo. D. Collins*, for respondent.

FOOTE, C. This is an action of ejectment. The court below, sitting without a jury, gave judgment in favor of the defendant, from which, upon the judgment roll only, the plaintiff appeals. The points made for the reversal of the judgment are that under the general denial of the answer to the allegations of the complaint it was inadmissible to introduce any evidence to show that the consideration of the deed upon which the plaintiff based his title and right of entry was illegal, and the deed void; and that the finding of the court upon such evidence was outside of the issues made by the pleadings, and should be disregarded, in which event judgment would necessarily have been given for the plaintiff. The finding complained of, which is conceded to have been supported by sufficient evidence, is to the effect that the real consideration of the deed under which plaintiff claimed was \$300, and an agreement by the plaintiff that he would as a pre-emptor procure a title from the United States to a part of the land embraced in the deed, and reconvey the same to the defendant, who was in possession of it. This, of course, involved the taking of an oath, required by section 2262 of the Revised Statutes of the United States, with a present intention to violate it. Under a general denial in an action of ejectment the defendant has a right to introduce in evidence any fact which might show or tend to show that the plaintiff had no right of entry when the suit was brought. *Kimball v. Gearhart*, 12 Cal. 50; *Bell v. Brown*, 22 Cal. 672; *Willson v. Cleaveland*, 30 Cal. 201; *Bell v. M—— Co.*, 36 Cal. 219; *Semple v. Cook*, 50 Cal. 29. "In an action to recover possession of land, if the complaint is in the usual form, merely averring that the plaintiff is the owner in fee of the premises described and entitled to their possession, and that the defendant unlawfully withholds the same, the general denial admits proof of anything that tends to defeat the title which the plaintiff attempts to establish on the trial." *Pom. Rem. & Rem. Rights*, § 679. The deed which the plaintiff introduced as the evidence of his title and right of entry to the premises of which he sought possession was void, because the statute expressly declares it to be so. Section 2262 Rev. St., *supra*. Under the general denial of the answer evidence was admissible to show that the title, which on the face of the deed appeared to have passed to the plaintiff, could not have done so, and that the deed was worthless as a muniment of title, or, as that under which a right of entry accrued to the plaintiff, even although the fact that the deed was void by reason of an illegal consideration was not set up by special plea in confession and avoidance. The general denial of the defendant was, in effect, that he denied the plaintiff's title and right of entry, the proof to sustain which, was that the deed under which the plaintiff claimed was, in fact, no deed at all, of no more value to convey title than a piece of blank paper, and utterly valueless as evidence of title. The result of showing that the plaintiff's deed from the defendant was void, was to prove title in the defendant, and this has been held to be admissible under the general denial in *Marshall v. Shafter*, 32 Cal. 177. The proof went to show directly that the plaintiff's claim of title to and right of entry upon the land in the possession of the defendant was, and is, without merit. It is not evidence merely to support a special plea of confession and avoidance; it is evidence which tends absolutely to contradict the fact that the plaintiff is entitled to the possession of the premises. It is not an effort to show that, not-

withstanding the plaintiff may have had the right of entry under that deed, he has by some other independent and separate line of inequitable conduct lost it; it is an effort to show that he never had any right of possession at all. If the evidence was admissible, the court did right in making a finding thereon, and the judgment should be affirmed.

We concur: HAYNE, C.; BELCHER, C. C.

PER CURIAM. For the reasons given in the forgoing opinion the judgment is affirmed.

76 Cal. 169

TAPPENDORF v. DOWNING. (No. 11,388.)

(Supreme Court of California. May 19, 1883.)

1. BOUNDARIES—ACCRETION—RIPARIAN RIGHTS.

A deed conveying land formerly fronting on a river by its section number, passes title to land added thereto by accretion.

2. LIMITATION OF ACTIONS—ADVERSE POSSESSION—EVIDENCE.

In ejectment to recover land formed by accretion, evidence that plaintiff has been in possession under color of title, and occasionally cultivated the land, for 11 years, does not show adverse possession within the meaning of the statute of limitations.

Commissioners' decision. Department 1. Appeal from superior court, Humboldt county; JOHN J. DE HAVEN, Judge.

Action of ejectment by Frederick Tappendorf against William Downing to recover land formed by accretion. In 1859, G. G. Dudley conveyed to R. N. Dungan S. E. fraction of N. W. $\frac{1}{4}$ of section 25, fronting on Eel river, a navigable stream in Humboldt county. Dungan conveyed to plaintiff, and in 1874 plaintiff conveyed to Caleb Merritt, who conveyed to Shallard, and by divers mesne conveyances the land passed to defendant, who took possession of the land formed by accretion in front of and attached to the original tract. Plaintiff claimed the accretion by quitclaim deed from Dungan, and by occupancy and occasional cultivation for 11 years. There was judgment for defendant, and plaintiff appeals.

J. D. H. Chamberlin, for appellant. S. M. Buck, for respondent.

HAYNE, C. In this case, we think that the land formed by accretion was part of the adjoining fractional quarter section, and that therefore the accretion passed by the deeds conveying the fractional quarter by its number. The statement of the quantity of land conveyed by a deed is not controlling.

With reference to the statute of limitations, if we assume that the appellant's specification is sufficient to raise the question, which is doubtful, see *Barstow v. Newman*, 34 Cal. 91; *Goodrich v. Van Landingham*, 46 Cal. 603. We do not think the evidence shows a case of adverse possession by the plaintiff for the requisite period. It may be that there was such possession; but the fact does not appear from the record. Since the appellant has no title to the fractional quarter section as it originally stood, or to the accretion, there can be no question as to a boundary line between the two. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

2 Cal. Unrep. 863

MORGANS v. ADEL. (No. 11,155.)

(Supreme Court of California. May 19, 1883.)

1. EVIDENCE—ACCOUNT BOOKS—PARTNERSHIP.

In an action to recover money due on contract, where one furnishes material and another does work under an agreement to divide the profits, the original books of entry of the parties are proper evidence to show the amount of work done.

B. APPEAL—REVIEW—FINDING BY COURT.

On a trial to the court the finding will not be disturbed where the evidence is conflicting.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; F. E. SPENCER, Judge.

Action by C. H. Morgans against William T. Adel to recover money due on contract, under the following state of facts. Defendant, being engaged in the business of carriage making, in all its branches, and having a paint-shop in connection with said business, employed plaintiff to paint vehicles upon mutual agreement between them that defendant build, furnish all the materials, shop utensils, and appliances, and collect all sums due for painting from customers, and the plaintiff should perform all the labors in and about painting all the vehicles and usual work that would be brought into a carriage shop; that, as compensation for his labor, and that of any and all employees in and about such painting, it was agreed that the plaintiff should receive from the defendant from time to time a share or portion of sums charged by defendant to customers for said work sent them, to be thereafter agreed upon, and to be a just proportion of the whole price charged.

J. B. Lamar and *W. B. Hardy*, for appellant. *C. D. Wright* and *John Reynolds*, for respondent.

FOOTE, C. This is an action for work and labor performed by the plaintiff as a painter for the defendant. Upon a cross-complaint the court below rendered judgment for the defendant, which, upon motion being made for a new trial, was modified in favor of the plaintiff to the extent of lessening the sum of money for which the original judgment was given, and, the defendant agreeing to the reduction thus made, the motion for new trial was refused. From the judgment and order this appeal is prosecuted.

It is claimed that the court erred in finding that there was a special agreement between the parties as to the manner and amount of plaintiff's compensation. There was a very decided conflict of evidence upon the point, and it is evident from the record that the very experienced judge who tried the cause had a better opportunity than we can have to determine upon which side preponderated the weight of testimony; hence his findings should not be disturbed. The objections to the introduction in evidence of the two books, entitled "Paint-Shop Book, 1882," and "Paint-Shop, 1883," and of Exhibit A of the defendant, at folio 104 of the transcript, are untenable. They were original books of entry of the parties, and shed light upon the question as to what charges were made, the work performed by plaintiff, and the amount thereof, so that there might be ascertained what was his fair proportion or percentage for his labor. We perceive no error in the record, and advise that the judgment and order be affirmed.

We concur: **BELCHER, C. C.; HAYNE, C.**

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(76 Cal. 212)

BLACKWOOD v. CUTTING PACKING CO. (No. 11,111.)

(*Supreme Court of California.* May 19, 1888.)

1. SALE—OF FUTURE CROP—IMPLIED WARRANTY.

Future crops of fruits are "merchandise not then in existence," within the meaning of Civil Code Cal. § 1768, which provides that "one who agrees to sell merchandise not then in existence thereby warrants that it shall be sound and merchantable at the place of production, contemplated by the parties."

2. SAME—WHEN TITLE PASSES.

A contract of sale of future crops of fruit produced in certain seasons from a specified orchard, not to be less than a minimum or greater than a maximum quantity

per annum, at an agreed price per pound, to be delivered by producer at a stipulated place, does not pass title to such fruit under Civil Code Cal. § 1140, which provides that "the title to personal property, sold or exchanged, passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not," the goods not being identified by said contract within the meaning of said section, and although the written contract makes use of the terms "bought and sold," the transaction is construed to be an agreement to sell, and not a sale.

3. SAME—ACTION FOR PRICE—EVIDENCE.

Upon the trial of an action by the vendor against the vendee upon an agreement to sell future crops of fruit, produced in certain seasons, from a specified orchard, where the defense is failure of implied warranty as to quality, the facts that the orchard was properly cared for, and the trees open to the inspection of defendant, who knew the climatic conditions influencing the crop, etc., are irrelevant.

4. SAME—ACCEPTANCE—WAIVER.

Upon the trial of an action by vendor against vendee for the breach of contract to sell fruit not then in existence, the defense was failure of warranty as to quality. It was proved that when the first shipment reached defendant it wrote plaintiff that the goods did not come up to contract, but as they had reached the city without their condition being discovered, and could only be returned to plaintiff a total loss, defendant had disposed of them to the best advantage. By a subsequent agreement defendant was to send an agent to select of the residue such as was considered fit for use, and the balance was to be prepared for use, and handled by plaintiff at his cost, subject to such rights and obligations with reference thereto as either party might have by the first contract; and it was stipulated that neither the receipt of the first shipment nor the execution of the subsequent agreement was to be construed as acceptance of the goods, or a change of the rights, duties, or obligations of either party under the first contract. *Held*, defendant did not waive its right to refuse to accept such part of the goods as did not comply with the terms of the contract first mentioned, either by receiving the first shipment or by the subsequent agreement.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; JOHN HUNT, Judge.

Action by William C. Blackwood against the Cutting Packing Company for breach of contract in refusing to accept goods purchased by defendant of plaintiff. Judgment for defendant. Plaintiff appealed.

A. A. Moore, Geo. W. Reed, and Arthur Rodgers, for appellant. *A. N. Drown*, for respondent.

HAYNE, C. Action for the price of apricots alleged to have been sold to defendant. Defense, the breach of an implied warranty as to quality. The contract was in two parts. The part signed by the defendant was as follows: "SAN FRANCISCO, September 17, 1881. Bought of W. C. Blackwood his crop of apricots, at Haywards, for the seasons of 1882-83-84-85-86, not less than 75 tons, and not exceeding 200 tons, per annum, at 3 cents per pound, f. o. b. [free on board cars at] Haywards. CUTTING PACKING COMPANY, By A. D. CUTLER." The part signed by the plaintiff was similar to the above, except that it said, "Sold my crop of apricots," and "Sold Cutting Packing Company." The court below gave judgment for the defendant, and the plaintiff appeals.

1. The first question is whether there was any warranty. The defendant relies upon section 1768 of the Civil Code, which is as follows: Sec. 1768. "One who agrees to sell merchandise not then in existence thereby warrants that it shall be sound and merchantable at the place of production contemplated by the parties, and as nearly so at the place of delivery as can be secured by reasonable care." The plaintiff contends in the first place that apricots are not "merchandise." A walk through the markets would probably convince him that he is mistaken. It is said, however, that such fruit comes under the head of "produce." Very likely it does. But we think the word "merchandise" is used in the above section in a large sense, and covers all kinds of personal property which is ordinarily bought and sold in the market. Whether it covers more than that need not be decided in this case. This point of plaintiff is not unlike saying that a promissory note between farmers is not

a negotiable instrument, because such an instrument is a creation of the law between "merchants." And we think also that the future crops of fruit come under the head of merchandise "not then in existence." Section 1770 covers the case of an article manufactured to order; and section 1771, the case of merchandise "inaccessible to the examination of the buyer," which probably refers to merchandise in existence. Taking the three sections together, we think that the one above quoted applies to a case like the present. It is argued for the plaintiff, however, that the transaction was a sale, and not an agreement to sell, and that therefore the section does not apply. The fundamental difference between a sale, properly so-called, and an agreement to sell is that in the former case the title passes, and in the latter case it does not. The inquiry in this regard, therefore, must be as to whether the title passed. And it is to be observed that the point of time to which the inquiry must relate in the present case is the time the contract was entered into. Some question is made by counsel as to whether the title to a thing which is not in existence can pass. But we shall assume in favor of the plaintiff that the fruit to be produced from trees already grown and the property of the plaintiff has such a potential existence as to be the subject of sale. It seems well settled that the question as to whether the title has passed is one as to the intention of the parties. And such intention is, as a matter of course, to be gathered from the language of the parties, considered in the light of all the circumstances of the case. But, in the absence of anything showing a contrary intent, there are certain circumstances which have a controlling force, and these exist in the present case. (a) There was at the time to which the inquiry relates neither delivery of the goods nor payment of the price. The contract says that the fruit was bought "at three cents per pound, f. o. b. [free on board cars at] Haywards." This, as we construe it, is an expression of intention that the price was to be paid or to become due when the fruit was delivered to the carrier at Haywards. But the result would be the same if the words quoted do not express such an intention. For if the time of payment be left indefinite, the law implies that it is to be on the delivery of the goods. Civil Code, § 1784; *Dwyer v. Duquid*, 70 Ill. 307; *Case v. Dewey*, 55 Mich. 118, 20 N. W. Rep. 817, and 21 N. W. Rep. 911. In common phrase the terms were cash on delivery. And where such is the case the delivery of the goods and the payment of the price are conditions concurrent. And if the condition of payment is not waived the title does not pass until the price is paid. *Peabody v. Maguire*, 79 Me. 585, 12 Atl. Rep. 630; *Railroad Co. v. Erwin*, 84 Ind. 464, 465; *Turner v. Moore*, 58 Vt. 456, 3 Atl. Rep. 467; *Adams v. O'Connor*, 100 Mass. 515; *Hoffman v. Culver*, 7 Bradw. 454. It frequently happens that the seller will deliver the goods notwithstanding the failure to fulfill the condition of payment; and in such cases the question arises as to whether such delivery is not to be considered a waiver of the condition. Some courts hold that, in the absence of circumstances showing a contrary intention, the condition is waived, and that the title passes. But where, as here, there was neither delivery nor payment, there can be no doubt but that the title does not pass. *Dixon v. Duke*, 85 Ind. 435, 436. (b) There are other circumstances which constitute more specific criteria than the above. The goods were not in a condition in which the buyer could be called upon to accept them. Benjamin gives the following rule in this regard: "Where, by the agreement, the vendor is to do anything to the goods for the purpose of putting them into that state into which the purchaser is to be bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of those things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property." Benj. Sales, bk. 2, c. 3. In this case the seller was to give the necessary cultivation to the orchard, pick the fruit, pack it in suitable boxes or baskets, and deliver it to the carrier at Haywards. (c) There is yet another circumstance. The portion of the crop to be de-

livered had not been identified. What was contracted for was to be "not less than 75 tons, and not exceeding 200 tons per annum." Possibly it might be argued that, if any crop should turn out to be less than 75 tons, the buyer would not be bound to accept any portion of it. It is not necessary to consider that question. It certainly cannot be maintained that the same result would follow if the crop of any year should turn out to be more than 200 tons. At the time of the formation of the contract (to which the inquiry must relate) it could not be known what number of tons would be produced. Even if the fruit had been then ripe, and hanging upon the trees, it could not be known what portion was to go to the defendant until it was weighed. In this regard Benjamin gives the following rule: "Where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of these things also shall be a condition precedent to the transfer of the property, although the individual goods are ascertained, and they are in the state in which they ought to be accepted." Benj. Sales, bk. 2, c. 3. So far as concerns the proposition that, where weighing or measuring is necessary to the identification of the goods, the title does not pass until they have been weighed or measured, the American cases are generally in accord with the above rule. See *Hires v. Hurff*, 39 N. J. Law, 10; *Galloway v. Week*, 54 Wis. 608, 12 N. W. Rep. 10; *Bank v. Gillette*, 90 Ind. 268; *Hutchinson v. Railway*, 59 N. H. 489; *Fry v. Bank*, 75 Ala. 474; *Allen v. Melton*, 64 Tex. 218; *Hubler v. Gaston*, 42 Amer. Rep. 794; *Elgee Cotton Cases*, 22 Wall. 180. In California the cases are to the same effect. See *Horr v. Barker*, 8 Cal. 608; *McLaughlin v. Piatti*, 27 Cal. 463; *Caruthers v. McGarvey*, 41 Cal. 15. Some of the American cases are not in accord with the rule laid down by Mr. Benjamin, in this: that if the goods are identified it does not matter that weighing or measuring is necessary to ascertain the price or the quantity. And this seems to be the law in California. For the Civil Code contains the following: Sec. 1140. "The title to personal property, sold or exchanged, passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not." This section does not dispense with identification. On the contrary, it requires it. It only dispenses with segregation when the property is otherwise identified. Therefore, where the identification consists in the segregation, weighing or measuring, they are still necessary. And the present case was of the latter character. As against these controlling features of the transaction, the plaintiff has only the language of the instrument. The term "sold," it is said, indicates a consummated sale. But this word is not conclusive. *Anderson v. Read*, 106 N. Y. 344, 345, 13 N. E. Rep. 292. In *McLaughlin v. Piatti*, 27 Cal. 458, the agreement was that in consideration of a certain sum, the receipt of which was recited, the owner "granted, bargained, and sold" the property to the buyer, yet it was held to be a mere agreement to sell. And in the *Elgee Cotton Cases*, 22 Wall. 180, the language was even stronger. We think, therefore, that the title did not pass, and that consequently there was no sale, but a mere agreement to sell. Hence the case falls within section 1768, and a warranty that the goods should be sound and merchantable was implied.

2. The court below found that the goods were not sound or merchantable at the place of production, etc. It is contended that this finding is not sustained by the evidence. But we think the evidence is amply sufficient. S. Roper, who had been in the fruit business for 12 or 14 years, and who was shown a sample, testified: "They are not really good for anything. They would not pay to dry. I suppose that animals would eat them." John A. Emerson, who had been in the fruit and produce business for 20 years, and who had seen a portion of the crop, and was shown a sample while on the stand, testified: "A very few boxes were very good apricots, but the majority

of them were very small, very inferior; something that I could not sell unless at a very low figure. * * * I should not consider those in Exhibit H as merchantable." William Jacobs, who was in the fruit business, and who had seen a portion of the fruit, testified: "They were not even fit for pie-fruit. I would not consider them fit for pulp that we squeeze into jelly. * * * I say that those apricots that I saw of the crop of 1882 would not be salable to canners in this market, or anybody else." And to the same effect was the testimony of other witnesses who were competent to give an opinion on the subject, and who had either seen portions of the crop, or were shown samples of it. The fact that most of the witnesses testified that the fruit might have been used for pie-fruit, or for pulp, does not help the plaintiff's case. Very inferior fruit may be used for pulp. And it was in evidence that "there is only a small quantity used by canners for pulp. Fifty tons would be enough for the whole city," and that "pie-fruit" is merely the inferior fruit which is found in most crops. It is not sold as such. Upon the same principle it might be contended that, if the fruit could have been fed to hogs, it had a value, and was therefore not within the warranty. Undoubtedly, the testimony of some of the witnesses was toned down on cross-examination, and some of them seemed to have had an indirect interest in the question. But the question of credibility was, under our decisions, for the court below. At the very least, there was a substantial conflict in the evidence. The fact that the orchard was properly cared for, that the trees were open to the inspection of the defendant, and that it was acquainted with the climatic conditions, etc., seem to us to be entirely irrelevant.

3. It seems to be contended, though not very strenuously, that the defendant accepted a portion of the crop, and that thereby it waived its rights in the premises. The facts in this regard are as follows: When the first shipment reached the defendant it wrote to the plaintiff that the fruit was "by no means of proper quality, nor sound, nor merchantable. Yet as these had been allowed to come to the city before we discovered their inferiority and unfitness and unmerchantable condition, and could not have been returned to you except at an entire loss to yourself, we made such disposition of them as we were able to make." Subsequently the parties entered into a written contract whereby it was agreed that the defendant should send an agent to pick out such portions of the crop as was considered fit to be used. This contract provided that the receipt of the first shipment referred to in its letter above quoted, "shall not be regarded as an acceptance, and shall not in any manner operate to waive any of the rights of said company;" and, further, that the picking out and taking of such portion of the crop as should be picked out by the agent "shall not, nor shall any action hereunder, be deemed or taken to be an acceptance by said company, or a waiver, or to operate in any manner so as to affect, change, or impair the rights, duties, or obligations of either of the parties under said first-mentioned agreement." With reference to the remainder of the crop the contract contained the following: "The remainder of said crop shall be forthwith picked, pitted, and dried in the sun on said premises by said Blackwood, on his own account, and at his own cost and expense, subject to such rights or obligations with reference thereto as either party may have under said first-mentioned agreement." The defendant sent its agent to the orchard, and he picked out all of the crop which was considered fit for use. This, together with the first shipment, amounted to 89,000 pounds, for which the defendant paid at the rate provided for by the first contract. The remainder was dried by the plaintiff as provided by the second agreement, and the suit is for the price of such remainder at the contract rate, less what the dried fruit was sold for. We are unable to see that there was any waiver of defendant's rights under the first agreement. It was expressly agreed that the receipt and disposal of the first shipment should not be considered an acceptance; and had it not been for the second contract the defendant would

doubtless not have taken any more of the apricots. We therefore advise that the judgment and order denying a new trial be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

76 Cal. 222

CITY OF NAPA v. EASTERBY et al. (No. 11,017.)

(*Supreme Court of California.* May 19, 1888.)

1. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—GRADE OF STREETS.

The charter of the city of Napa (Laws Cal. 1875-76, pp. 556, 557; Laws Cal. 1877-78, pp. 1013-1017) provides in section 11 that the board of trustees shall have power to establish the grade of all streets and enforce conformity thereto; section 13, that the city shall not pay therefor, but the expense shall be assessed on the property holder fronting said streets; section 19, that when owners of more than one-half of property fronting on a street desire the grade thereof established, they shall petition the board, which the board may order done at the expense of the property holders on said street; section 30, that the board, without petition, may, by order entered on their journal, provide for grading, etc., of streets, and assess the expense thereof on the property chargeable, in like manner as if petition had been filed. *Held*, under the foregoing provisions, that the board, without such petition being filed, had power to establish by one general ordinance the official grade of all streets in the city.

2. SAME—ORDINANCES—VALIDITY—PUBLICATION.

Under a law requiring the publication of the ordinances of a city as an essential of their validity, maps and books referred to in such ordinances need not be published.

3. SAME—ORDINANCES—AUTHENTICATION.

An ordinance of a city, published in a newspaper, was authenticated thus: "In board of trustees finally passed this 23d day of January, 1879. J. H., president of the board of trustees of the city of N. Attest: J. N. W., clerk."—and the copy as published contained the following addition: "Published by order of the board, J. N. W., clerk." *Held*, sufficiently authenticated.

4. SAME—ORDINANCES—WHAT ARE.

The board of trustees of the city of Napa made an order directing certain work to be done on one of the streets; the language used being, "The board order," etc. *Held*, under the charter of said city, (section 34,) which provides that the enacting clause of ordinances shall be, "The board of trustees of the city of N. do hereby ordain as follows," and section 11, (Laws Cal. 1877, p. 1013,) which provides that the board may pass "by-laws, resolutions, and ordinances,"—the order referred to was valid, not being an ordinance, and said charter provision concerning the enacting clause being merely directory.

5. SAME—ORDERS—PUBLICATION.

Under section 22, charter city of Napa, (Laws Cal. 1873-74, p. 149,) and section 30, (Laws 1877-78, p. 1017,) relating to the publication of ordinances of the city, mere orders or resolutions need not be published.

Commissioners' decision. Department 2. Appeal from superior court, Napa county; WILLIAM C. WALLACE, Judge.

Action for street assessment by the city of Napa against A. Y. Easterby and certain real estate in the city of Napa. Plaintiff had judgment for \$305.25. Defendant appealed.

Wm. & Geo. Leviston, for appellant. *Estee, Wilson & McCutchen, Oscar Coglan* and *W. F. Henning*, for respondent.

HAYNE, C. Action upon a street assessment. Judgment was given for the plaintiff, and the defendants appeal. As is usual in such cases, every point with the least semblance of merit is made. We deem it sufficient to notice the following:

1. It is said that the official grade was not established. Upon the former appeal (61 Cal. 509,) the judgment in favor of plaintiff was reversed, because it did not appear that the ordinance purporting to establish the grades had been published by order of the board. This decision necessarily affirms that, unless it appears that the ordinance was published by order of the board, the

official grades were not established; and that the consequence is that subsequent proceedings for grading, etc., are void. This has become the law of the case. Upon the trial two attempts to prove that the official grade was established were made. The first proposition was that the grade was established by ordinance 42. With reference to this, we are inclined to think that the position of the appellants is correct, and that there was no sufficient proof of the publication by order of the board, within the rule laid down by the former decision. Assuming this to be so, then the subsequent proceedings taken upon the idea that the grade was established, were void. If such subsequent proceedings were void, there can be no reason why the board should not disregard them entirely, and commence fresh proceedings. This was what it would seem they did do by their second attempt to establish the grade. The second attempt was by ordinance 77. This ordinance (which, though somewhat meager, we think, was sufficient) was duly ordered to be published, and was published for the requisite period; and at the expiration of the period of publication the proceedings upon which the assessment rests were commenced. The only objections which are taken to this ordinance are the following: (a) It is urged that the board had no power to establish the official grade except upon petition of the property owners, and that the grades of the streets must be established separately, and not all together, as was done here. This view was set forth in the opinion of three of the justices upon the former appeal. But a majority of the court did not concur in this portion of the opinion, and it is obvious that it did not become the law of the case, but was merely the individual opinion of three members of the court. The argument in favor of the position is forcible. But the inconvenience resulting from such a construction is so great that we think if any other construction is fairly open it should be adopted. And we think there is room for another construction. The provisions of the charter in relation to the subject are as follows: Sec. 11. " * * * The board of trustees shall have power; * * * *Third*, to establish the grade of all streets, avenues, and alleys, and to require and enforce conformity thereto." Laws 1877-78, p. 1013. Sec. 18. "The city of Napa shall not pay for establishing the grade, grading, working, improving, or repairing streets, avenues, or alleys, laying down or constructing sewers therein, or sidewalks or crosswalks thereon; but all such expenses shall be assessed upon the property fronting on such streets, avenues, and alleys as hereinafter provided." * * * Laws 1877-78, p. 1017. Sec. 19. "When the owners of more than one-half in frontage of the property fronting on any street, etc., * * * shall desire to have the grade established, or to grade, fill, plank, pave, macadamize, or gravel the same, construct sidewalks along, or sewers therein, or otherwise improve or repair the same, and shall petition the board of trustees in writing, asking that the same may be done, the board may order said work to be performed as requested, at the expense of the property fronting on said street." Laws 1875-76, p. 556. Sec. 30. "The board of trustees may at any time, without petition, by an order entered in the journal of their proceedings, provide for grading, filling, planking, paving, macadamizing, or graveling streets, avenues, alleys, or portions thereof, constructing sidewalks along, or sewers therein, or otherwise improving or repairing the same, and shall proceed in letting contracts, and in assessing the expense of said work upon the property chargeable therewith, and enforcing the same, in the same manner as in cases of assessments made upon petition." Laws 1877-78, p. 1017; and see Laws 1875-76, p. 557. The argument against the validity of the ordinance is, in substance, that the city had no power to pay for establishing the grades; that the expense thereof must be charged upon the property owners according to frontage, and that they could only be so charged where there had been a petition that the grade be established. Now, it is perfectly true that the city had no power to pay for establishing the grades, and that the property owners could not be compelled to pay for it in the ab-

sence of a petition. But is the power to establish the grade commensurate with the power to pay, or to compel payment therefor? Suppose that some public-spirited surveyor had offered to do the work for nothing; would the board have been powerless to accept the offer? Or suppose that a portion of the citizens, chafed at what they might consider undue conservatism on the part of the property owners of the locality, should subscribe the amount necessary to pay for the expense of the work, would the board have no power to order the work to be done at their expense? Or suppose that the actual work of surveying had been done long before, and the maps and plans made, would it be necessary that the property owners should petition to have such work done a second time, and subject themselves to a useless expense, when the maps, etc., lay ready to their hands? We cannot think that there would be a want of power in such cases. And, if not, then the power to establish the grades is not absolutely commensurate with the power to pay, or to compel payment therefor. But if this be granted, the foundation for the argument against the validity of the grades is gone. If the power to adopt any particular grade is not commensurate with the power to pay or to compel payment therefor, then the former power may exist, although the latter does not; and the result of its exercises may be valid, although nothing can be collected from the property owners, or, notwithstanding the fact that former trustees may have unlawfully appropriated the city's money to pay for it.

There is nothing in the nature of the proceedings which makes against this construction. It does not take away from the property owners all right to determine what work shall be done. For although, when the grade is established, the board may order certain work to be done without petition, yet the property owners of the locality may put a veto on it by filing a protest. Section 30. Nor is there anything in the language of the charter which negatives the construction. The charter expressly provides that the board shall have power, "to establish the grade of all streets," etc. Section 11. This grant of power is unlimited by anything, unless it be the provision in a subsequent place with reference to the petition of the property owners. But this latter provision is not inconsistent with an unconditional grant of the power. It is simply that when the property owners of a locality "shall petition the board of trustees in writing, asking that the same may be done, the board may order said work to be performed as requested, at the expense of the property owners." Section 19. If there is no petition, it cannot be done at the expense of the property owners. But this is a different thing from saying that it cannot be done at all. We think, therefore, that the board had the power to pass the ordinance establishing the official grades. (b) It is contended that the maps and bench books to which the ordinance refers were not published. The argument is that the reference to the maps, etc., makes them a part of the ordinance, and that the requirement as to publication means that the whole ordinance be published. When an ordinance or a deed refers to a separate document, it is not true, as a matter of fact, that the two are one and the same. The law, for some purposes considers one a part of the other. But this fiction will not be extended to any such absurd consequences as is contended for here. Where, for example, a deed refers for a description to a map in the office of some city official, it can hardly be supposed that the map must be carried to the recorder's office, and filed there as a part of the deed. And so here, all that is required to be published is the ordinance itself—the thing which is entered in the ordinance book. (c) It is said that the ordinance as published was not properly certified. The authentication was as follows: "In board of trustees, finally passed this 23d day of January, A. D. 1879. JOSEPH HENRY, President of the board of trustees of the city of Napa. Attest: J. N. WALLINGFORD, Clerk." And the copy as published contained the following addition: "Published by order of the board. J. N. WALLINGFORD, Clerk." This, we think, was sufficient authentication.

2. It is next objected that there was no order that the work be done. The record shows the following order: "Resolved, that the board deem the proposed work on Randolph street expedient, and that there is no valid objection thereto. The board order that said work be done," etc. The point seems to be that the above order is not "in the form of an ordinance;" that is to say, that it did not comply with section 34 of the charter, which provides that "the style of all city ordinances shall be as follows: 'The Board of Trustees of the city of Napa do hereby ordain as follows.'" In the first place, we think this provision is merely directory. There is nothing in the case of *Creighton v. Manson*, 27 Cal. 629, which is contrary to this view. In the second place, the provision applies only to ordinances, and not to mere resolutions or orders. The charter provides that the board may pass "by-laws, resolutions, and ordinances." Section 11, Laws 1877-78, p. 1013. There is evidently a difference between these modes of action. See, 1 Dill. Mun. Corp. (3d Ed.) § 307, and notes. It is unnecessary to consider what is the precise difference. It is sufficient to say that in our opinion the order was not an "ordinance," and that the provision does not apply. It is further objected that this order was not published. But being a mere resolution it does not come under the general provision requiring "ordinances" to be published; and there is no specific requirement that it be published. See section 22, Laws 1873-74, p. 149, and section 30, Laws 1877-78, p. 1017. Therefore no publication was necessary.

3. It is contended that there was a protest of two-thirds of the property owners, under section 30 of the charter. But the court finds that there was no such protest; and we think the evidence is sufficient to justify the finding.

4. Finally it is said that "the proceeding was an unmitigated fraud." The finding is that there was no fraud; and we think the evidence sustains the finding. We, therefore, advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

76 Cal. 181

COPERTINI v. OPPERMAN *et al.* (No. 11,144)

(Supreme Court of California. May 19, 1888)

COURTS—JURISDICTION—TITLE TO LAND.

Plaintiff brought an action in a superior court for \$200, paid as a deposit on an agreement to purchase land, in which agreement defendants stipulated to return the deposit should their title prove defective. *Held*, under Const. Cal. art. 6, § 5, which enacts that in all cases at law which involve the title or possession to real property the superior courts have original jurisdiction, and Code Civil Proc. Cal. § 838, which provides that parties to an action in a justice's court cannot give evidence upon any question involving the title or possession to real property, that, as the right to recover the deposit in question primarily depended on the title of defendants, the superior court had original jurisdiction.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Gaetano Copertini brought an action in the superior court of the city and county of San Francisco against Richard and Richard H. Oppermann for the return of a deposit of \$200 paid by him to them on agreeing to purchase certain real property. Judgment for plaintiff. Defendants appeal.

A. D. Splivalo, for appellants. *G. H. Rixford*, for respondent.

BELCHER, C. C. This action was commenced in the superior court of the city and county of San Francisco. The complaint alleges "that at said city

and county of San Francisco, on the 5th day of May, 1884, said defendants, claiming to be the owners of a certain piece or parcel of land situate on Maiden lane, in said city and county, (describing the land by metes and bounds,) in writing agreed to sell and convey the same to said plaintiff for the price of \$2,400; that then and there plaintiff paid to them on account of such purchase price the sum of \$200, and then and there defendants agreed, among other things, to return said sum of \$200 to plaintiff, if the title to said real property should be defective; that on examination, the title of said defendants to said real property proved defective, and plaintiff alleges that the defendants have not, nor has either of them, a good title to said lands; that plaintiff has notified said defendants of the failure of their title as aforesaid, and demanded of them the said sum of \$200, and that they have refused and still refuse to repay the same to the plaintiff." And the prayer is for judgment against the defendants for the sum of \$200, with interest and costs. The defendants demurred to the complaint on the ground that the court had no jurisdiction of the person of defendants or the subject of the action. The demurrer was overruled, and thereupon defendants answered, denying that their title to the premises was defective, and alleging that it was altogether good and sufficient. Defendants also, by way of cross-complaint, set up their contract to sell to plaintiff the lot in question for \$2,400, the payment thereon by him of \$200, and an agreement on his part to pay the remaining \$2,200 within 30 days from the date of the contract; and they alleged that after the expiration of the 30 days they tendered to plaintiff a good and sufficient conveyance of the said property, and demanded payment of the said sum of \$2,200, but plaintiff had refused to pay the same or any part thereof, and that they were still ready and willing to perform the contract on their part. Wherefore they prayed that the relief asked for by plaintiff be denied; that the contract made between the plaintiff and defendants be specifically performed; and that plaintiff be adjudged to pay defendants the sum of \$2,200 on the execution by them to him of a good and sufficient deed of the premises. The plaintiff answered to the cross-complaint. In this condition of the pleadings the case was tried, and the court found that the defendants' title to the lot, which they had contracted to sell to plaintiff, was defective and not good, and that before the commencement of the action plaintiff notified defendants that their title had been found defective, and demanded from them the repayment of the \$200 which he had advanced on account of the purchase price. Judgment was accordingly entered that plaintiff recover from defendants the \$200, with interest and costs. The defendants appealed from the judgment, and have brought the case here on the judgment roll. They now insist (and this is the only point made) that the subject of the action was within the jurisdiction of a justice's court, and not within the jurisdiction of the superior court; and in support of their contention they cite *Schroeder v. Wittram*, 66 Cal. 636, 6 Pac. Rep. 737. The case cited does not decide the point. That was an action brought in a justice's court to recover back an advance payment made upon a contract similar to the one involved here. The case was tried in the justice's court upon an unverified answer, and judgment rendered in favor of the plaintiff. From that judgment an appeal was taken to the superior court, where a trial *de novo* was had, and a like judgment entered. An appeal was then taken to the supreme court, and the question was whether that court had jurisdiction of the case, the judgment being for less than \$300. It was held that the court did not have jurisdiction, and the appeal was dismissed. The principal opinion favors the theory of appellants here, but it was concurred in by only one justice beside its author. Of the other three justices who took part in the decision two seem to have held that the case was one which, under section 838, Code Civil Proc., might have been transferred to the superior court, so as to give that court original jurisdiction to try it; but in the absence of such an application for transfer the justice could exercise jurisdiction. The third, the

chief justice, thought the case, as presented, involved a question of title to land, and the justice of the peace had no jurisdiction. From this statement it is apparent that the case did not decide the question presented here by appellants. Of course, the superior courts have original jurisdiction "in all cases at law which involve the title or possession of real property." The constitution so provides, (article 6, § 5.) and the Code declares that "the parties to an action in a justice's court cannot give evidence upon any question which involves the title or possession of real property." Code Civil Proc. § 838. But when is the title or possession of real property so involved as to vest original jurisdiction in the superior courts? In *Holman v. Taylor*, 31 Cal. 338, the court, speaking by RHODES, J., of the same language found in the constitution then in force, said: "It is difficult to define with precision the word 'involve,' as it is employed in that section. Its primary signification is to 'roll up or develop,' and it also means 'to comprise, to contain, to include, by rational or logical construction;' but none of these express the precise idea, and its exact synonym may not be found in a single word. The idea intended to be embodied in the phrase, 'cases at law, which involve the title or possession of real property,' may be expressed by the paraphrase: 'Cases at law in which the title or possession of real property is a material fact in the case, upon which the plaintiff relies for a recovery or the defendant for a defense.' When the title, or claim of title, the possession, or right of possession, of real property, or any right growing out of or dependent upon either, is alleged in the pleadings as an issuable fact, the case is within the meaning of the constitutional provision." The court further adds: "Where the title or possession of real property is merely a fact in controversy, where it is incidentally brought into the action, or is only collaterally in question, it cannot be said that the case involves the title or possession, within the meaning of that clause of the constitution." That was an action brought in the district court to recover the sum of \$200, one-half of the value of a partition fence built by plaintiff on the alleged line between the lands of plaintiff and defendant. Defendant demurred on the ground that the court had no jurisdiction of the subject of the action, and the demurrer was overruled. The supreme court held that, under the statute, plaintiff's right of recovery depended primarily upon his title to the land on which the fence was erected, and the defendant's liability depended upon his title to the adjoining land, and that therefore title to real property was involved, and the district court had jurisdiction. In this case plaintiff sued for \$200, and his right to recover depended primarily upon whether defendants had a defective or good title to the lot of land which they had contracted to sell. If the title was defective, he had a clear right to recover, and if good, no cause of action whatever. The words "good title" import that the owner has the title, legal and equitable, to all the land, and the words "defective title" mean that the party claiming to own has not the whole title, but some other person has title to a part or portion of the land. Now, as plaintiff could not recover if defendants had title to the property, and could recover if they had not, it would seem that the title of real property was a material fact in the case and was directly involved. In our opinion the court below had jurisdiction of the case, and the judgment should be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

76 Cal. 187

McENTEE v. COOK *et al.* (No. 9,905.)

(Supreme Court of California. May 19, 1888.)

1. PUBLIC LANDS—PURCHASE FROM STATE—APPLICATION.

Where, in an action to determine the right to purchase certain state land, it appeared that plaintiff's affidavit was in due conformity with the requirements of

Pol. Code Cal. § 3495, relating to the purchase of any portion of a sixteenth or thirty-sixth section of a township, but not with those of Pol. Code Cal. § 3500, providing the form of affidavit necessary on the purchase of other state lands, and that the land applied for was not any portion of a sixteenth or thirty-sixth section, *held*, that such affidavit was insufficient.

2. PLEADING—COMPLAINT—CONCLUSION OF LAW.

In an action to determine the right to purchase certain state lands, a statement in the complaint that on a certain day plaintiff filed in the surveyor general's office "his affidavit and application in due form," is not sufficient, being the statement of a mere conclusion of law.

3. APPEAL—BILL OF EXCEPTIONS—WHEN UNNECESSARY.

No bill of exceptions or statement is necessary on an appeal to set aside the overruling of defendants' demurrer where the transcript contains the demurrer, the order of court overruling the same, and the judgment in which is recited the demurrer, the ruling thereon, and the exceptions taken by defendants' counsel to that ruling.

Commissioners' decision. Department 1. Appeal from superior court, Mendocino county; ROBERT MCGARVEY, Judge.

John McEntee brought this action against Hiram B. Cook and Willard B. Brown to determine the right to purchase certain state lands. Defendants demurred to complaint. Demurrer overruled. Defendants appeal.

T. L. Carothers, (E. D. Sawyer, of counsel,) for appellants. *J. A. Cooper,* for respondent.

BELCHER, C. C. The demurrer to the complaint should have been sustained. The action was commenced to determine a contest between the parties as to their rights to purchase from the state certain parts of sections 20 and 29, in township 18 N., range 17 W., Mount Diablo meridian. The plaintiff's application to purchase the land was made in May, 1884, and the defendants' applications were made in May, 1877.

Section 3495 of the Political Code, as it was framed in 1884, provided for the form of affidavit to be made by a person desiring to purchase any portion of a sixteenth or a thirty-sixth section of any township which had been surveyed by the United States, and section 3500 provided for the form to be used by any one desiring to purchase any part of the unsold portion of the 500,000 acres granted to the state for school purposes, or of the lands selected in lieu of the sixteenth and thirty-sixth sections. The complaint shows that plaintiff's affidavit was made under and in strict conformity to the requirements of section 3495, and not under and in conformity to the requirements of section 3500. But the land applied for by plaintiff was not any portion of a sixteenth or thirty-sixth section, and his affidavit was therefore not the one required in such a case. It is well settled that where one seeks to purchase land from the state he must state in his affidavit all the facts which the law makes requisite for such a purchase, and, failing to do that, his application must fail. *Woods v. Sawtelle*, 46 Cal. 389; *Millidge v. Hyde*, 67 Cal. 5, 6 Pac. Rep. 852; *McKenzie v. Brandon*, 71 Cal. 209, 12 Pac. Rep. 428. The statement in the complaint "that on the 26th day of May, 1884, plaintiff filed in the office of the surveyor general of the state of California his affidavit and application in due form," is the statement of a mere conclusion. The law requires the facts to be stated so that the court may see whether the application was made in due form or not. The record is sufficient. No bill of exceptions or statement was necessary. The transcript contains the demurrer, the order of the court overruling the same, and the judgment, in which is recited the demurrer, the ruling thereon, and the exception taken to that ruling by counsel for defendants. The judgment should be reversed, and the cause remanded, with directions to the court below to sustain the demurrer, giving leave to the plaintiff to amend his complaint if he is so advised.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded, with directions to the court below to sustain the demurrer, giving leave to the plaintiff to amend his complaint if he is so advised.

76 Cal. 171

SMITH v. MOTT. (No. 11,041.)

(Supreme Court of California. May 19, 1883.)

1. PLEDGE—OF HUSBAND'S PROPERTY FOR WIFE'S DEBT—RATIFICATION.

Where a wife pledges personal property belonging to her husband to secure a loan to herself of \$200, and the husband, upon learning of the matter, promises by parol to pay the debt if the pledgee will wait, which the latter agrees to do and does, these acts constitute an agreement, binding upon the husband, that the property shall remain in pledge for the wife's debt.

2. SAME—STATUTE OF FRAUDS.

An agreement that personal property given to secure \$200 shall remain in pledge for the debt of another need not be in writing.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco. T. H. REARDEN, Judge.

Replevin by George G. Smith to recover a piano pledged by his wife for a loan to her of \$200 from defendant, J. H. Mott. Judgment for defendant, and plaintiff appeals.

Royce & Cummins, for appellant. *Van Schaick & Jacobs*, and *A. D. Splivalo*, (*F. A. Berlin*, of counsel,) for respondent.

HAYNE, C. Replevin for a piano. The plaintiff was the owner of the piano. His wife pledged it without his knowledge or consent, to secure a loan to her from the defendant. When the plaintiff learned of the whereabouts of the piano, he went to the defendant, and, after being informed of the position of affairs, made a parol promise to pay the interest and storage within a few days and the principal in three or four months, if the defendant would wait that time, which the defendant agreed to do and did do. The court below sustained the validity of the pledge on the theory that there was a ratification. It is probably not technically correct to speak of a "ratification" where the transaction was by one who neither was nor assumed to be an agent, but who acted on her own account. And it may be conceded that the parol promise of the plaintiff to pay the debt was within the statute of frauds, and void, so far as his personal liability to pay was concerned. See *Crooks v. Tully*, 50 Cal. 255. But we think that what occurred amounted to an agreement between the parties that the property should remain in pledge for the wife's debt. This agreement was collateral to, and distinct from, the contract to pay, and was not required to be in writing. Jones, Pledges, § 5; Civil Code, § 2986. The property being already in possession of the defendant, no redelivery to him was necessary. Jones, Pledges, § 36. And the agreement for forbearance of the wife's debt was sufficient consideration. 1 Pars. Cont. *443 We therefore advise that the order denying the motion for new trial be affirmed.

We concur. BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order denying the motion for a new trial is affirmed.

76 Cal. 173

SIEBER v. BLANC. (No. 11,332.)

(Supreme Court of California. May 19, 1883.)

1. LANDLORD AND TENANT—DUTY OF LANDLORD TO REPAIR—NOTICE.

In an action by a tenant against his landlord for injuries resulting from the defective condition of the leased building, which the landlord had covenanted to repair, a finding for plaintiff is not warranted by the evidence where it appears that no notice to repair was given by the tenant.

2. SAME—STATUTORY LIABILITY TO REPAIR.

Under Civ. Code Cal. § 1941, which provides that the lessor of a building constructed for the occupation of human beings, must put it in a condition fit for such occupation, such lessor is not liable to a tenant for injuries resulting from the defective condition of the leased building, it not having been alleged or found that the building was intended for the occupation of human beings, and the only statutory consequence of a breach of the lessor's obligation being that the tenant may either vacate the premises, or, after notice to the landlord, expend one month's rent towards the repairs.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Action by Mathilde Sieber against Alexander Blanc, her landlord, to recover damages for injuries received by plaintiff by reason of the faulty condition of the building leased by defendant to the plaintiff. Judgment for plaintiff, and defendant appeals.

L. Quint and Cary, Sullivan & Sullivan, for appellant. *Wm. H. Mott*, for respondent.

HAYNE, C. Action by a tenant against her landlord for injuries received by reason of the condition of the building. The court found that "the floor of the back room of the second story of said premises was defectively and insufficiently supported, and the lumber in the flooring thereof worn and rotten." It does not appear that the landlord himself constructed the building, but at the time of the lease he "then and there covenanted and agreed with the plaintiff to repair said premises." Judgment passed for the plaintiff, and the defendant appeals. At common law there was no duty resting upon the lessor of real property (except, perhaps, where furnished houses were let for lodgings,) to put or keep the property in any particular condition or fit for any particular purpose. *Brewster v. De Fremery*, 33 Cal. 341; *Loupe v. Wood*, 51 Cal. 586; *Jaffe v. Harteau*, 56 N. Y. 398. And where, as here, the lessor made an express covenant to repair, such covenant was construed to mean, in a reasonable time after notice from the tenant. 1 Tayl. Landl. & Ten. (8th Ed.) § 330; Wood, Landl. & Ten. (Ed. 1881) 610; *Spellman v. Bannigan*, 36 Hun, 174. There was no such notice in this case; and hence, so far as the action rests upon the covenant, the evidence is insufficient to support the somewhat general finding of the court. Nor was there any liability arising from section 1941 of the Civil Code, which provides that the lessor of a building intended for the occupation of human beings, must put it in a condition fit for such occupation. In the first place it is not alleged or found that the building was intended for the occupation of human beings. And in the second place it was held, in *Van Every v. Ogg*, 59 Cal. 566, as we understand the decision, that the obligation imposed upon the landlord by section 1941 "should be limited by the extent of the privilege conferred upon the tenant" by section 1942; and that therefore the only consequence of a breach of the landlord's obligation is that the tenant may either vacate the premises, or expend one month's rent towards the repairs after notice, etc. We therefore advise that the judgment and order denying a new trial be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

Proc. § 1465," a mortgagee of an insolvent's homestead need not prove his claim in the insolvency proceedings, and the fact that he might have realized part of his claim in such proceedings does not prevent him foreclosing for the amount of his mortgage.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

Action against J. A. Robinson and Sarah, his wife, to foreclose a mortgage given by defendants on their homestead. Judgment for plaintiff, and defendants appeal.

R. Thompson, for appellants. *W. F. Goad*, for respondent.

HAYNE, C. Action to foreclose a mortgage. The defendants, who were husband and wife, declared a homestead upon the property, and afterwards mortgaged it to the plaintiff. Subsequently, the husband was adjudged to be an insolvent, his estate being sufficient to pay something towards his debts. The only point made upon the appeal is that the plaintiff should have proved his claim in the insolvency proceedings. The idea of counsel, so far as we understand him, is that the plaintiff should have got what he could from the estate, and then proceeded to foreclose for the balance. This idea is based upon the analogy to probate proceedings and upon section 60 of the insolvent act, which provides that the insolvency court shall set apart a homestead "in the same manner as provided in section 1465 of the Code of Civil Procedure." Whatever may be the law with regard to mortgages upon probate homesteads, we can see no ground for the position of the appellants. The provision above quoted from section 60 does not refer to all the provisions of the probate law as to homesteads and claims. It refers only to a specified section, which relates merely to the manner of setting apart homesteads. In addition to this, section 44 of the insolvent act seems to negative the theory of the appellants. We think the appeal is without merit, and we therefore advise that the judgment and order denying a new trial be affirmed, with 5 per cent. damages.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are affirmed, with 5 per cent. damages.

78 Cal. 177

TURNER v. McDONALD. (No. 11,181.)

(*Supreme Court of California*. May 19, 1888.)

VENDOR AND VENDEE—GOOD TITLE.

In an action brought for the return of a deposit paid on entering into an agreement for the purchase of certain land in California, the vendor stipulating that the deposit would be returned if the title proved defective, it appeared that one S., who owned the property in 1853, mortgaged the same by a deed absolute in form to one T.; that T., by power of attorney, gave one A. power to sell any land which he then owned or was interested in, in the state; that T. afterwards foreclosed his mortgage, and bought the property under his foreclosure decree; that then T., by A., his attorney, made a quitclaim deed of the property to defendant's grantor; subsequently T. received his sheriff's deed, and died in the state of Michigan, leaving all his property to his wife; that the will was proved in Michigan, but not in California, and there was nothing to show whether there were any debts in California against the estate or not. *Held*, as a good title is one free from grave doubts, and fairly deducible of record, that the title was defective, as a deed absolute, if intended as a mortgage, cannot transfer the title between the parties, and therefore A. had no power to convey to H.; and, as the will was not probated in California, it could not be said that T.'s wife had beyond doubt a good title.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco. JOHN F. FINN, Judge.

R. B. Turner, assignee of one Woodworth, brought an action against Mark L. McDonald to recover back a deposit paid by Woodworth on entering into

an agreement to purchase certain property. Judgment for plaintiff. Defendant appeals.

James A. Waymire, for appellant. *Edward P. Cole*, for respondent.

BELCHER, C. C. On the 19th day of February, 1879, the defendant contracted to sell to one Woodworth a lot in the city of San Francisco for \$20,500, and received from him on account, and as a deposit to secure the sale, the sum of \$500. The contract was made "upon the following terms, to which both parties are mutually bound: Ten days are to be allowed for legal search of title. If it is not found to be perfect, the deposit, for which this is a receipt, is to be returned. If the title is found perfect, and the sale is not consummated in accordance with the above terms, the deposit is to be forfeited." Within the 10 days allowed, Woodworth submitted an abstract of title to John R. Jarboe, an attorney at law, for examination, and was ready and willing to complete the purchase, if Jarboe pronounced the title good. After examination, Jarboe decided that the title was not perfect, and he informed defendant of his decision about the time it was made. Woodworth then demanded from the defendant a return of his deposit, and the defendant refused and neglected to pay back the money, but did not, so far as appears, offer or tender to him any deed of the property. Woodworth assigned his claim to the plaintiff, and this action was brought to recover back the \$500, with interest. The court below gave judgment for the plaintiff, and the defendant appealed.

In support of the appeal it is urged that the defendant's title was, in fact, perfect, and the court should have so found from the evidence. A perfect title must be one that is good and valid beyond all reasonable doubt. Whether the title in particular cases is good or not is a question which it is often difficult to determine, and one upon which lawyers and judges sometimes disagree. "Though the court," it has been said, "may entertain an opinion in favor of the title, yet if it be satisfied that that opinion may fairly and reasonably be questioned by other competent persons, it will refuse specific performance. Thus, in a case before Sir JOHN LEACH, he expressed the strong inclination of his opinion to be in favor of the title, and yet refused the relief sought by the plaintiff; and in the recent case of *Pyrke v. Waddingham*, 10 Hare, 1, in which the vice-chancellor, TURNER, discussed the subject now before us, he expressed an opinion in favor of the title, but nevertheless dismissed the vendor's bill with costs. Still less, of course, will the court force a title on a purchaser in opposition to the decision of another court, though it may think that decision to be wrong." Fry, Spec. Perf. § 579. See, also, *Richmond v. Gray*, 3 Allen, 25; *Sturtevant v. Jaques*, 14 Allen, 523. It was shown on the trial that the title to the lot in controversy here was, in January, 1855, in one Stevens, and that on the 8th day of that month he mortgaged the lot to one Charles S. Tripler. The mortgage was by a deed absolute in form. On the 3d day of December, 1862, Tripler executed a power of attorney to one Abell, giving him power to sell any real property which he (Tripler) then owned, or was interested in, in the state of California. On the 20th of December, 1862, Tripler commenced suit to foreclose his mortgage, and on the 10th of July, 1863, he bought in the property under his decree of foreclosure. On the 8th of October, 1863, Tripler, by Abell, his attorney, made a quitclaim deed of the lot to Hutchinson, defendant's grantor. On the 13th of January, 1864, Tripler received his sheriff's deed. Some time in 1866, Tripler died in the state of Michigan, leaving a last will, by which he gave all his property to his surviving wife, Eunice Tripler, "in confident expectation that the same will be expended in her own comfortable support, and in the education and maintenance of our children, leaving it entirely discretionary with her to make such provision for our children as she, in the exercise of her judgment, may deem best." While the will speaks of the children, it

nowhere gives the names, ages, or number of them. The will was admitted to probate in Michigan, but was never probated in this state, and there was no proof as to whether there were any debts against the estate here or not. In March, 1869, Eunice Tripler executed a quitclaim deed of the lot to defendant's grantor. It is admitted that a title to be good "should be free from litigation, palpable defects, and grave doubts; should consist of both legal and equitable titles, and should be fairly deducible of record." Upon the showing made, it seem to us that defendant's title was not free from grave doubts as to its sufficiency. When Tripler made his power of attorney to Abell he did not own, and had no legal interest in, the lot. It is settled law in this state that a deed absolute, if intended as a mortgage, does not transfer title between the parties to it. *Cunningham v. Hawkins*, 27 Cal. 606; *Taylor v. McLain*, 64 Cal. 514, 2 Pac. Rep. 399; *Healy v. O'Brien*, 66 Cal. 519, 6 Pac. Rep. 386; section 744, Code Civil Proc., which is the same as section 260 of the old practice act. But if Tripler had no interest in the lot when he made his power of attorney to Abell, can it be said, beyond doubt, that the deed afterwards made by the attorney conveyed any interest therein? Again, when one dies leaving property in this state, that property must be disposed of according to the laws of this state; and if he left a will, that will must be proved here, before it can affect property situated here. Now, can it be said, beyond doubt, that Mrs. Tripler could convey by quitclaim deed a good title to the lot in question before the will under which she claimed it was produced and proved here? It seems to us that these questions must be answered in the negative, and that it must follow, therefore, that defendant's title was not "fairly deducible of record." There is no other question requiring special notice. We find no error in the record, and therefore advise that the judgment and order be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

76 Cal. 197

EMERSON v. BERGIN *et ux.* (No. 11,120.)

(Supreme Court of California. May 19, 1888.)

EASEMENT—WATER-COURSE—PLEADING—STATUTE OF FRAUDS.

In an action to restrain defendants from diverting the waters of a stream from plaintiff's land, an averment in the complaint of an agreement with defendants' grantor, under which plaintiff long enjoyed and now claims a right to receive upon his land water from said stream by means of an aqueduct constructed over defendants' land, which defendants have destroyed, is a sufficient allegation of a right to an easement over defendants' land, although not alleging such agreement to have been in writing.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; BELDEN, Judge.

Suit by Silas B. Emerson against John Bergin and Francisca Bergin for injunction and damages for diverting a water-course. Judgment for defendants, and plaintiff appeals.

G. A. Heinlen, for appellant.

It is not necessary, in actions of this character, to allege that the agreement under which plaintiff built these water-works was in writing. The statute of frauds has changed the rule of evidence, but not the rule of pleadings. *Tucker v. Edwards*, 3 Pac. Rep. 233; *Goulds Pl. c. 4*, § 43, and cases; *Marshall v. Water Co.*, 5 Pac. Rep. 101; *Vassault v. Edwards*, 43 Cal. 458; *Wakefield v. Greenhood*, 29 Cal. 598; *Hayt v. Hunt*, 15 Pac. Rep. 410; *Bliss*, Code Pl. 312; 1 Chit. Pl. 270; *Miller v. Drake*, 1 Caines, 45; *Nelson v. Dubois*, 13

Johns. 177; *Elting v. Vanderlyn*, 4 Johns. 237; *Gibbs v. Nash*, 4 Barb. 449; *Martin v. M'Fadin*, 4 Litt. 240; *M'Dowel v. Delap*, 2 A. K. Marsh. 33. The rule in equity was the same as at law. *Spurrier v. Fitzgerald*, 6 Ves. 548; *Cozine v. Graham*, 2 Paige, 177; *Coles v. Bowne*, 10 Paige, 526; *Champlin v. Parish*, 11 Paige, 405.

S. O. Houghton, for respondents.

The matter stricken out did not state facts sufficient to constitute a cause of action. *Green v. Palmer*, 15 Cal. 414. There was no allegation that the easement claimed to convey water across lands of defendant was acquired by grant or by adverse user. Easements are created by grant. *Duinneen v. Rich*, 22 Wis. 550; *Cook v. Pridgen*, 45 Ga. 331; *Adams v. Andrews*, 15 Q. B. 284; 1 Washb. Real Prop. p. 552. To acquire rights to real estate by prescription, the use for five years must be exclusive, open, and notorious, under a claim of right hostile in its inception, and with the knowledge of the owner, and it must affirmatively appear that the claim was hostile. *Miller v. Garlock*, 8 Barb. 153; *Parker v. Foot*, 19 Wend. 313. A license creates no estate in land, and may be revoked at any time. *Cronkhite v. Cronkhite*, 94 N. Y. 323; *Johnson v. Skillman*, 29 Minn. 95, 12 N. W. Rep. 149; *Wiseman v. Lucksinger*, 84 N. Y. 31. The matter stricken out was redundant, and was properly stricken out. Code Civil Proc. § 453.

BELCHER, C. C. The court below, on motion of defendants' attorney, struck out a part of the complaint. The defendants then answered, and upon the issues raised by them the case was tried and judgment entered in their favor. The plaintiff appealed, and in support of his appeal insists that the court erred in striking out a portion of his complaint. The action was brought to obtain an injunction restraining defendants from diverting from the land of plaintiff the waters of a small stream called "Arroyo Permanente," and for damages. The complaint alleged that for more than 20 years plaintiff had owned and occupied a farm in Santa Clara county containing about 1,100 acres, through which a running stream of water called "Arroyo Permanente," had its natural course or bed; that plaintiff had kept a large number of cattle, horses, and sheep on his farm, and had obtained water for them, and for domestic purposes, at his house from the stream referred to until the waters thereof were diverted by defendants; that in 1865 one Robert McKubin owned and occupied a tract of land bordering on the Arroyo Permanente above the plaintiff's farm; and that in that year plaintiff and McKubin jointly constructed a wooden flume from a point on the stream above the latter's land to a point selected by him on his land, and through and by means of this flume they diverted and appropriated so much of the water of the stream as would flow through the same; that at the time of constructing the flume it was understood and expressly agreed by and between the parties that the water so appropriated, diverted, and conveyed through the flume should be equally used by them upon their respective tracts of land, and the flume was constructed and the water diverted through the same, under and with this understanding and agreement; that at the time of constructing the flume plaintiff, with the consent of McKubin and by agreement with him, constructed a tank at the foot of the flume into which the waters flowing through the same were discharged, and also laid a pipe, connecting with the tank, across a portion of McKubin's land and his own, to his buildings, through which pipe he drew from the tank his moiety of the water conveyed through the flume; and at the same time McKubin laid down a pipe of the same capacity, leading to the buildings on his land, through which he also diverted and conveyed to its place of use his moiety of the water, and that so long as McKubin continued to own and occupy his tract of land he and plaintiff continued to equally divide and use the water conveyed through the flume, upon their respective tracts of land; that after-

wards, about the year 1873, and while the flume, tank, and pipes were so laid and in use, the defendant Francesca Bergin, then Francesca Price, became the owner of the McKubin tract of land, and succeeded to all his rights therein, and ever since has been and still is the owner thereof; that in the year 1876 defendant Francesca and plaintiff constructed a new flume in place of the one originally built, and through this new flume continued to divert and convey water from the Arroyo Permanente, and to use the same, dividing it equally, on the lands owned by them respectively; that shortly after the construction of this new flume defendants intermarried, and have ever since been and are now husband and wife; that in the year 1879 plaintiff, with the knowledge and consent of defendants, at large expense, laid down and substituted for the wooden pipe, through which he had previously drawn his proportion of the water brought through the flume, a cement pipe of the same capacity, through which he continued to convey to his buildings his proportion of the water, until the same was disconnected by defendants; that in the year 1881 plaintiff, at his own expense, and with the knowledge and consent of defendants, substituted for the wooden flume three pipes, through which plaintiff and defendants continued to divert and convey the water of the Arroyo Permanente, for use on their respective lands, until some time in the fall of the year 1882, when defendants broke and destroyed the connection of the cement pipe through which plaintiff took water from the tank, as aforesaid, and they thus prevented, and have ever since continued to prevent, plaintiff from conveying any water from the tank to his land and the buildings thereon. It is then further alleged that defendants have built a dam across the stream on the land of defendant Francesca, and have placed in position a hydraulic ram below the dam, and by means thereof they force water from the creek through a pipe upon the land of defendant, and use the same for irrigation and other purposes; that by means of the dam and ram they divert and cause to be absorbed so much of the water of the stream that the same has ceased to flow to and upon the land of plaintiff, and threaten and will continue so to do unless restrained, and that plaintiff has sustained damages in the sum of \$5,500. The part of the complaint stricken out was that commencing with the averments about the construction of the flume and pipes by plaintiff and McKubin in 1865, and ending with the disconnecting of plaintiff's cement pipe and stopping the flow of water through the same by defendants in 1882. The respondents justify the action of the court upon the ground that the part stricken out showed only a parol license, which was subject to be and was revoked by them. The appellant, on the other hand, insists that under his averments he could have proved that he had acquired an easement over respondents' land, which was not subject to their revocation.

A license in respect to real estate is defined to be "an authority to do a particular act, or series of acts, on another's land, without possessing any estate therein." 1 Washb. Real Prop. side page 398, and authorities cited. And the general rule is that a mere license may be revoked at any time at the pleasure of the licensor. *Potter v. Mercer*, 53 Cal. 667; *Cronkhite v. Cronkhite*, 94 N. Y. 323; *Wiseman v. Lucksinger*, 84 N. Y. 31. "An easement is said to be a permanent interest in another's land, with a right at all times to enter and enjoy it, and must therefore be founded upon a grant by deed or writing, or upon prescription." 2 Hil. Real Prop. (3d Ed.) 5; 1 Washb. Real Prop. 398. And the owner of an easement has the right at all reasonable times to enter on the servient premises and make any necessary repairs. 2 Wait Act. & Def. 743, and cases cited. It will be observed that, according to plaintiff's averments, the flume, tank, and pipes were constructed, and the water was diverted and distributed, under and in accordance with an agreement made between plaintiff and McKubin, but whether that agreement was in writing or not, so as to take the case out of the statute of frauds, does not appear. It is settled law that where one has agreed to sell a piece of real property, and an

action is brought to enforce the agreement, the plaintiff is not required to allege that the agreement was in writing. "The averment that the agreement was made is sufficient, without alleging that it was reduced to writing, and signed; but if the statute requires the agreement to be in writing, the party alleging the agreement must, if the allegation be denied, prove it by the production of the writing or other competent evidence." *Vassault v. Edwards*, 43 Cal. 458; *Coles v. Bowne*, 10 Paige, 526; *Champlin v. Parish*, 11 Paige, 405; *Hayt v. Hunt*, 15 Pac. Rep. 410. Now, if this be the rule where one agrees to transfer to another his whole interest in real property, why should it not be the rule when he agrees only to transfer some smaller interest or create an easement? We are unable to perceive any distinction between the two supposed cases. We think the complaint was sufficient, and under it the plaintiff should have been permitted to prove, if he could, that he acquired an easement to conduct water across defendants' land to his own land, which is still a subsisting right. The court erred in striking out a part of the complaint, and for this error the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause remanded for a new trial.

76 Cal. 235

SIERRA M., S. & M. CO. v. HARTFORD FIRE INS. CO. *et al.* (No. 11,050.)

(*Supreme Court of California.* May 21, 1888.)

1. INSURANCE—CONDITIONS OF POLICY—WATCHMAN.

In an action on a policy, one condition of which required the assured during all the time the mill, which was part of the insured premises, was idle to employ a watchman to be in and upon the premises insured, day and night, it appeared that the required watchman was employed, but that when the fire occurred he was about 65 feet from the insured premises, though engaged in watching the same, and was upon higher ground than that on which the mill stood, from which he had a better view of the insured premises than if he had been in the mill. Held that, the assured having employed a proper watchman, had complied with the requirement of the policy, although the watchman was not actually upon the insured premises at the time of the fire.

2. SAME—WATER SUPPLY.

In an action on a policy, one condition of which required the assured to keep a supply of water constantly on top of the mill, which was part of the insured premises, in readiness for immediate use, it appeared that a tank about two feet deep and three feet square was located on the roof, but below the apex thereof, and that it was fed by a small flume. Held, that the jury were justified in believing that the tank was sufficiently supplied with water.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Action on a fire insurance policy brought by the Sierra Milling, Smelting & Mining Company against the Hartford Fire Insurance Company and R. Hewson. Judgment for plaintiff, and Hartford Fire Insurance Company appeals.

Gray & Haven, for appellant. *H. A. Powell* and *Arthur Rodgers*, for respondent.

FOOTE, C. This is an action to recover a loss upon a fire insurance policy. Judgment was given for the plaintiff, and from that and an order denying a new trial defendant appeals. It is contended by the appellant that the jury found contrary to the instructions of the court, and that the evidence before them went, without contradiction, to show that the plaintiff had violated at least two of the warranties by which it was bound by the terms of the policy, and that the verdict was, therefore, against the evidence. The obligations thus imposed are to this effect: That during all the time the mill, which was

part of the insured premises, remained idle the plaintiff should employ a watchman to be in and upon the premises insured, day and night; that the plaintiff should keep a supply of water to be constantly on top of the mill and in readiness for immediate use whenever required. It is alleged in the answer "that no watchman was employed at or in charge of the premises at the time of said fire;" and that "no water whatever was on top of the said mill at the time of said fire." The evidence is to the effect that a watchman was employed, whose duty it was to be at the premises insured and to be a sentinel in looking after them at all times when the mill was idle, but when the fire took place he was in front of a blacksmith shop belonging to the mill property, but not insured, which was about 65 feet from the mill, and that he was engaged at that time in watching over the insured premises, and was upon higher ground than that on which the mill stood, where he could have a better opportunity of seeing the mill, the outside machinery, and the tramway, which were all insured, than if he had been in the mill. So far as any negligence of the watchman is concerned in fulfilling his duty, it is clear that he was diligent in watching, and the only doubt which can be said to rest upon the plaintiff's compliance with the warranty, is whether by its terms it was bound to see that the watchman which it employed, was either in the mill or immediately at it, or the tramway or some other part of the property actually insured, or whether the warranty only bound the corporation to employ a proper watchman to be at and upon the premises whenever the mill was idle. To us it seems as if the corporation was only bound to employ a proper watchman to be in and upon the premises when the mill was idle. And when the watchman of a proper kind was employed to perform this duty, the plaintiff could not be held responsible for his not being, at the time of the fire, actually in the mill, or beside it, or the tramway or other insured property. Although the blacksmith shop was not insured, it was, in point of fact, upon the premises to which the insured property belonged, and the watchman, posted where he was, was just as much in, upon, and in charge of the insured premises as if he had been in the mill. As we understand the issues raised by the pleadings, as to the warranties, the fact that the watchman was not in the mill or at the tramway when the fire occurred, is not alleged to be a breach of the warranty, but this is claimed in the argument, and the fact that he was 65 feet from the mill, in front of a blacksmith shop in full view of the insured property, is urged as proof that he was not on the insured premises when they burned, and therefore the contract of warranty was violated. We do not see any element in the acts of the corporation or the watchman which show any violation of the warranty, either through failure to employ the watchman, as required, or in his or the corporation's negligence in the performance of his duty as a sentinel. In this case, under the issues made by the pleadings, the inquiry addressed to the jury was, did or did not the plaintiff have a watchman employed upon the premises insured at the time of the fire? It is not apparently questioned now by the appellant but what the watchman was so employed by the plaintiff, but the contention appears to be that the warranty consisted in something else besides that which was claimed in the answer, viz., that the watchman, although employed to be in and upon the premises, was not there, and that therefore a breach of the warranty is asserted. To us this seems to be nothing more than an allegation of negligence upon the part of the watchman, and for this the plaintiff was not responsible under section 2629 of the Civil Code. The case of *Mining Co. v. Insurance Co.*, 67 Cal. 28, 7 Pac. Rep. 4, is cited in support of the defendant's contention that the fact of the watchman not being in the mill, or at it, or the tramway, or, as is expressed by the learned counsel, "on the premises insured," was a breach of the warranty. But an examination of that case discloses the fact that there the issue upon which the case was tried was whether or not the watchman was in fact in and upon the premises; here the issue as made by the plead-

ings is, was he employed at or in charge of the premises at the time of the fire? In *Wenzel v. Insurance Co.*, 67 Cal. 440, 7 Pac. Rep. 817, it was held upon the facts found that no one was in fact employed as a watchman of the premises, because the individual, whom it was claimed filled that position, worked in the day-time 2,100 feet from the insured premises, and at night slept 900 feet from them. Here it is clear that the watchman was employed to do what the policy required, and that at the time of the fire he was at the premises, being in front of the blacksmith shop that belonged to and was substantially a part of the premises including the mill and tramway, which two last were insured, on duty as a sentinel, and in a more favorable situation to keep guard and watch over the premises insured than if he had been in the mill or on or near the tramway. We do not see, under the defendant's contention, how being in the mill would have satisfied the conditions of the policy any more than being a hundred feet off on the tramway, which was insured, or close up to the mill, where he would have been less likely to have seen the fire at its inception, than where he was, 65 feet off, in front of the blacksmith shop, and on higher ground than the mill itself. We think that upon this state of facts the warranty is shown to have been fully complied with.

As to the question made upon the matter of inadequate water supply kept on the top of the mill, it is evident that no place on the roof was prescribed under the contract as being the particular place where the supply was to be located, and no specific amount of water was mentioned as being necessary to be so kept. Both these questions, therefore, were matters of fact to be ascertained by the jury upon the evidence before them; which has been done. The evidence was that a tank about two feet deep and three feet square was located on the roof, but below the apex thereof, that it was fed by a small flume carrying water, and the jury was justified in believing that the tank was sufficiently supplied with water. At any rate, upon the testimony before them, we are not disposed to say that their verdict upon the question submitted to them was manifestly wrong, and against all the evidence.

As to the instructions given and excepted to, we must say that we had some difficulty in determining which of them precisely were excepted to, but finally after much labor and consideration, we were enabled to identify them, and taking them and all the others together, although some of them perhaps, were subject to the objections made, yet we think the law was fairly put before the jury, and they could not have been misled to the defendant's prejudice, and that was sufficient, and has been so held in numerous cases. *People v. Tomlinson*, 66 Cal. 344, 5 Pac. Rep. 509.

We perceive nothing in the record which shows a misrepresentation of the value of the property insured which should entitle the defendant to defeat the plaintiff's recovery. No prejudicial error appearing, we advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

76 Cal. 240

CLEARY v. CITY R. CO. (No. 9,794.)

(Supreme Court of California. May 22, 1888.)

DAMAGES—MEASURE OF—PARENT AND CHILD.

Under Code Civil Proc. Cal. §§ 376, 377, providing that a father may maintain an action for the death of his minor child, when the same is caused by the wrongful act or neglect of another, and that such damages may be given in such action as, under all the circumstances of the case, may seem just, an instruction limiting the measure of damages to such sum as would fully and fairly compensate the father for the

loss of his child's services during her minority, in addition to medical and funeral expenses, is erroneous; the mental anguish and suffering of the parents being also an element proper to be considered in determining the amount of the recovery.¹

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Action for damages for death of minor child, by Patrick Cleary against the City Railroad Company. Verdict for plaintiff. Damages, \$1,000. New trial granted, on motion of plaintiff, for errors in law. Defendant appeals. Code Civil Proc. Cal. § 376, provides that a father may maintain an action for injury or death of minor child when the same is caused by the wrongful act or neglect of another. Section 377 provides that in every such action such damages may be given as, under all the circumstances of the case, may seem just.

Wilson & Wilson, for appellant. *P. Reddy* and *F. R. Whitcomb*, for respondent.

BELCHER, C. C. This action was brought to recover damages for injuries sustained by the plaintiff's minor daughter, Julia Cleary, which resulted in her death, and are alleged to have been caused by the negligence of an employe of defendant, a street railway company in the city of San Francisco. The case was tried before a jury, and the verdict was for the plaintiff in the sum of \$1,000. The plaintiff moved for a new trial on the ground of errors in law occurring at the trial and excepted to by him, and the court granted the motion. The appeal is by defendant from that order. At the request of the plaintiff the court instructed the jury in reference to the measure of damages as follows: "You are instructed that you have the right to award or give to the plaintiff, if you find in his favor, such damages as may, under all the circumstances of the case, be just and reasonable." Afterwards the court, of its own motion, gave to the jury another instruction upon the measure of damages, in these words: "Should you find for the plaintiff, the damages recoverable by the plaintiff, in addition to the medical and funeral expenses, would be such a sum as would fully and fairly compensate the father for the loss of the service of his daughter during her minority, and you should not, in considering the matter, take into account the personal wrongs done to the deceased, nor the pain and suffering inflicted on her, nor on the father or mother. In other words, the measure of plaintiff's damages, in case he recovers, should be such sum, and such sum only, as would fully and fairly compensate the father for the loss of his child's services during her minority, in addition to the expenses of medical attendance and funeral expenses."

The first instruction was proper, (Code Civil Proc. § 377,) and the second was erroneous, (*Beeson v. Mining Co.*, 57 Cal. 20; *Cook v. Railroad Co.*, 60 Cal. 604; *Nehrbas v. Railroad Co.*, 62 Cal. 320.) It is true, the damages awarded to the parent in such cases are not for the pain and suffering inflicted on the infant; but the loss of the child's services during minority, the mental anguish and suffering of the parents, in addition to the medical attendance and funeral expenses, are elements which, under our peculiar statute, (Code Civil Proc. §§ 376, 377,) are proper to be considered in determining the amount of the recovery. Every error is presumed to work injury to the party against whom it is committed, unless it affirmatively appears from the record that no injury did or could result. *Rice v. Heath*, 39 Cal. 609. The instruction complained of improperly limited and controlled the jury in determining what

¹In general, as to the measure of damages for negligently causing death, see *Cooper v. Railway Co.*, (Mich.) 33 N. W. Rep. 306; *County of Howard v. Legg*, (Ind.) 11 N. E. Rep. 612, and note; *Stoher v. Railway Co.*, (Mo.) 4 S. W. Rep. 389; *Hogue v. Railroad Co.*, 32 Fed. Rep. 365; *Davis v. Guarnieri*, (Ohio), 15 N. E. Rep. 350; *Railroad Co. v. Rouse*, (Ga.) 5 S. E. Rep. 627; *Railroad Co. v. Lee*, (Tex.) 7 S. W. Rep. 357; *Brunswick v. White*, (Tex.) 8 S. W. Rep. 85; *Coal Co. v. Nee*, (Pa.) 13 Atl. Rep. 841.

amount of damages plaintiff was entitled to recover, and we are unable to say that it did not operate to his prejudice. Other instructions were given to the jury, which were excepted to by the respondent, and are claimed to have been erroneous; but they need not be considered here. In our opinion the new trial was properly granted, and the order should be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

76 Cal. 242

LLEWELLYN STEAM-CONDENSER MANUF'G CO. v. MALTER *et al.* (No. 9,762.)

(*Supreme Court of California.* May 22, 1888.)

1. SALE—ACTION FOR PRICE—QUESTION FOR JURY.

In an action to recover the purchase price of steam-heaters, the evidence for plaintiff showed that the heaters were scheduled at certain prices, and that defendants, when purchasing, knew of the schedule, and that it was agreed between plaintiff's agent and defendants that the latter should receive a certain per cent. on such prices, if they took the heaters. Defendant denied ever having purchased or negotiated with plaintiff or its agent for the heaters. *Held*, that the question whether defendants purchased the heaters, and for the scheduled prices, is for the jury.

2. SAME—EVIDENCE.

Where there is no direct evidence showing the price defendants were to pay for certain steam-heaters sold them by plaintiff, but it appears that there was a schedule of prices, and there is testimony to show that defendants purchased under an agreement that if they took the heaters they were to have a certain commission to be computed on the schedule prices, and no other prices were mentioned, it cannot be said that there is no evidence of the price to be paid.

3. SAME—PRICE—INSTRUCTIONS.

Where persons enter into an agreement that, if they buy certain property at a price stated, they shall be entitled to a certain commission thereon, it is error for the court not to instruct the jury to deduct such commission from the contract price in case they find that the plaintiff is entitled to recover in his action on the contract.

Department 2. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Action for goods sold and delivered by the Llewellyn Steam-Condenser Manufacturing Company against George H. Malter and others. Judgment for plaintiff, and defendants appeal.

R. Percy Wright and *W. C. Flint*, for appellants. *J. H. B. Wilkins, C. A. Webb*, and *Page & Eels*, for respondent.

THORNTON, J. This is an action for goods sold and delivered by plaintiff to defendants. The goods were two steam-condensers or heaters. The original claim was for three condensers, but on the trial the claim for one of them was abandoned by plaintiff. The trial was by jury, who found a verdict for plaintiff for \$1,100.

It is contended by appellants that there was no evidence respecting the price to be paid for either of the heaters, nor any evidence respecting their value. We think there was some evidence of the price to be paid for the heaters. The plaintiffs had a list or schedule of prices for these heaters,—\$625 for one, and \$475 for the other,—and there was testimony tending to show that the contract was made with reference to those schedule prices. The defendants were to be allowed by plaintiff a commission of 20 per cent. on taking and using these heaters, and this commission was to be computed on the schedule prices. No other prices were mentioned in the negotiation between the parties, and the commission could be computed alone on the prices set down in the schedule. A like contention is made as to the evidence in regard to the receipt and acceptance of the heaters. An examination of

the record shows that there was evidence tending to show such receipt and acceptance. It is contended that the court erred in its charge to the jury in regard to the value of the heaters. On this point the court, in its charge, used this language: "It is claimed by the plaintiff that one of these heaters—the 48-inch heater—was worth \$475, and a 60-inch heater was worth \$625. If you should conclude that the plaintiff is entitled to recover for both of these, the result would be that he would be entitled to a verdict for \$1,100. If you should conclude that he was entitled to recover for only one, then your verdict would depend upon which you think they are entitled to,—if the 48-inch heater, your verdict should be for \$475; if the 60-inch, \$625." There was really no direct evidence of the value of the heaters; that is to say, no witness was asked or testified what the heaters, or either of them, was worth. The evidence tended to show that the defendants contracted with plaintiff with reference to a schedule in which the prices were set down as \$475 for one heater, and \$625 for the other. But the evidence whether defendants agreed to pay these schedule prices was circumstantial. Such agreement was to be inferred from circumstances stated by a witness. With regard to the 60-inch heater, Jones, who acted as an agent for plaintiff in making the contract, answered to the following questions as stated below: "*Question.* What was the price agreed upon between yourself and Mr. Malter at that time? *Answer.* Twenty per cent. *Q.* What was the price of the heater? *A.* It was \$625; that is the schedule price." The witness further says that he agreed to pay them (the defendants) 20 per cent. on the schedule prices of the heaters if they took them. As to the 48-inch heater, the following was the evidence as to the price: The witness Jones was asked: "Was any price agreed upon between yourself and Malter, Lind & Co. at the time of the sale of this heater?" To which he answered: "Of course, they all knew the price of the heater was \$475,—the 48-inch one. That is the schedule price." Now, in regard to both heaters, and clearly in regard to the 48-inch heater, it may be mentioned that the question whether plaintiffs and defendants contracted with regard to the prices named on the schedule, or did not contract with regard to such prices, was to be determined, and to be determined by the jury. We do not regard this case as one where the evidence as to the price of the articles purchased is all one way; for Malter, the defendant, with whom Jones negotiated, states in his testimony that he never ordered or purchased a heater from Jones or the company he represented. This testimony should be regarded as a denial of the purchase and all its incidents. We think that the court, in that portion of the charge above quoted, invaded the province of the jury, and took from it a question which, under the law, the jurors were to determine. We are also of opinion that the court erred in ignoring in his charge the 20 per cent. commission to which defendants were entitled on purchasing the heaters. This percentage should have been deducted from the price or value of the heaters, and the jury should have been directed to make this deduction in fixing the amount of their verdict. The other portions of the charge excepted to are without error. As the cause has to be reversed and sent to the court below for a new trial, we think it proper to say that on the new trial it will be the better course to admit the evidence which counsel for defendants proposed to offer on the cross-examination of the witness Jones, and which will be found stated on page 11 of the transcript. Such a course will conduce to a fair trial of the cause. For the error above noted, the judgment and order must be reversed, and the cause remanded for a new trial. So ordered.

We concur: SEARLS, C. J.; SHARPSTEIN, J.

76 Cal. 190

PEOPLE *ex rel.* REDEMEYER *v.* ANDERSON & U. V. R. Co. (No. 9,961.)

(Supreme Court of California. May 19, 1888.)

1. TUNPIKES AND TOLL-ROADS—EXPLANATION OF FRANCHISE.

A toll company which has acquired its right to construct and maintain its toll-road under an order of a county board of supervisors made in pursuance of a special act of the legislature providing that the board may grant a franchise "for any term not more than fifteen years from the date of said charter" has no right to collect tolls on its road after the expiration of such 15 years.

2. SAME—RIGHT TO ENJOIN COLLECTION OF TOLL—FINDINGS.

In a proceeding by the people to restrain a toll company from collecting toll on a wagon road, its franchise having expired, a finding that at the expiration of such franchise said road "became and ever since has been a public highway" is not inconsistent with a finding that defendant's grantor "procured the right of way," but that no proceedings to condemn the land were taken, and that "no owner of said land or of any part thereof has ever heretofore conveyed the same to the public, or granted the right of way across the same," as such right of way may have been acquired by prescription; and the latter finding does not affect the right of the people to maintain the proceeding.

Commissioners' decision. Department 1. Appeal from superior court, Mendocino county; ROBERT MCGARVEY, Judge.

Action by the people upon the relation of A. F. Redemeyer to enjoin the Anderson & Ukiah Valley Road Company from collecting tolls upon a designated road, and to declare such road a public highway. Defendant's franchise, under which it had collected tolls on the road in question, expired on or about May 19, 1883. Judgment for plaintiff. Defendant appeals.

T. L. Carothers, for appellant. *J. A. Cooper*, for respondent.

HAYNE, C. This is a proceeding in the nature of an information to restrain the defendant from collecting tolls on a wagon road. The court below gave judgment for the plaintiff, and the defendant appeals; the case coming up on the judgment roll. The findings show that the defendant acquired its right from one John Gschwend, who acquired the right to construct and maintain a toll-road under an order of the board of supervisors on May 19, 1868. This order was made in pursuance of a special act of the legislature, which provided that the board could grant a franchise "for any term not more than fifteen years from the date of said charter." Laws 1867-68, p. 350. The 15 years having expired, it is perfectly clear that neither Gschwend nor his assignee has any further right to collect tolls. The defendant makes a point which can only go to the right of the people to maintain the proceeding. It is said that there is a contradiction in the findings upon the question whether Gschwend or his assignee ever acquired the right of way over the lands across which the road runs. But we do not think there is any material contradiction. The complaint alleges that the road was a public highway, etc. There was no special demurrer to this, and in the absence of such a demurrer the

allegation must be considered as of an ultimate fact. The complaint being good, the findings which follow its language are sufficient. Hence the finding that on the 19th day of May, 1883, the said road "became and ever since has been a public highway" must be considered to be of an ultimate fact. The findings that Gschwend "procured the right of way," but that no proceedings to condemn the land were taken, and that "no owner of said land or of any part thereof has ever heretofore conveyed the same to the public or granted the right of way across the same," are not inconsistent with the ultimate fact. It may be that the right of way was acquired by prescription. The material points are that the road is a public highway, and that the defendant has no right to collect tolls upon it. And these sufficiently appear from the findings. We therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

76 Cal. 269

PEOPLE *ex rel.* ATTORNEY GENERAL v. REIS, County Treasurer, *et al.*, (SAN FRANCISCO GAS-LIGHT CO., Intervenor.) (Nos. 9,973 and 11,079.)

(*Supreme Court of California.* May 22, 1888.)

1. TAXATION—INTEREST—PENALTIES AND FORFEITURES.

Interest required by Pol. Code Cal. § 3803, to be collected upon delinquent taxes, is not a penalty or forfeiture which is to go to the county under section 3886, providing that "fines, forfeitures, and penalties incurred by a violation of any of the provisions of this title must be paid into the treasury for the use of the county where the person against whom the recovery is had resides," and that portion of the interest collected which accrues on the state tax should be paid to the state.

2. SAME—INTEREST ON DELINQUENT TAXES—POWER OF LEGISLATURE TO IMPOSE.

It is within the power of the legislature to impose payment of interest upon delinquent taxes, to regulate the rate thereof, and to require such interest upon the state's portion of the tax to be paid to the state.

3. SAME—CONSTRUCTION OF STATUTES—RECOVERY OF DELINQUENT TAXES.

The word "recovery," used in said section, is to be construed in its popular sense of recovery had by process and course of law, under Code Civil Proc. Cal. § 1861, providing: "The terms of a writing are presumed to have been used in their primary and general acceptance," etc.

4. COUNTY OFFICES—STATE TAXES—MANDAMUS.

On application for mandate to compel a county auditor to report and the treasurer to pay over an amount claimed to be due the state as interest on delinquent taxes, provided for by Pol. Code Cal. § 3803, where it appears that at the time of the application the fund derived under said section of the Code, except a certain sum thereof, had been paid out for regularly audited claims, mandate will not lie for more than such sum remaining.

5. SAME.

In an action by the state for writ of mandate to compel a county auditor to make report and the treasurer to pay over an amount claimed to be due the state, under Pol. Code Cal. § 3803, as interest on delinquent taxes, upon appeal by the state, the judgment as to an intervenor directing mandate to issue for payment to intervenor, a gas company, of its duly-presented claim out of the revenue applicable to the payment of expenses, will be affirmed.

6. APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW.

Objection that a complaint in intervention does not state facts constituting a cause of intervention comes too late when first raised upon appeal.

7. SAME.

Where objection is first made on appeal to the sufficiency of a complaint, and no defect appears which affects the substantial rights of the parties, judgment should not be reversed under Code Civil Proc. Cal. § 475, requiring defects to be disregarded unless they affect substantial rights.

8. MANDAMUS—PROCEDURE—WAIVER.

Writ of mandate, which, under Code Civil Proc. Cal. § 1086, "must be issued upon affidavit," may be allowed upon an unverified complaint when the parties go to trial without first making objection on that ground.

Department 2. Appeal from superior court, city and county of San Francisco; F. M. LAWLER, Judge.

Action by the people of the state of California *ex rel.* the attorney general against Christian Reis, treasurer, and William M. Edgar, auditor, of the city and county of San Francisco, and the San Francisco Gas-Light Company, intervenor, to obtain a writ of mandate. The plaintiff and the defendant both appeal from the judgment rendered. Sections of the Code of Civil Procedure, referred to in the opinion, are as follows: "Sec. 475. The court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect." "Sec. 1861. The terms of a writing are presumed to have been used in their primary and general acceptance, but evidence is nevertheless admissible that they have a local, technical, or otherwise peculiar signification, and were so used and understood in the particular instance, in which case the agreement must be construed accordingly."

George Flournoy, Jr., City and County Atty., Geo. A. Johnson, Atty. Gen., and Langhorne & Miller, for the State. Garber & Bishop, for intervenor and defendants.

THORNTON, J. This action was brought by the people of the state for a writ of mandate to compel defendant Edgar, as auditor of the city and county aforesaid, to make his official statement and certificate that certain sums of money, consisting of interest on the state's portion of delinquent taxes collected by the said city and county for the fiscal year commencing with 1872-73, and ending with 1882-83, are in the hands of defendant Reis, the above-named treasurer, and to command Reis, as treasurer, to settle with the controller of the state for said sums, and to pay the same over to the treasurer of the state. The claim of the state for the sums of money above mentioned is based on section 3803 of the Political Code, which is as follows: "Interest at the rate of 2 per cent. per month must be collected on such delinquent taxes from the time they were first delinquent until paid." This provision applies to all delinquent taxes, to such as are due to the state as well as those due to the counties or to the city and county of San Francisco. The defendants Edgar and Reis answered the petition or complaint. The San Francisco Gas-Light Company, by leave of the court, filed a complaint in intervention, claiming the moneys then in the city and county treasury, as applicable to the payment of their demands for gas furnished the city and county, which demands had been regularly passed, allowed, and audited by the auditor of the city and county, and that the sums of money herein claimed by the state, as being then in the treasury, constituted a portion of the income and revenue of the fiscal year for which their demands for gas had been incurred. The plaintiff, (we so style the applicant herein for the writ,) without making any objection in any way to the filing of the complaint in intervention, either by demurrer or by motion to strike it out, answered it. Judgment passed for the plaintiff for the sum of \$5,184.99, and for the intervenor for \$39,515.27, and it was ordered in it that writs of mandate issue to the parties respectively for the sums above mentioned.

There are two appeals herein: one by the plaintiff from the entire judgment, and the other by the defendants Reis and Edgar, from the judgment in favor of the plaintiff. The first appeal above mentioned is numbered 9,973, and the second 11,079. It is argued on behalf of plaintiff that the complaint in intervention does not state facts sufficient to constitute a cause of inter-

vention. This objection, which is, in effect, that the intervenor had no right to intervene herein by reason of the insufficiency of the facts stated in the complaint, is raised for the first time in this court, and according to the well-settled rule here the objection urged comes too late. *McKenty v. Gladwin*, 10 Cal. 228; *Smith v. Penny*, 44 Cal. 161; *Bangs v. Dunn*, 66 Cal. 72, 4 Pac. Rep. 963. The plaintiff took issue on the complaint of the intervenor in the court below, without objection to it or exception of any kind, and the trial proceeded between the plaintiff and intervenor on the issues joined. The objection, then, cannot be made for the first time on this appeal. We cannot see how this court can avoid affirming that part of the judgment in favor of the intervenor, on the facts appearing to be true, as shown by plaintiff's bill of exceptions. In the bill it is stated that it was made to appear to the court below "that the intervenor, the San Francisco Gas-Light Company, furnished gas to said city and county, as alleged in their petition, for intervention herein, and that they presented their claims therefor, as therein alleged, and that the said moneys which, by the judgment herein, the said treasurer is commanded to pay the intervenor, to-wit, the sum of \$39,515.27, is a part of the income and money provided to pay the indebtedness and liabilities for the year at which the said several items of indebtedness to said intervenor were incurred; and that said moneys were properly applicable to the payment of said claims, and none other." And it was also made to appear to the court below "that the said sums mentioned in the complaint, for the various fiscal years therein specified, were collected by the city and county officers as interest upon the state's portion of delinquent taxes, under section 3803 of the Political Code, and paid over to the treasurer of and into the treasury of the said city and county, and the general fund thereof; and was all paid out again by the treasurer of said city and county in the fiscal years when collected to satisfy regularly audited demands upon said treasury, except the sum of \$5,184.99, mentioned in the judgment herein, and that at the time of the various demands and requests alleged in the plaintiff's petition, and each of them, and at the time of the commencement of this action, no part of said moneys so alleged to have been collected for interest was in the hands of said treasurer, or in the said treasury, except the said sum of \$5,184.99." If the several sums claimed by the state had been paid out when demand was made for them, as stated in the complaint or petition of plaintiff, (conceding the request in the complaint to be a demand,) no mandate can go from this court to compel either the auditor to make a report as asked for or the treasurer to pay them. It would be useless to compel either of these officers to do what is asked on behalf of the state. As to the auditor, because the treasurer would not be charged with any duty to pay again what has already been regularly paid away, and as to the treasurer, because he could not be compelled to pay the money from the treasury, which he had already regularly disbursed, and he certainly should not be compelled to pay it out of his own funds. It is well settled that an officer cannot be compelled to pay a sum of money by mandate unless the money is in his official custody, legally subject to the payment of the demand made when the steps are initiated to enforce the payment of such demand by writ of mandate. See *Redding v. Bell*, 4 Cal. 333; *Bates v. Porter*, 15 Pac. Rep. 732. As it appears conclusively from the bill of exceptions that the money received for the interest claimed, except the amount of \$5,184.99, for which the state recovered judgment, had been regularly paid out by the treasurer before any steps were taken by mandate to collect it, we cannot see that the state has any interest in the question whether there was money in the treasury of the income and revenue of the city and county of San Francisco properly applicable to the payment of the demands of the gas-light company, and for which the gas-light company had judgment. Conceding that the judgment was erroneous, for the reason that the money was not of such income and revenue, and would be reversed on appeal of the

defendants Edgar and Reis, still the state was not aggrieved by it, and it would not be reversed on its appeal, for the reason that the money was not of such income and revenue. For the foregoing reasons we are of opinion that that portion of the judgment in favor of the gas-light company is without error, and must be affirmed.

We pass to the consideration of that portion of the judgment in favor of the state, the amount of which is \$5,184.99, from which the appeal is prosecuted by the defendants Edgar and Reis. On this appeal it is argued on behalf of appellants that the complaint (referring to the petition) is fatally defective as a basis for a writ of mandate because not verified or accompanied by an affidavit. It is said in support of this point that the statute provides that the writ of mandate "must be issued on affidavit." Code Civil Proc. § 1086. This is so. But the parties went to trial in the court below on the complaint without objection to the lack of an affidavit, and on this account we do not think such objection should be regarded here. It comes too late when made for the first time on appeal. We do not see why the defendant may not waive the affidavit, and we must consider it waived when the objection is made for the first time in this court. In *McCullough v. Clark*, 41 Cal. 293, it was held that if plaintiff goes to trial on the merits, without objection to the non-verification of an answer, he will not be allowed to raise the point in the appellate court. We think the same rule should be applied in this case. We therefore rule this point against the appellants, and hold that the complaint should be considered as free from the objection urged. The appellants further contend that the complaint states no cause of action because the state is not entitled to the 2 per cent. charged on delinquent taxes; but the same is a penalty or forfeiture to the city and county. The general revenue system provided in the Political Code, (see title 9 of part 3 of that Code,) which went into effect in 1872, applies to the city and county of San Francisco. *Society v. Austin*, 46 Cal. 415. By that system it is enacted that the "fines, forfeitures, and penalties incurred by a violation of any of the provisions of this title must be paid into the treasury for the use of the county where the person against whom the recovery is had resides." Pol. Code, § 3886. And it is contended on behalf of the appellants that the interest of 2 per cent. per month, directed to be collected on delinquent taxes, (Pol. Code, § 3803,) is a penalty or forfeiture, and must be paid as above for the use of the county. It may be granted that the 2 per cent. is a penalty for non-payment of delinquent taxes. It may be granted also to be a forfeiture, but only in the sense of a penalty. The two words seem to mean the same thing, when said of money, in which sense it imports a requirement to pay the sum mentioned, as a mulct for a default or wrong. See Abb. Law Dict. word "forfeit," and cases there cited. When used in the section above quoted of a payment of a sum of money, it is difficult to distinguish the one from the other. We think they mean here the same.

If it be conceded, then, that the payment of interest above mentioned is a penalty or forfeiture, the two words being used in the sense stated above, does it follow that the payment is required to be made for the use of the county? The tax collector of the city and county, as well as of each county, collects both the state and county taxes of the character involved herein. The unpaid taxes become delinquent on the last Monday in December, at 6 o'clock P. M., and unless paid prior thereto, 5 per cent. must be added to the amount thereof, and this 5 per cent. must thereafter be collected by the collector for the use of the county. Pol. Code, § 3756. The tax collector must afterwards, on a day mentioned in the statute, publish the delinquent list. Pol. Code, § 3764. The expense of this publication is a charge against the county. *Id.* The tax collector must also append and publish with this list a notice that unless the delinquent taxes, together with the costs and percentage, are paid the real property upon which such taxes are a lien will be sold at public auc

tion. Pol. Code, § 3765. These taxes become a lien on such property on the first Monday in March of each year. Pol. Code, §§ 3717, 3718. If these taxes are not paid or collected by sale of the property of the delinquent, by the third Monday of March following the notice of sale, interest on them must be collected at the rate of 2 per cent. per month from the time of the delinquency in December until paid. This interest is not to be charged on the delinquency in December, unless the taxes remain unpaid on the third Monday in March following. This was so held in *Harper v. Rowe*, 53 Cal. 233, where it was said of this section, that it "has no application to a sale made by a tax collector to collect a delinquent tax in the first instance. If the tax remains finally delinquent, after the tax collector has exhausted all means for its collection, it may possibly be subsequently collected in some other method provided by law, in which event the interest is to be added to compensate for the long delay, and as an incentive to the tax-payer to make a voluntary payment, and thus stop the interest." *Harper v. Rowe*, has been followed by this court in *Lake Co. v. Mining Co.*, 66 Cal. 17, 4 Pac. Rep. 876, 68 Cal. 14, and 8 Pac. Rep. 593; *People v. Railroad Co.*, 68 Cal. 553, 10 Pac. Rep. 45. It will be observed that in the foregoing sections, which lead up to the collection of the 2 per cent. per month interest on delinquent taxes under section 3803, requiring it to be collected, nothing is said definitely for whom it is to be collected. The 5 per cent. to be added on the delinquency in December is required to be collected for the use of the county. This is distinctly and clearly provided for in section 3756. Conceding, then, as above pointed out, that such interest is required to be paid by the delinquent as a penalty or forfeiture, it must be determined to whom such money goes when paid under section 3886, Pol. Code, above quoted, and by that section let it be noted that it must be paid "into the treasury for the use of the county where the person against whom the recovery is had resides." It is material to be determined what is the meaning of the word "recovery" in the above section. Does it signify a collection without suit, or a payment compelled by action? In its general use it means a recovery had by process and course of law. It was so held in *Jones v. Walker*, 2 Paine, 688. In a special case it may mean collected or obtained without a suit. It was so held in *Douglass v. Reynolds*, 7 Pet. 113, 126. We think the word is here used in its general sense, which is its ordinary and popular meaning, and when there is nothing in the statute to indicate that it is used in a peculiar sense, we must attribute to it its ordinary and popular signification. This is the rule to be adopted in the construction of a statute or any writing. Section 1861, Code Civil Proc. We find nothing in the title establishing the revenue system of the state which indicates that this word is used in any other than its ordinary and popular meaning. On the contrary, we find much to indicate that it is so used. The words "collect" and "collection" are used in the title, but nowhere signifying recovery by action or judicial process except where such meaning is manifested by the context. Unless so manifested, the word "collect" and its cognates or derivatives are clearly used to signify the obtainment of the money without suit. See chapter 7, tit. 9, Pol. Code. Further, there are penalties or forfeitures (using the word "forfeiture" in the sense set forth above) prescribed in the title, which are to be recovered by action. Sections 3656, 3697, 3737, Pol. Code. There are other penalties or forfeitures which require no action to be brought. They are directed to be withheld or deducted by an officer of state designated, viz., the controller. Sections 3867, 3870. The amount withheld under section 3867 "to be paid into the treasury for the use and benefit of the state." The above considerations lead to and fortify the conclusion that the penalties and forfeitures spoken of in section 3886 refer only to those to be recovered by action under the statute, and not to the interest of 2 per cent. per month on delinquent taxes, which is obtained by the ordinary method of collection without a suit. And, as this interest is not required by the statute

to be collected for the use of the county, or city and county, it is reasonable to hold that that portion of the interest accrued and collected on the state tax should be paid to the state, and go into its treasury. In regard to the argument that delinquent taxes do not bear interest as a debt, we cannot see much force in it, for certainly it is within the power of the legislature to enact that they shall bear interest in the same manner as a debt, regulate the rate, and require such interest on the state's portion of delinquent taxes to be paid to the state, and go into its treasury; and this is true under the statute, conceding that such interest may be regarded as a penalty or forfeiture.

We have examined the other points made by appellants, which refer to the sufficiency of the complaint, and we are of the opinion that, as there was no demurrer, either general or special, to the complaint, and no objection made to it in the court below, we ought not to reverse the judgment. The cause appears to have been tried as if the complaint was in all respects sufficient. On an examination of the record we find no error or defect in the pleadings or proceedings which affects the substantial rights of the parties, and in such a case the judgment should not be reversed. Code Civil Proc. § 475. It is doubtful whether the express or distinct demand upon the defendant to perform the acts required prior to the application for the writ of mandate is necessary in this case, which relates to the performance of a public duty, and in which the relator has no private interest, and claims no benefit of the acts to be done. See *Railroad Co. v. Plumas Co.*, 37 Cal. 362, 363. But we think it was substantially averred to have been made by the general words often requested and refused to be done, and the bill of exceptions refers to the demand as having been made.

Both of the judgments appealed from must be affirmed. So ordered.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

76 Cal. 249

LEWIS v. RIVERSIDE WATER CO. (No. 12,403.)

(*Supreme Court of California.* May 22, 1888.)

NEGLIGENCE—DANGEROUS PREMISES—INSTRUCTION.

Upon the trial of an action for injuries received from the overturning of plaintiff's wagon from a bridge, caused by a ditch wrongfully made in the highway by defendant, the complaint and answer alleging that plaintiff was thrown from the wagon, of which there was also evidence, an instruction that "if plaintiff, without negligence, drove off the bridge, and was thereby thrown from the wagon, and bruised or wounded, the defendant was liable," is proper, although plaintiff testified that he leaped from the wagon as it overturned.

In bank. Appeal from superior court, San Bernardino county; HENRY M. WILLIS, Judge.

Action by Perry D. Lewis, a minor, by Perry D. Cover, his next friend, against the Riverside Water Company, for damages occasioned by plaintiffs overturning in a wagon, caused by a ditch kept by defendant. On the trial it appeared that the ditch was wrongfully and negligently made and allowed to remain in the highway by defendant. There was a trial by a jury, verdict for plaintiff for \$1,500, and judgment thereon, from which defendant appealed.

Curtis & Otis, for appellants. *H. C. Rolfe*, for appellee.

McKINSTRY, J. There was ample evidence to justify a finding that the plaintiff was not guilty of contributory negligence. Appellant asserts error in that the court instructed the jury that if plaintiff, without negligence, drove off the bridge, "and was thereby thrown from the wagon, and bruised or wounded," the defendant was liable. The point of the objection is that the instruction, abstractly correct, was misleading, because there was no evi-

dence that plaintiff was thrown from the wagon. The witness Kleinfelter testified that the plaintiff was thrown from the wagon. True, the plaintiff testified: "I made a spring when the wagon went down." But the impelling force of the overturn did not necessarily deprive the plaintiff of all voluntary action, even while the overturn was in progress. If there had been evidence that the wagon was not overturned, or that he leaped from it unnecessarily, when a person of ordinary prudence would not have leaped, and that he would not have been injured had he retained his seat, different questions might have been presented. *Lawrence v. Green*, 70 Cal. 417, 11 Pac. Rep. 750. But here both the complaint and the answer allege that the plaintiff was thrown from the wagon, and if the matter had been in dispute, as there was evidence of the fact that he was thrown, the instruction was as favorable as defendant was entitled to have, accompanied, as it was, by full instructions upon the subject of contributory negligence. Judgment and order affirmed.

We concur: SEARLS, C. J.; PATERSON, J.; MCFARLAND, J.; SHARPESTEIN, J.

76 Cal. 246

CITY AND COUNTY OF SAN FRANCISCO v. McALLISTER *et al.*
(No. 11,118.)

(Supreme Court of California. May 22, 1888.)

JUDGMENT—ASSIGNMENT—SHERIFF—GARNISHMENT.

Where a sheriff has given bond for the faithful performance of his duties, and has taken a like bond from his deputy, who afterwards misappropriates fees which should have been paid to the county, and the sheriff brings suit on such deputy's bond and recovers judgment, which judgment he assigns to his creditors prior to serving notice by the county on the deputy's sureties that the money in their hands belonging to the sheriff was attached, such county cannot, in the absence of any evidence of fraud in the assignment, restrain the assignees from collecting of the deputy's sureties the money due on the assigned judgment.

Department 2. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Action by the city and county of San Francisco against Hall McAllister, Thomas J. Bergin, Matthew Nunan, Peter Hopkins, James Adams, and Samuel Platshek, to restrain the collection of money due on a judgment. Judgment for defendants, and plaintiff appeals.

George Flounoy, Jr., for appellant. *McAllister & Bergin*, for respondents.

THORNTON, J. Defendant Matthew Nunan was for two terms, covering a period extending from the first Monday in December, 1875, to the first Monday in December, 1879, the sheriff of the city and county aforesaid. He executed for this period the usual official bonds with sureties. During the same period Gideon M. Berry was a deputy of said Nunan, sheriff, appointed by him to act as book-keeper, and was charged *inter alia* with the receipt of certain moneys for his principal. He became a defaulter with regard to these moneys. Nunan had required of him a bond, with sureties, for the faithful discharge of his duties of deputy and book-keeper. The sureties to this bond are defendants James Adams and Samuel Platshek. Berry's default was covered by this bond, and suit was brought on it by Nunan, and judgment recovered by him against the sureties for the sum of \$13,108.32. This judgment was, on the 3d of March, 1883, assigned by Nunan to the defendants McAllister & Bergin, for a sum of money due them by him for services rendered him as attorneys and counselors at law. It appears that a portion of the moneys for which Berry defaulted was for commissions and fees, collected by him for his principal, and which it was the duty of Nunan, as sheriff, to pay

into the treasury of the city and county above named. McAllister & Bergin notified Adams and Platshek of the assignment by Nunan of the above-mentioned judgment to them, and filed it with the papers in the action of Nunan against Adams and Platshek. The plaintiff herein, on the 21st of July, 1881, commenced an action on his official bonds against Nunan and the sureties thereon, in the superior court of the city and county of San Francisco, to recover a portion of the commissions and fees above mentioned, and on the 9th of February, 1885, commenced another action on his official bonds against Nunan and the sureties thereon to recover another portion of the commissions and fees above mentioned. On the 9th of February, 1885, the plaintiff caused writs of attachment to be issued in the actions just mentioned, which were, by Peter Hopkins, sheriff of the city and county aforesaid, duly served on Adams and Platshek, the judgment debtors above mentioned, with a notice that the moneys in their hands belonging to Nunan, and debts due by them to the same, were attached in pursuance of the writs so served. Adams and Platshek refused to pay the sheriff the moneys due upon the said judgment, and informed him of the notice to them of the assignment of the judgment to McAllister & Bergin. McAllister & Bergin, on the 11th day of February, caused a writ of execution to be duly issued on the judgment to them, and are about to collect the moneys due on the judgment. Plaintiff asks for an injunction to restrain the collection of the money due on this judgment, and that Adams and Platshek be required to pay it into court. The court refused the injunction, and rendered judgment in favor of defendants. McAllister & Bergin were the assignees of the judgment against Adams and Platshek prior to the issuance and levy of the writs of attachment sued out by the plaintiff. The bond on which suit was brought by Nunan against the sureties of Berry was the property of Nunan, and the recovery belonged to him. He could use it to pay his creditor. In the absence of any intent to hinder, delay, or defraud the plaintiff herein, by Nunan and his assignees, the assignment was good against the city and county. We find no fraud either charged or found in this case. The court finds that the assignment to McAllister & Bergin was made in good faith, and for a valuable consideration, and the finding is sustained by the evidence. There was no privity between Berry and the plaintiff herein which would give the plaintiff any property in the bond executed by Berry and his sureties to Nunan to indemnify him against Berry's defaults, or any interest in the moneys recovered on the judgment. There was no relation existing between Nunan and the plaintiff which would subrogate plaintiff to the rights of Nunan in the bond given him by Berry, or in the recovery on it. The plaintiff was protected against the defaults of Nunan by his official bonds, on which, if aggrieved, it had its remedy. We do not see that plaintiff occupies a position different from that of any creditor. This is a case of a contest between two creditors, in which that one prior in point of time is superior in right, and McAllister & Bergin hold the vantage ground of priority in time and superiority in right. The argument for plaintiff proceeds on the ground that Adams and Platshek hold the very moneys collected by Nunan through Berry for the city and county. In this there is a mistake. These moneys were appropriated by Berry. Damages arising out of this appropriation by Berry were recovered of his sureties as indemnity for the moneys so appropriated. The principle on which this case is decided is illustrated in the case of *Carrington v. Insurance Co.*, 1 Bosw. 152, and *Herckenrath v. Insurance Co.*, 3 Barb. Ch. 63. The contract on which Nunan recovered is distinct and different from that which he made with the city and county, as evidenced by his official bonds. We find no error in the case and the judgment is affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

76 Cal. 255

RANDALL v. HUNTER *et al.* (No. 11,237.)

(Supreme Court of California. May 23, 1888.)

PARTNERSHIP—POWER OF PARTNERS TO BIND FIRM.

Where one person bought a stock of goods, agreeing in consideration thereof to pay the seller's note to a third person, and thereafter entered into a partnership with another, which partnership assumed to pay the indebtedness incurred in purchasing such goods, and while the partnership still existed, one member of the firm executed to the holder of the aforesaid note, as security for the payment thereof, and in the name of the firm, the note sued on, *held*, that the firm was liable on such note, the indebtedness being one for which the firm was liable, and one for which a member of the firm had authority to execute a note of the firm. Following *Randall v. Hunter*, 6 Pac. Rep. 331.

Department 1. Appeal from superior court, Humboldt county; N. HAMILTON, Judge.

Action by A. W. Randall on a promissory note alleged to have been made by defendants W. S. Hunter and C. W. Gill, in their firm capacity, for the sum of \$1,000. Judgment for plaintiff. Defendant W. S. Hunter appeals. For a former opinion, see *Randall v. Hunter*, 6 Pac. Rep. 331.

J. D. H. Chamberlin and *G. W. Hunter*, for appellant. *J. J. De Haven* and *S. M. Buck*, for respondent.

MCFARLAND, J. The appellant W. S. Hunter and C. W. Gill were partners, doing a general merchandising business in Petrolia, Humboldt county, under the firm name of Gill & Hunter. While they were thus partners Gill, on May 25, 1881, made and delivered to the plaintiff Randall, a partnership promissory note for \$1,000, signing to it the firm name, "Gill & Hunter;" and to recover the balance due upon said note this action was brought. Gill made default, and Hunter answered, setting up the defense that Gill, to plaintiff's knowledge, made the note without Hunter's knowledge or consent, for Gill's individual use and benefit, and not in the business, or for the use of the firm, etc. The jury rendered a verdict for the amount of the balance due on the note, and judgment was entered for that amount. From this judgment, and from an order denying a new trial, Hunter appeals.

Gill was originally the sole owner of the business, stock of goods, etc., and had sold an undivided one-half to one C. W. Long. Long had paid Gill for the one-half interest, some \$1,500 in cash, and had given him his two promissory notes for \$1,000 each. One of these notes Gill had given to plaintiff Randall as security for money furnished by Randall to Gill. A short time after Long had bought into the business, he resold to Gill upon the same terms as those upon which he had bought. The \$1,500 was repaid to him, and one of the promissory notes redelivered; but the other, being held by Randall, could not be, at that time, redelivered to Long; and Gill agreed to take care of said note, and to protect Long from any liability on it. About the time Long resold to Gill the defendant Hunter purchased from Gill the one-half interest which Long had held; and, within two months afterwards Gill took up the note made by Long and held by plaintiff Randall by giving to the latter the firm note of Gill & Hunter upon which this suit was brought. Now, it was claimed at the trial that it was part of the transaction of the sale from Gill to Hunter; that the firm of Gill & Hunter should pay the indebtedness of Gill to Randall; and that the said firm note sued on was made with the knowledge and consent of Hunter; and that the latter acquiesced in, and ratified it. This appellant denied; and the issue thus made was passed upon by the jury adversely to appellant. The case comes here upon exceptions to rulings of the court upon the admissibility of evidence, and to instructions to the jury, given and refused. These exceptions are numerous; and no one is more entitled to special notice than either of the others. They involve no particular principle of law, or rule of practice, and are of no general import-

ance. We think, therefore, that no useful purpose would be served by noticing in detail each individual exception; and it is sufficient to say that, in our opinion, no material error can be found in the rulings of the court, and that the instructions fairly presented the issue to the jury. When the case was here before, this court held that "where a partnership agreement provides that an existing individual debt of one of the partners shall be assumed and paid by the firm, either of the partners has authority to execute the note of the firm to secure the payment of such indebtedness." 66 Cal. 512, 6 Pac. Rep. 331. Judgment and order denying a new trial affirmed.

We concur: MCKINSTRY, J.; TEMPLE, J.

76 Cal. 192

COCKRILL v. HALL. (No. 9,946.)

(Supreme Court of California. May 19, 1888.)

1. APPEAL—REVIEW—OBJECTIONS WAIVED.

Where respondent's attorney signed the settled statement on motion for new trial, it will be presumed that he waived all objections to the hearing of the motion on the ground that notice thereof had not been given.

2. SAME.

When the record does not show when an oral charge was made, an exception "to each and every part and to the whole of said instructions" is insufficient, and will not be considered.

3. ATTORNEY AND CLIENT—NOTICE OF APPEAL.

Where a party has two attorneys of record, the signature of any one of them to a notice of appeal is sufficient.

4. TRIAL—CONDUCT OF—DEPOSITIONS.

Where notes are not glued to the deposition in which they are referred to, and one is offered in evidence separately from the deposition, they are not parts of the deposition, within the meaning of Code Civil Proc. Cal. § 612, excepting depositions from the papers in evidence which may be taken out by the jury, and such notes may be detached from the deposition, and taken out by the jury while making up their verdict.

5. SAME—INSTRUCTIONS.

When, upon the request of the jury to be informed as to the law on a certain point, the court informed them that, if they desired, he would read to them again all the instructions, and the foreman stated that such was not their desire, the refusal to read again that portion of the instructions touching the point presented by the jury is not error.

6. WITNESS—CREDIBILITY—IMPEACHMENT.

A witness cannot be asked whether he was not impeached as a witness upon the trial of another cause.

Commissioners' decision. Department 2. Appeal from superior court, Sonoma county; JOHN G. PRESSLY, Judge.

Action by Damie Cockrill against Henry Hall. Upon the trial, the jury, after deliberating about two hours, returned into court. On being asked by the court what they desired, their foreman answered: "What are we to do with the four old notes?" To which the court replied: "They are in evidence. You are to determine that, under the instructions which I have given you." Plaintiff's attorney then moved the court to read to the jury that portion of the instruction touching that point, on the ground that it would explain the purpose for which the four old notes were admitted in evidence, which the court refused to do, and plaintiff excepted; but the court informed the jury that, if they wished all the instructions read again, he would read them. The foreman said that was not desired. The jury then retired, and brought into court a verdict for the defendant, upon which judgment was rendered. Plaintiff appeals.

Henley & Oates, for appellant. *G. A. Johnson*, for respondent. *McGee & Burnham*, for estate of Henry Hall, deceased.

FOOTE, C. This is an action based upon alleged deceit practiced upon the plaintiff, to her damage, by the defendant, and is brought under the provis-

ions of sections 1709 and 1710 of the Civil Code. It is alleged in the complaint that the defendant had executed, for value received, a promissory note to the plaintiff in renewal of another note, and that it was about to become barred by the statute of limitations; that pretending he wanted to have a calculation made, and renew the note, with security thereon, for the sum of money due, the defendant got possession of it from the plaintiff, not intending to renew it; and that, while in his possession under the false promise thus made, the note became barred by the statute of limitations, and the defendant refused, upon demand made, to pay it, although solvent at that time. The defendant denied that he practiced any deceit, claimed that the note was already barred by the statute of limitations when he obtained possession of it, and that it was not valid against him, as he had already overpaid what he owed the plaintiff before he made and executed it, which he claimed to have done under a misapprehension of his rights. The case was tried before a jury, who returned a verdict for the defendant. From the judgment thereupon given and made, and an order denying a new trial, the plaintiff has appealed.

The record contains no notice of intention to move for a new trial, nor does the statement on that motion recite that any such notice was given. But the defendant's attorney not only accepted the draught of the statement without any opposition, and at no time objected in the court below to the consideration or settlement of the statement on the ground that proper notice of intention to move for a new trial had not been given, but also signed the statement, stipulating, in the same manner as did the attorneys for the plaintiff, that it was "a full and correct statement in said cause." The court who heard the motion does not appear to have proceeded upon the idea that there was any supposed absence of a proper notice of intention, but seems to have determined the motion upon the questions presented by it. Under all these circumstances, it is hardly possible but that there was either a proper notice of intention given, or that the defendant or his attorney had waived it, and agreed to the hearing of the motion upon its merits. *Girdner v. Beswick*, 69 Cal. 119, 10 Pac. Rep. 278. The notice of motion must be made to appear as part of the record by a statement or bill of exceptions, "or in some appropriate mode." "If it had appeared that the respondent had proposed amendments to the proposed statement without reserving proper objection, the notice of motion would have been waived." *Dominguez v. Mascotti*, 15 Pac. Rep. 773. Here no amendments were proposed by the respondent without reserving proper objections, but he stipulated that the statement was full and correct, and made no sign of objection to it. It must be presumed, therefore, that he had no objection and urged none to the motion being heard upon the questions raised by it, irrespective as to whether the notice of intention therefor had been properly given or the contrary.

It is objected to the consideration of this appeal that the attorneys of record in the court below were Whipple & Oates, and that the attorneys who gave the notice of appeal were Henley & Oates, and that the transcript does not show any substitution of the latter. But we think that where a party has two attorneys of record in the court below, or a firm of attorneys, either one of the two, or either of the firm, may sign the notice of appeal. The records of the court show that such is the practice; and, while there may be technical objections that can be made to it, a contrary rule would upset numerous appeals that have been taken in good faith.

The exception taken to the oral charge of the court to the jury, given of its own motion, is in this language: "To each and every part, and to the whole of said instructions, the plaintiff duly excepted." This was nothing more than an exception taken to the whole charge of the court, without bringing to its attention any special point where error was claimed to have been committed. Nor does it appear at what time during the course of the trial the oral charge was given to the jury. It has been said heretofore by this court: "Except-

tions to the oral charge ought to point out the specific portions excepted to and be made at the time, in order that the judge may have an opportunity, before the jury retires, to correct any error he may have inadvertently fallen into in the hurry and perplexities of the trial." *Robinson v. Railroad Co.*, 48 Cal. 425; *Rider v. Edgar*, 54 Cal. 130. "The exception should be sufficiently specific to call the attention of the court to the alleged error." *Rogers v. Mahoney*, 62 Cal. 613. Tested by the rules thus laid down, the exception was insufficient, and should not be considered here. Nor do we perceive wherein the court erred in giving, refusing, or modifying any of the instructions asked for by either side to the controversy. The law as given to the jury seems fully and fairly to present for their consideration the material issues made by the pleadings, based upon the evidence before them.

It is further contended that the court below erred, to the prejudice of the plaintiff, in permitting certain promissory notes, which were alleged to be attached to a deposition, to be detached therefrom, and taken out by the jury while making up their verdict. The notes referred to were all before the jury as evidence, and one of them was offered separately from the deposition, by the plaintiff, as proof of certain matters, and the other notes seem not to have been glued to the deposition. We think that the notes were not parts of the deposition within the meaning of section 612 of the Code of Civil Procedure. If the witness had been produced, and had identified the notes, and proved their execution, and given their history, and they were thereupon admitted in evidence, it could not be contended that they were part of the testimony of the witness. They could in such case be taken by the jury upon retiring. And, similarly, we think that they are not parts of the deposition, although it proved certain matters concerning them.

The effort to discredit Stewart by asking him if he had not been impeached as a witness upon a trial of a cause other than the one in which he was then testifying, was properly checked by the court upon the defendant's objection. A witness cannot be called upon thus to discredit himself except in the mode prescribed by the statute. Code Civil Proc. §§ 2051, 2052, 2061, 2066.

The point is made that the court erred in not acceding to the plaintiff's request to have re-read to the jury a portion of the instructions touching a special point. The court informed the jury that, if desired, he would read to them all the instructions. On their part, the foreman stated that such was not their desire. In this we perceive no ground for complaint against the court.

No prejudicial error appearing in the record, we advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

76 Cal. 203

HOBSON v. HASSETT. (No. 11,296.)

(Supreme Court of California. May 19, 1888.)

1. NEGOTIABLE INSTRUMENT—PARTIES—DESCRIPTIO PERSONÆ.

A promissory note which says, "We promise to pay," without further naming the maker, and which is signed, "A. HASSETT, President," binds him personally; the word "President" being merely *descriptio personæ*.

2. SAME—CONSIDERATION.

When part payment is made upon the note of a corporation, the personal note of the president given for the balance due is upon a good consideration; it being presumed that the note of the corporation was given up.

Commissioners' decision. Department 2. Appeal from superior court, Sonoma county; JACKSON TEMPLE, Judge.

Action by A. D. Hobson against A. Hassett. Judgment for plaintiff, and defendant appeals.

Wm. E. McConnell, for appellant. *Vaughn & Cradlebaugh* and *G. A. Johnson*, for respondent.

BELCHER, C. C. This action was brought to recover the amount due on a promissory note, which reads as follows: "SEPTEMBER 7, 1881. \$1,135. One day after date, without grace, we promise to pay A. D. Hobson, or order, the sum of eleven hundred and thirty-five dollars, payable only in gold coin of the government of the United States, for value received, with interest thereon, in like gold coin, at the rate of 10 per cent. per year from date until paid. A. HASSETT, President." The court below found that, prior to the year 1878, the Grangers' Business Association of Healdsburg was duly organized as a corporation, and has existed as such ever since; that on the 8th day of January, 1878, the said corporation became indebted to the plaintiff in the sum of \$2,000, and on that day made and delivered its promissory note to plaintiff for that amount; that on the 7th day of September, 1881, plaintiff presented this note to one Bagge, who was the book-keeper and accountant of the corporation, for payment, and requested that the corporation pay him \$900 in cash, and give him a new note for the balance; that defendant, Hassett, was president of the corporation at that time; that Bagge paid the \$900, and drew a new note for the balance, and requested defendant, as president of the corporation, to sign it, which defendant intended to do, but signed only his own name, adding thereto the word "President;" that the note so executed is the note set out in the complaint; that defendant and Bagge only intended to make and deliver the note of the corporation, and did not then or at any other time say or do anything to lead plaintiff to believe that defendant intended to make or deliver his own note, and not the note of the corporation; that plaintiff could not read writing, and did not at the time know in what manner the note was executed, but at the end of every month, for 18 months thereafter, he presented it, and received from the corporation the interest due thereon, and never claimed or demanded from defendant the payment thereof prior to the bringing of this action. Upon these facts the court found, as a conclusion of law, that the note was the note of defendant, and not of the corporation, and thereupon judgment was entered in favor of the plaintiff. The defendant appealed, and the case comes here on the judgment roll.

The principal contention of the appellant is that the note was the note of the corporation, and not of the defendant, and that the court erred in its conclusions of law to the contrary. In view of the large number of adjudicated cases, it is sometimes difficult to determine whether a note or bill of exchange drawn by an agent, but for the use and benefit of his principal, binds the agent personally or not. There are, however, some general rules upon the subject which seem to be well settled. Judge Story says: "Where, upon the face of the instrument, the agent signs his own name only, without referring to any principal, then he will be held personally bound, although he is known to be or avowedly acts as agent." Story, *Prom. Notes*, § 68. But "if it can, upon the whole instrument, be collected that the true object and intent of it are to bind the principal, and not to bind the agent, courts of justice will adopt that construction of it, however informally it may be expressed." *Id.* § 69. Prof. Parsons says: "If an agent make a note in his own name, and add to his signature the word 'Agent,' but there is nothing on the note to indicate who is principal, the agent will be personally liable, just as if the word 'Agent' were not added." 1 *Pars. Notes & B.* 95. And "one who puts his name on negotiable paper will be liable personally, as we have seen, although he acts as agent, unless he says so, and says also who his principal is; that is, unless he uses some expression equivalent, to use Lord ELLENBOROUGH'S

language, to, 'I am the mere scribe.' For if the construction may fairly be that while he acts officially, or at the request of others, yet what he does is still his own act, it will be so interpreted." *Id.* 102. And see, also, *Sayre v. Nichols*, 5 Cal. 487; *Stackpole v. Arnold*, 11 Mass. 27; *Williams v. Robbins*, 16 Gray, 77; *Manufacturing Co. v. Fairbanks*, 98 Mass. 101; *Sturdivant v. Hull*, 59 Me. 172; *Pentz v. Stanton*, 10 Wend. 271; *Powers v. Briggs*, 79 Ill. 493. The cases cited by appellant are not in conflict with the rules above stated. In *Bank v. Colby*, 64 Cal. 352, the note was signed by "G. A. COLBY, Prest. Pac. Peat Coal Co., D. K. TRIPP, Sec. *pro tem.*" It was indorsed by Colby and four others. The action was against Colby and Tripp as makers, and the other defendants as indorsers. The court said: "Read as a whole, we think it apparent from its face that it is the note of the company indorsed by the individuals." In *Bean v. Mining Co.*, 66 Cal. 451, 6 Pac. Rep. 86, the note was signed, "PIONEER MINING COMPANY, JOHN E. MASON, Supt." The plaintiff sought to hold Mason personally responsible on the note, but the court considered him not bound. The court said: "The signature is not, 'JOHN E. MASON, Superintendent of the Pioneer Mining Company;' the last portion of which, in the absence of any words in the body of the note indicating an intention that it should be an obligation of the company, might, it is claimed, be held to be merely *descriptio personæ*. But here the words 'Pioneer Mining Company' precede the name 'John E. Mason.'" In *Bank v. Bank*, 5 Wheat. 326, the question was whether a certain act done by the cashier of a bank was done in his official or individual capacity. The action was based upon a check, and the court said: "But the fact that this appeared on its face to be a private check is by no means to be conceded. On the contrary, the appearance of the corporate name of the institution on the face of the paper at once leads to the belief that it is a corporate, and not an individual, transaction; to which must be added the circumstance that the cashier is the drawer, and the teller the payee; and the form of ordinary checks deviated from by the substitution of to order, or to bearer. The evidence, therefore, on the face of the bill, predominates in favor of its being a bank transaction." In *Carpenter v. Farnsworth*, 106 Mass. 561, the action was on a check, having the words "Ætna Mills" printed in the margin, and signed, "J. D. FARNSWORTH, Treasurer." The court said: "that this check manifests upon its face that the writing is the act of the principal, though done by the hand of an agent; or, in other words, that it is the check of the Ætna Mills, executed by Farnsworth as their treasurer and in their behalf." The other cases cited do not need special notice. In the light of the rules of law above announced, the question, then, is, did the defendant, by signing the note as he did, make himself personally responsible for its payment? It seems to us that there can be but one answer to this question, and that is that he did. There is nothing on the face of the note to show that there was any principal back of the defendant. He signed his own name, and wholly failed to indicate, if he had a principal, who or what the principal was. The word "President," which he added to his name, must therefore be regarded as a mere *descriptio personæ*.

It is further contended that as the promissory note of the defendant it was without consideration. We do not think this position can be maintained. The note imports a consideration, and it must be presumed that when the old note was paid it was given up, and the new one taken in its place. The old note was a sufficient consideration for the new one.

We think the court drew correct conclusions from the facts before it, and therefore advise that the judgment be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

76 Cal. 251

DODGE v. YATES. (No. 11,208.)

(Supreme Court of California. May 23, 1888.)

1. EJECTMENT—POSSESSION—WHAT SUFFICIENT.

Where plaintiff's grantor had actual possession of the land, and inclosed it with a substantial fence, and by a valid deed conveyed it to plaintiff, the latter, though he himself never took actual possession of the land, but cultivated a portion of it through his employes, has constructive possession of the whole, and may maintain ejectment against an intruder on any part thereof.

2. SAME—INSTRUCTION.

Personal residence on land is not essential to ejectment, and the court does not err in charging that "a person may be in possession of land without a personal residence thereon, and without having personally cultivated it."

Department 1. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

Ellen A. Dodge brought this action of ejectment against Abram Yates. Judgment for plaintiff. Defendant appeals.

Geil & Morehouse, for appellant. *Walter & Wm. M. Van Dyke*, for respondent.

PATERSON, J. The plaintiff bases his right of recovery upon the ground of prior possession. It was admitted that the land in controversy was public land, within the limits of the grant to the Atlantic & Pacific Railroad Company, and had been withdrawn from sale, pre-emption, or homestead entry. The evidence introduced by plaintiff tended to show that H. C. Dodge and George Dutton took possession of the land and other lands adjoining, and inclosed the same, in 1872-73, with a fence,—the fence being made of a ditch, and oak pickets set in the ground, fastened together at the top by nailing a pine strip or board thereon; that the fence inclosed the N. E. $\frac{1}{4}$, the N. $\frac{3}{8}$ of the S. W. $\frac{1}{4}$, of section 5, and the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, and the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, of section 6, township 23 S., range 8 E.; that the fence, when built, was substantial, and sufficient to turn stock, and cost about \$1,500; that a house was built and a well was dug on the 40 acres in section 6, within the common inclosure; that the barn was built upon the land in dispute, but a year later was removed to section 6, (no part of which is in controversy;) that the claimants lived upon the land for nearly two years, and plowed and cultivated a portion thereof; that in 1881 the land was leased to one Gillet for the term of one year; that, after the making of the lease to Gillet, Dutton sold and conveyed the land to J. W. Dodge, and thereafter took charge of the place for Dodge, and employed one Nance, who plowed and sowed a portion of the land in dispute in the fall of 1882; that a portion of the land thus plowed was put in grain, and the balance of it reserved as summer fallow; that, in 1883, Nance was again engaged to plow and sow the land, and was about to go to work, when he was forbidden to do so by the defendant, Yates, who had entered upon the land in August, 1883, put up a house, and dug a well thereon,—these improvements being made upon the land which had been summer-fallowed by the agent of the plaintiff; that the place was leased by plaintiff to one Pigott in 1883, who had cut the crop grown on the land for hay, and had his hogs feeding on the volunteer crop when the defendant, Yates, went into possession. Neither the plaintiff nor any one in his employ has ever actually resided on the land. There is no question, however, that the land was originally inclosed with a substantial fence. This fence has since been considerably broken down, and parts of it removed.

Upon all the evidence in the case, it was for the jury to determine whether or not the artificial barriers and the acts of dominion were sufficient to notify the public that the land was appropriated, and to impart to the claim of appropriation the characteristic notoriety and *indicia* of ownership. *Brumagin v. Bradshaw*, 39 Cal. 25. It was not error, under the evidence in the case.

to instruct the jury that "a party may be in possession of land without a personal residence thereon, or without having personally cultivated it." This instruction does not assume, as we read it, that "if the plaintiff had no agent or employe in possession of the land, and was not living on it himself, and did not cultivate it, he might still recover in this case on the bare fact that the land was once inclosed and claimed by plaintiff," as claimed by appellant. Personal residence on the land was not essential. *Barstow v. Newman*, 34 Cal. 90. The plaintiff's grantors had actual possession of the land, and inclosed the same with a substantial fence, and erected valuable improvements within the inclosure; and, while claiming and using the land as their own, they conveyed the same to plaintiff by a good and sufficient deed. The good faith of the plaintiff in taking possession under said deed, through his employes and tenant, does not seem to be questioned; but it is claimed that, inasmuch as the plaintiff himself never took actual possession of the lands, the deed did not give him constructive possession of all the land named therein, and that, at most, the plaintiff can claim only about 10 acres, the portion which was actually cultivated. But the land was inclosed when plaintiff purchased, and by his agents took possession; and it has been held here that "a party who enters into actual possession of a portion of a tract of land, claiming the whole under a deed in which the entire tract is described by metes and bounds, is not limited in his possession to his actual inclosure or possession, but acquires constructive possession of the entire tract, if it is not in the adverse possession of any other person at the time of his entry; and that such person, in an action to recover possession of the land, will prevail against one who enters subsequently upon the uninclosed part as a mere intruder, or showing color of title only. * * * The fact that Crowell had neither title nor actual possession puts the case within, instead of without, the rule. It is the want of title and actual possession in the grantor that renders the rule necessary to the grantee. If the grantor has title, there can be no question, between his grantee and a subsequent intruder, either as to actual or constructive possession. And so, if he has actual possession, and his grantee succeeds to it, there can be no question between the latter and an intruder as to constructive possession." *Walsh v. Hill*, 38 Cal. 482. While the preponderance of evidence appears from the record to be on the side of the defendant, there is a substantial conflict therein as to the material issues. Therefore the verdict of the jury cannot be disturbed. Judgment and order affirmed.

We concur: MCKINSTRY, J.; TEMPLE, J.

76 Cal. 257

MCDONALD v. SWETT. (No. 11,270.)

(*Supreme Court of California.* May 23, 1888.)

1. PRACTICE—DISMISSAL FOR WANT OF PROSECUTION—DISCRETION.

One of the defendants served notice of motion on plaintiff to dismiss the action, as to him, for want of prosecution; he not having been served with summons until about two years after the summons was issued. At request of plaintiff's attorney the hearing of the motion was continued to a certain date. A few days before the hearing, plaintiff's attorney entered judgment by default against said defendant, and on the hearing the motion to dismiss was denied. *Held*, that there was no abuse of the discretion of the court in denying the motion.

2. JUDGMENT—BY DEFAULT—PENDING MOTION TO DISMISS THE ACTION.

A judgment by default against one of the defendants cannot be set aside on the ground that it was entered pending a motion by him to dismiss the action for want of prosecution, a motion to dismiss not extending the time to answer.

3. SAME—AMENDMENT OF COMPLAINT.

On a motion to vacate a judgment obtained by default, the court may allow plaintiff to amend the complaint by changing the name of defendant, and enter judgment against him in his correct name.

Department 2. Appeal from superior court, Alameda county; A. M. CRANE, Judge.

George E. Lawrence, for appellant. *J. E. McElrath*, for respondent.

SHARPSTEIN, J. This is an appeal from the final judgment entered against Daniel Swett, the appellant. The facts are as follows: Plaintiff filed her complaint to quiet title to certain property in Oakland against Walter S. Hobbs, Daniel Swett, John Doe, and Richard Roe, on the 4th of September, 1882, and on the same day summons issued, and on the 21st day of July, 1884, they were served on Daniel Swett. On the 13th of August, 1884, appellant served a notice of motion to dismiss the action, as to him, for want of prosecution, for the 19th. At plaintiff's attorney's request the motion was continued by stipulation until the 28th of August, 1884. On the 23d day of August, 1884, plaintiff's attorney had the clerk enter the default of Daniel Swett. On the 28th day of August, 1884, appellant's motion to dismiss the action as to him was heard and denied, and appellant excepted. A stay of 10 days was granted; and on the 28th day of August, 1884, appellant served a notice of motion, for September 3, 1884, to vacate the default entered against him. The same was heard on the 3d of September, and denied, and an exception was taken. Plaintiff's counsel then asked the court to amend the complaint by changing the name of Daniel Sweet into Daniel Swett, and to enter judgment against Daniel Swett. Appellant's attorneys objected. The court granted the motion, and appellant excepted. Appellant prepared bills of exceptions to the several matters, and they were duly certified and filed.

1. We cannot hold that the court abused its discretion in overruling the motion to dismiss the action for want of prosecution, and therefore cannot reverse the judgment on that ground. *Grigsby v. Napa Co.*, 36 Cal. 585.

2. It was not sufficient ground for setting aside the default that it was entered pending the hearing of the motion to dismiss, and we cannot hold that the facts presented to the court below were of such a character as to make the denial of the motion to set it aside an abuse of discretion. The motion to dismiss the action did not extend the time to answer. *Shinn v. Cummins*, 65 Cal. 97, 3 Pac. Rep. 133.

3. It was not error to allow the name of the defendant to be corrected. *Brook v. Martinovich*, 55 Cal. 516.

The appeal herein was taken more than 60 days after the entry of the judgment, and we held in *Society v. Meeks*, 66 Cal. 371, 5 Pac. Rep. 624, that nothing could be reviewed on an appeal from a judgment by default, not taken within 60 days after the entry thereof, except what appeared on the judgment roll. We have, however, in this case reviewed the orders excepted to, and fail to find that any error was committed for which the judgment should be disturbed. Judgment affirmed.

We concur: MCFARLAND, J.; THORNTON, J.

MORTGAGES—PAYMENT OF TAXES—CONSTITUTIONAL LAW.

A mortgage which secured a note stipulating for interest at 9 per cent., payable monthly in advance, and upon default thereof the unpaid principal and interest to become due, provided that the mortgagee might pay taxes accruing on the mortgaged property; such payments, with interest thereon, to become part of the mortgage debt. Const. Cal. art. 13, § 4, provides that a mortgage or other security on property shall be a taxable interest therein, and that the property shall be taxed against the owner, less the value of such security; and that, in case the mortgagee pay the taxes thereon, the amount thereof shall become part of the mortgage debt. Section 5 enacts that a contract whereby a debtor is obligated to pay taxes on money loaned, or on any mortgage, shall, as to any interest specified therein, and as to such taxes, be null and void. *Held*, that the clause in said mortgage did not, under said sections, render the agreement in said note to pay interest monthly, at 9

per cent., in advance, null and void; and, default in the payment of interest being made, the right to foreclose accrued before the time at which the note was made payable.

Department 2. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Action by George T. Marye, Jr., administrator *de bonis non cum testamento annexo*, of the estate of Emeline L. Haslam, deceased, against John B. Hart and Sallie C. Hart and others, unknown parties, having liens against the real estate in question, to foreclose a mortgage executed by said Hart and wife to said Emeline L. Haslam. Decree for plaintiff. Defendants appealed.

Wm. Matthews, for appellants. A. N. Drown, for appellee.

SHARPSTEIN, J. This is an appeal from a judgment of foreclosure of mortgage, executed by the defendants to Emeline L. Haslam, deceased. The mortgage was made to secure the principal and interest specified in a certain promissory note executed by the defendants to said Haslam of even date with the mortgage. The note was for \$770, payable on or before June 10, 1887, with interest at the rate of 9 per cent. per annum, payable monthly in advance, and, in case of default in the payment of any installment of interest, the entire unpaid balance of principal and interest to become due and payable at the option of the holder of the note. This action was commenced February 6, 1887. The plaintiff alleges, and the defendants do not deny, that no part of the interest or principal had then been paid. A right of action accrued before this action was commenced, unless by reason of a clause in the mortgage the agreement to pay interest was void. The following is a copy of the clause which appellant's counsel contends renders the agreement to pay interest void: "And it is hereby agreed that it shall be lawful for the party of the second part, her heirs, executors, administrators, or assigns, to pay and discharge at maturity all taxes or assessments, liens, or other incumbrances, now subsisting, or hereafter to be laid or imposed, upon said lot of land or premises, and which may be in effect a charge thereupon; and also to pay (upon failure by said first parties so to do) the amount necessary to keep said premises insured as hereinafter stated, and such payment or payments shall be allowed, with interest thereon at the rate of two (2) per cent. per month from the date of such payments; and such payments and interest shall be considered as secured by these presents, and a charge upon said premises, shall be repayable in the same kind of money or currency in which the same may have been paid, and may be deducted from the proceeds of the sale above authorized." To support this contention section 5 of article 13 of the constitution is cited. The section reads as follows: "Every contract hereafter made by which a debtor is obligated to pay any tax or assessment on money loaned or on any mortgage, deed of trust, or other lien, shall, as to any interest specified therein, and as to such tax or assessment, be null and void." Section 4, which immediately precedes the section above quoted, provides that "a mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby, * * * and the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of said security, shall be assessed and taxed to the owner thereof. * * * The tax so levied shall be a lien upon the property and security, and may be paid by either party to such security. If paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured. If the owner of the property shall pay the tax so levied on such security, it shall constitute a payment in full discharge thereof." This section certainly does provide that taxes levied upon the property and security may be paid by either party to the security; and, if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so se-

cured. The contract attacked in this case provides for the same thing in somewhat different language. It provides that the owner of the security may pay and discharge at maturity all taxes, etc., now or hereafter to be laid or imposed upon said lot of land and premises, and which may be in effect a charge thereupon, "and such payments and interest shall be considered as secured by these presents." We must so construe the various clauses of the constitution as to make them harmonize, if it can be done without distorting the meaning of any of them. This would not be accomplished by holding that section 5 prohibits what section 4 expressly permits. There is no occasion, in this case, to construe section 5 beyond holding that it does or does not render the agreement to pay interest at the rate of 9 per cent. per annum monthly in advance null and void. We think it does not. As to the contract which it is claimed effects that result, nothing is claimed under it, and it is unnecessary to indicate what we would do if there was. We think the complaint states facts sufficient to constitute a cause of action, and it follows that the judgment must be affirmed.

We concur: MCFARLAND, J.; THORNTON, J.

76 Cal. 305

JOSHUA HENDY MACH. WORKS v. CONNOLLY. (No. 11,345.)

(Supreme Court of California. May 28, 1888.)

1. FRAUDULENT CONVEYANCES—DELIVERY—EVIDENCE.

In an action by the purchaser of a boiler against a sheriff seizing the same under an attachment against the vendor, plaintiff's evidence tended to show that he paid value for the property, and that at the time of the sale the vendor delivered the keys of the building, of which he was lessee, containing the boiler, pointed out the same, and turned over possession. Defendant's evidence tended to show that the vendee, under whom plaintiff claimed, had the keys of and full access to such building, as an employe of his vendor, at and prior to the sale to him, and that he had never removed the boiler, or exercised any act of ownership over it except to make the sale to plaintiff. *Held*, that a finding that there was not such an "immediate delivery, followed by an actual and continued change of possession," as is required by Civil Code Cal. § 3440, was not contrary to the evidence.

2. WRONGFUL ATTACHMENT—ACTION AGAINST SHERIFF—FINDINGS.

In an action by the vendee of a chattel against a sheriff seizing the same under an attachment against the vendor, a finding that plaintiff was not and never has been the owner warrants a judgment for defendant; it being unnecessary to find whether such vendor was the owner when the chattel was seized under the attachment.

3. SAME—EVIDENCE.

In an action by the purchaser of a chattel against a sheriff seizing the same under an attachment against the vendor, the judgment roll in the attachment suit, showing a judgment for the plaintiff therein, sufficiently shows that such vendor was indebted to such plaintiff; the admission of such judgment roll in evidence not having been objected to as not showing such indebtedness.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Action by Joshua Hendy Machine-Works against Patrick Connolly, sheriff of the city and county of San Francisco, for the conversion of a steam-boiler of which plaintiff claimed to be the owner. Plaintiff's evidence tended to show that it paid value for the property, and that at the time of the sale the vendor delivered the keys of the building, of which he was lessee, containing the boiler, to Alexander McDaid, under whom plaintiff claims, pointed out the boiler to him, and turned over the possession. Defendant's evidence tended to show that said McDaid was an employe of the vendor at and prior to the time of the sale; that he had the keys of and full access to the building containing the boiler, as such employe; and that he never removed the boiler, or exercised any act of ownership over it other than making the sale to plaintiff. Civil Code, § 3440, declares "every transfer of personal property * * *

not accompanied by an immediate delivery, and followed by an actual and continued charge of possession, * * * void as to creditors," etc. Judgment for defendant. Plaintiff appeals.

W. H. H. Hart, for appellant. *Royce & Cummins*, for respondent.

BELCHER, C. C. This is an action to recover the possession or value of a steam-boiler. The plaintiff asserts title to the boiler under a bill of sale made to it by one Alexander McDaid on the 14th day of August, 1883, and under a bill of sale made to McDaid by one John Mason on the 8th day of the same month. It is alleged in the complaint that on the 14th day of August, 1883, the plaintiff was, and every since has been, the owner of the boiler, and that on the 18th day of that month the defendant wrongfully took the same from the possession of plaintiff. The answer denies that the plaintiff was, at the time named in the complaint, or ever at any time, the owner of the boiler, or that defendant wrongfully, or at all, took it from the possession of plaintiff; and alleges that it was the property and in the possession of John Mason, and that defendant, as sheriff of the city and county of San Francisco, under a writ of attachment duly issued against Mason, seized and took it from the possession of Mason on the 17th day of August, 1883. The answer further alleges that the plaintiff's claim of title to the boiler was under a sham, fictitious, fraudulent, and void transfer from Mason, made for the purpose of hindering, delaying, and defrauding his creditors. The court below found that the plaintiff was not the owner of the boiler on the 14th day of August, 1883, nor at any time prior to the commencement of the action, and that defendant did not, on the 18th day of that month, or at any other time, take the boiler from the possession of plaintiff; and it further found that the defendant was the sheriff of the city and county of San Francisco at all the times mentioned in the complaint, and that on the 17th day of August, 1883, as such sheriff, he seized and took into his possession the property in question by virtue of a writ of attachment regularly issued out of the superior court of the said city and county in an action brought therein by one Joseph Schweitzer against John Mason to recover the sum of \$800, which action was afterwards regularly brought to trial, and judgment was entered therein for the plaintiff in the sum of \$854.50. Upon the findings the court gave judgment for the defendant, from which, and from an order denying a new trial, the plaintiff has appealed.

It is now claimed by the appellant that the findings that the plaintiff was not the owner of the boiler, and that defendant did not take it from plaintiff's possession, were not justified by the evidence. After carefully reading all of the evidence presented in the transcript, we cannot say that the findings complained of were not justified. The principal question at the trial was as to whether or not the alleged transfers of the boiler were accompanied by an immediate delivery, and followed by an actual and continued change of possession; and upon this question there was a conflict, if not a decided preponderance of the evidence that no such delivery and change of possession were had as is required to pass the title as against an attaching creditor. Civil Code, § 3440.

It is also claimed that the court should have found as to whether or not Mason was the owner of the boiler when it was taken under the writ of attachment, and as to whether or not the sales under which the plaintiff claimed title were made for the purpose of hindering, delaying, and defrauding the creditors of Mason, and that for the want of these findings the judgment should be reversed. It seems to us that the findings, as made, were sufficient. The plaintiff was not the owner of the boiler, as against an attaching creditor, if the sales were not accompanied by an immediate delivery, and followed by an actual and continued change of possession, nor if the sales were made with intent to delay or defraud the creditors of Mason. The findings

covered all the ultimate facts, and it was not necessary to find the probative facts.

It is said that there was no proof that Mason was indebted to Schweitzer, at the time of the sale to McDaid. But the judgment roll in the suit in which the attachment was issued, was offered and admitted in evidence, and there was no objection to it on this ground. It must be presumed, therefore, that it showed an indebtedness which antedated the sale, and justified the issuance of the writ and seizure of the property. Several exceptions were taken by the plaintiff at the trial to orders of the court refusing to permit certain questions to be answered by witnesses, but they need not be specially considered. We see no error in the rulings.

We find nothing in the transcript calling for a reversal of the judgment, and therefore advise that the judgment and order be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

76 Cal. 304

BUTE v. POTTS. (No. 11,273.)

(*Supreme Court of California.* May 28, 1888.)

PHYSICIANS AND SURGEONS—NEGLIGENCE—EVIDENCE.

In an action against a physician for negligence and incompetency in the treatment of plaintiff, evidence that defendant procured his certificate of proficiency from the state board of examiners without examination, by means of diplomas irregularly obtained from medical schools, is irrelevant, as are also defendant's statements concerning such diplomas; the only question being as to the degree of care and skill used in the particular case.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; D. BELDEN, Judge.

Action by B. F. Butte against J. S. Potts, a physician and surgeon, for negligence and incompetency in the treatment of plaintiff. Verdict and judgment for defendant. Plaintiff appealed.

Burt & Pfister, for appellant. *C. D. Wright and T. H. Laine*, for appellee.

FOOTE, C. This was an action for damages against a physician and surgeon for alleged incompetency and negligence. Judgment passed for the defendant, and from that the plaintiff appeals. Upon the trial the plaintiff offered as evidence to support his contention that the defendant was an incompetent physician and surgeon, that the latter had obtained a certificate from the state board of examiners without an examination as to his qualifications, and that his certificate was issued "upon the presentation of two diplomas" from certain medical schools, which were irregularly obtained. He also desired to show by a witness what the defendant said about his diploma. The court excluded the evidence. The plaintiff excepted, and now claims that the action of the court was erroneous. The case was presented upon the theory that the party sued had been guilty of negligence, and lacked skill as a physician and surgeon. The fact that he had or had not certificates and diplomas as a physician and surgeon is no proof either that he had skill as such or lacked it. A certificate or diploma could be no proof that he acted with skill in attending a given patient, or that he did not so act. His services as to skill or the contrary must be determined by his acts and conduct in attending the patient. It is the manner in which the services are performed that is the test of their character. The evidence was immaterial and irrelevant, and the judgment should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

2 Cal. Unrep. 869

PARDY v. MONTGOMERY *et al.* (No. 11,204.)

(*Supreme Court of California.* May 25, 1888.)

PRACTICE—DISMISSAL FOR WANT OF PROSECUTION.

A case was tried before the court, who announced that his opinion was for defendants, but notice of decision was not given, or finding of facts filed or waived. After some delay, plaintiff applied to the clerk to enter judgment, that he might appeal, and, being refused, moved for a new trial, which motion was dismissed, whereupon he moved to place the case on the calendar for trial, pending which defendants moved to dismiss the case for want of prosecution. *Held*, not a proper case for dismissal.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Action by George Pardy against Charles Montgomery, George S. Montgomery, John F. Geary, and Isaac Barker. On motion of defendants the action was dismissed for want of prosecution, and plaintiff appealed.

W. T. Baggett and Saml. T. Birdsall, for appellant. *W. S. Goodfellow*, for respondents.

FOOTE, C. This is an appeal from a judgment dismissing a cause for the want of prosecution. From the affidavits in the transcript, which are mutually agreed, by the joint certificate of counsel on both sides, to have been those used on the hearing of the notice, it is apparent that the cause was tried before Judge ALLEN, but that no findings were ever waived or filed; that after some delay the plaintiff, against whom the judge announced that he should give judgment, endeavored to have the judgment entered, that an appeal might be taken; that the clerk of the court very properly refused to do so; that afterwards, upon the substitution of an attorney for the defendant, a motion for a new trial which had been made was dismissed, which was followed by a motion to reinstate the case upon the calendar for trial, to which the defendant responded by a counter-motion to dismiss for the want of prosecution,—no notice of decision ever having been given. This last motion was granted. As it seems to us, the failure of the defendants to file findings or have them waived, or to give any notice of decision, does not place them in a position to have dismissed, for the want of prosecution, a case which the plaintiff is clamorous to try. The fact that defendants, by neglect to take care of their rights, have occasioned the loss of important testimony, is not chargeable to the plaintiff, and there is nothing to show that the plaintiff or his several attorneys have purposely misled the defendants or their attorneys to their prejudice. There is nothing in the record which shows any merit in the defendant's contention that the action was properly dismissed for the want of prosecution, and we advise that the judgment be reversed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed.

76 Cal. 287

LAUGHLIN v. THOMPSON. (No. 12,457.)

(*Supreme Court of California.* May 25, 1888.)

SHERIFFS AND CONSTABLES—UNLAWFUL SEIZURE—ACTION FOR—WHEN LIES.

Where property in possession is taken by an officer under attachment issued by competent authority, and regular on its face, the writ protects such officer; but, in

cases of "claim and delivery," an action will lie to recover property taken from defendant by a constable, without any right but by virtue of an affidavit with the order indorsed thereon, and an undertaking,—the mere direction to the constable conferring no color of authority upon him.

In bank. Appeal from superior court, Los Angeles county; H. K. S. O'MELVENY, Judge.

James Laughlin brought an action of trover against S. G. Thompson to recover possession of property taken from him by the latter as constable under process in an action of claim and demand in which said James Laughlin was defendant. Judgment for defendant. Plaintiff appeals.

P. W. Dooner, for appellant. *S. M. Payton*, for respondent.

MCKINSTRY, J. The action is to recover certain lumber or its value. The court below did not err in overruling the plaintiff's general demurrer to the second amended answer. The answer denies that the plaintiff is or was the owner of the property described in the complaint, and denies that the property is of greater value than \$300. The answer admits the defendant to be in possession of the property, and admits the demand of plaintiff for a delivery of the property, and defendant's refusal. The narrative of the wreck of the vessel *San Luis*, and the rescue of a portion of her cargo by Frederick Wilson and other persons, however impertinent to a determination of the rights of the parties herein, cannot be said to make the answer "ambiguous, unintelligible, or uncertain." And so of the insufficiency of the defendant's averment of facts which would constitute a justification of his seizure of the property as constable. If they are insufficient, they do not render the answer ambiguous. Most of the testimony of Frederick Wilson, as set forth in the bill of exceptions, was totally irrelevant; but the plaintiff did not object to it on that ground, but only objected to its being admitted previous to evidence upon another point.

The appeal is from the judgment alone, and the court below failed to find upon the material issues made, or attempted to be made, by the answer. There is no finding, upon the averments, of the facts which would alone justify the defendant in taking the property out of the possession of the plaintiff. At the trial, evidence was or was not given of the institution and pendency of the alleged action brought by Wilson against the present plaintiff in the justice's court; that defendant was constable; and that, as such, he received from the plaintiff in that action an affidavit, order, and written undertaking, substantially complying with sections 510, 511, and 512 of the Code of Civil Procedure. If the evidence was given, the court should have found in favor of the defendant upon his plea purporting to justify a taking otherwise wrongful. If the evidence was not given, the court should have found against the defendant upon that plea. The foregoing assumes the justification to have been sufficiently pleaded, in the absence of a specific demurrer, or of a general demurrer addressed to the particular defense. The admitted case is that plaintiff was in possession, and that the property was taken out of his possession by the defendant. The plaintiff's possession gave him a right of action against a mere trespasser. Such the defendant was, unless he was a constable, who could justify the taking by the affidavit, indorsed order, and undertaking above mentioned. But the court did not find upon the facts pleaded by the defendant to justify his taking, and the plaintiff's implied denial thereof. There is no averment in the answer that the property was delivered to the plaintiffs in the action brought in the justice's court. On the contrary, it would appear from the answer that defendant holds the property subject to the further order of that court, or of the court to which the former action has been appealed. He did not take the property as agent of the plaintiffs in the justice's court, but as an officer claiming the right to take it by virtue of appropriate power or authority. Wilson and others are not parties to this ac-

tion, and their right to salvage, if any they have, and to the possession of the property to secure their lien for salvage, constitutes no defense for the defendant in the present action. When property is in the possession of the defendant to an action, the writ of attachment alone, if issued by competent authority and regular on its face, protects the sheriff or constable. Pol. Code, § 4187. But in case of "claim and delivery" the affidavit, order indorsed thereon, and undertaking, all go into the hands of the officer, and constitute the process. He must determine whether they are regular and sufficient. Moreover, a defendant can have an attachment issued by the court set aside when it has been improperly issued. Code Civil Proc. § 556. There is no such provision with respect to property taken under the chapter as to claim and delivery. Even if a defendant in an action cannot sue an officer who attaches his property while the attachment suit is pending, it does not follow that a defendant in an action for the recovery of specific personal property cannot sue for the recovery of the possession of property wrongfully taken by a constable, without any right. The mere direction to a sheriff or constable, by a plaintiff in an action of "claim and delivery," to take property from the defendant, confers no color of authority upon the officer. The cause was determined in the court below as if it had been an action against the alleged salvors; the court holding that the plaintiff could not maintain an action for the recovery of the property, without a tender [to them?] of the amount of the lien. The judgment dismissed the action, and gives the "defendants" their costs. On the return of the cause to the court below, it will be for the parties to apply to the court to amend their pleadings as they shall be advised. The answer should clearly show that, when the defendant took the property from the plaintiff, he was armed with an affidavit, containing substantially the matters required by law to be stated in it, and with a sufficient order and undertaking. Judgment reversed, and cause remanded for a new trial.

We concur: SEARLS, C. J.; PATERSON, J.; McFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.

(76 Cal. 281)

PEOPLE v. COX. (No. 20,410.)

(*Supreme Court of California.* May 25, 1888.)

1. HOMICIDE—TRIAL—INSTRUCTIONS.

On a trial for murder, it appeared that part of the judge's charge was addressed orally to the jury, and not taken down by the reporter, though he was present at the time; but the certified bill of exceptions showed that the language used did not affect or in any way qualify the charge as taken down by the reporter. *Held*, there was no error, notwithstanding Pen. Code Cal. § 1093, enacts that, "if the charge be not given in writing, it must be taken down by the phonographic reporter."

2. SAME.

On a trial for murder, where there is proof of deliberation and premeditation on the part of the prisoner, it is proper to charge that "where a person deliberately, premeditatedly, and unlawfully kills another, he is presumed to do so with express malice," and such a charge cannot be said to lead the jury to believe that a person can be guilty of murder in the first degree without proof of express malice.

3. SAME—CONDUCT OF PROSECUTING ATTORNEY.

On a trial for murder, the prosecuting attorney placed upon the table a bowie-knife, pistol, and a coat of mail, which had no bearing on the case, and were not offered in evidence, nor was the attention of the court called to them, nor requested to rule or charge with reference to them. *Held*, not sufficient ground for reversing the judgment.

In bank. Appeal from superior court, Calaveras county; C. V. GOTTSCHALK, Judge.

George W. Cox was convicted of murder in the first degree. He appeals. Conviction affirmed.

Ira Hill Reed, (*H. P. Bowie*, of counsel,) for appellant. *Geo. A. Johnson*, Atty. Gen., for respondent.

MCKINSTRY, J. The defendant was found guilty of murder in the first degree. It is contended the court below erred, in that the judge gave to the jury an oral instruction, not taken down by the phonographic reporter, as required by section 1093 of the Penal Code. The bill of exceptions shows that after the judge below had read written instructions, and prior to an oral instruction (which was taken down) explanatory of the difference between the degrees of murder, he addressed to the jury a few words "leading up to and in no way touching upon" the oral instruction, which were not taken down. When, by the statute in force, it was required that the charge of the court to the jury must be reduced to writing before its delivery, it was repeatedly decided that to charge the jury orally was to commit an error; and since the statute which provides for the charge being taken down by the reporter, it has been said the giving of an oral charge in the absence of the reporter, within call, was error. *People v. Hersey*, 53 Cal. 574. In the case at bar, the reporter was present, and was engaged in the task of taking down the charge while it was being delivered. If the bill of exceptions showed that an oral charge was given, not contained in the report of the short-hand reporter, while it neither showed what the charge was, nor the character or effect of it, the order denying a new trial would be reversed. It must be presumed, however, that if the judge of the superior court had been requested to do so, he would have inserted the language used by him which was not taken down by the reporter. If it appeared on appeal that such language could not have influenced the jury adversely to the defendant, the judgment would not have been reversed, either because the language was used or because it was not taken down by the reporter. Here the bill of exceptions does not contain the language of the judge not phonographically reported, but the certified bill of exceptions shows that the language did not affect nor in any way qualify the charge which was taken down by the reporter. The point of appellant is that, if any words were said by the judge to the jury which were not written down by the reporter, this is error, demanding a reversal of the judgment. It may be said it was intended the settlement of the bill of exceptions should not depend upon the fallible memory of the judge; but the alternative is that there can be no contradiction or modification of the account of the short-hand reporter. The notes of the reporter, and his transcription of them in long-hand, are but *prima facie* evidence of the charge. Code Civil Proc. § 273. It is plain that, in settling a bill of exceptions, the judge should insert what he actually said to the jury, as a substitute for what the reporter has erroneously stated was said to the jury. Shall it be held that, if the reporter omits to take down a portion of the oral charge, the judge has no power, in settling the bill, to supply the portion omitted? So to hold would be to transfer the judicial function of charging the jury to the phonographic reporter. The settled and certified bill of exceptions, the settlement never having been attacked in the manner provided by statute, imports absolute verity. The words of the judge not taken down by the reporter were therefore unimportant, and could not have injured the defendant. There is no pretense that the defendant sought to have included in the bill of exceptions the language actually used by the judge, not taken down by the reporter; or relied on the proposition that the language expressed an erroneous proposition as to the law, or that it was misleading. The defendant's counsel would have had the right to insist upon the insertion; and, had the judge below refused the demand, the judge would have refused to settle an exception according to the facts, within the meaning of section 1174 of the Penal Code. But such a refusal

can never be assumed. When the judge refuses, on request, to settle an exception according to the fact, the remedy of the party desiring the bill settled is to apply to this court for leave to prove the exception under the section of the Code last mentioned.

A recital in the bill of exceptions shows that, during the trial and in sight of the jury, a sheriff's officer brought into the court-room, and the district attorney placed upon the table, a bowie-knife, pistol, and coat of mail, which, as stated by counsel for appellant in this court, "had no bearing on the case." Whatever may have been the intention of the district attorney, the articles mentioned were not in fact offered in evidence. We are not called on to commend such an exhibition, but we find in it no sufficient reason for reversing the judgment. The attention of the court was not called to the presence of the articles, nor was the court requested to rule or charge with respect to them. No objection was made to the action of the sheriff or district attorney. The statement in the bill of exceptions as to the knife, pistol, and coat of mail, has no appropriate place in the bill. A bill of exceptions must contain so much of the evidence, or of facts occurring at the trial, only as is necessary to present the questions of law upon which the exceptions are taken. Pen. Code, § 1175. But we may safely say the jury was not influenced by the sight of the articles placed upon the table. They were very distinctly told that in finding their verdict they must be governed alone by the evidence admitted, and it must be presumed they were men of ordinary intelligence.

Appellant also contends: "The instruction in chief by which the jury may have understood that proof of the killing, without proof of express malice, was sufficient to establish the homicide to be murder in the first degree, was error." We have found no such instruction in the record. Malice is express when there is manifested a deliberate intention to take away the life of a fellow-creature. Pen. Code, § 188. Murder which is perpetrated by any kind of willful, deliberate, and premeditated killing, is murder of the first degree, (Pen. Code, § 189;) that is, the killing must be willful, deliberate, and premeditated. If the evidence manifestly proves beyond a reasonable doubt that the "killing" was premeditated, etc., the "express malice" is proved. The court charged: "When a person deliberately, premeditatedly, and unlawfully kills another, he is presumed to do so with express malice." This was at least as favorable to the defendant as it should have been. The court also gave the statutory definition of murder, *totidem verbis*. And, again: "The unlawful killing must be accompanied with a deliberate and manifest intent to take life in order to constitute murder of the first degree. The intent to kill must be the result of deliberate premeditation. It must be formed upon a pre-existing reflection, and not upon a sudden heat of passion sufficient to preclude the idea of deliberation." Further, the court charged: "Any unlawful killing of a human being with malice aforethought is murder; but, if nothing further characterizes the offense, it is murder in the second degree. To constitute the higher offense, there must be willfulness, deliberation, premeditation. By willfulness is meant that it was of purpose, with the intent that, by the given act, the life of the party should be taken." And afterwards, the court, speaking of murder of the first degree, said: "It is sufficient if a man conceives the intention to kill another one, and carries it into execution." The general idea of the charge is that if it is clearly proved the defendant killed the deceased, and the evidence does not show (it is unnecessary here to speak of the quantum of evidence necessary to show it) either that the killing was justifiable or excusable, or that the offense was manslaughter, the crime is murder of the second degree, unless the evidence manifests beyond reasonable doubt that the defendant deliberately and premeditatedly formed the intent to kill the deceased, and killed him to carry out that intent, in which case it is murder of the first degree. *People v. Doyell*, 48 Cal. 96, 97. We find nothing in it which could have induced the jury to believe that a homicide

could be murder of the first degree without express malice on the part of the slayer. Judgment and order affirmed.

We concur: SEARLS, C. J.; PATERSON, J.; McFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.

76 Cal. 309

KELLY v. LUNING. (No. 9,920.)

(Supreme Court of California. May 23, 1888.)

MUNICIPAL CORPORATIONS—STREET ASSESSMENT—POWER OF SUPERVISORS OF SAN FRANCISCO.

Acts Cal. 1877-78, c. 282, providing for the ratification of certain orders of the board of supervisors of the city and county of San Francisco, concerning street work on Montgomery avenue, and providing how assessments should be made for work already done, does not authorize said board to order property assessed for work ordered and completed before the passage of said act, when such property was not liable therefor under the law as it existed when the work was ordered; the legislature having no right to impose such liability.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; F. M. CLOUGH, Judge.

Action by M. J. Kelly against Nicholas Luning to foreclose the lien of a street assessment levied, under the act of 1872, (St. 1871-72, § 8, p. 911,) upon certain lots on Montgomery avenue, in the city and county of San Francisco. Montgomery avenue runs diagonally across the other streets in its vicinity, dividing the blocks in its course into fractional parts of blocks, one of which was owned by defendant, and is the property in question; and crosses Stockton and Green streets (which cross each other at right angles) squarely at their intersection, the only case of the kind in the city except on Market street. The act of 1872 (Acts Cal. 1871-72, § 8, p. 911) provides for assessments for street improvement generally, with special provisions for the crossings of Market street by name, but for no other cases of like kind; Montgomery avenue not then being in existence. The legislature, after the work in question was ordered and completed, passed an act which is relied on by the city as curative of the want of power in the board of supervisors to provide for such work. Acts Cal. 1877-78, c. 282, pp. 342, 343. Judgment for plaintiff, and defendant appealed.

Langhorne & Miller, for appellant. *J. M. Wood*, for appellee.

FOOTE, C. This action was brought to foreclose the lien of a street assessment levied, under the act of 1872, upon certain lots on Montgomery avenue, in the city and county of San Francisco. At the time when the notice of intention on the part of the board of supervisors was given, no valid assessment could have been made, as the act of 1872 did not provide for any mode of assessment, for work such as was done in the present instance. By a curative act approved March 19, 1878, (St. 1877-78, pp. 342, 343,) it was attempted to validate former assessments, and also to provide a mode of assessment for the work which has already been done. But the property involved here, upon which the burden of paying for the work was attempted to be imposed, was not liable when the work was ordered. At that time the proceedings of the board of supervisors had no relation to it. That being the case, the legislature, by the act of 1878, *supra*, had no more power to order it to be assessed for that work than it had the power to order lots lying on the other side of the city of San Francisco to be assessed for such work. We are of opinion that this case falls within the doctrine announced in *People v. Lynch*, 51 Cal. 23; *Brady v. King*, 53 Cal. 45. It follows that the judgment and order should be reversed, and the action dismissed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and action dismissed.

76 Cal. 384

PHILLIPS *et al.* v. DECK. (No. 12,444.)

(Supreme Court of California. June 1, 1888.)

SPECIFIC PERFORMANCE—ACCEPTANCE OF OFFER OF SALE BY VENDEE—REASONABLE TIME.

A contract for the sale of land in California, where the vendor lived, was, by an agent of both parties, thirteen days after its execution by the vendor, mailed to vendees, who lived in Missouri, but who, as was known by all parties, would not be at home for four days. Seventeen days after writing, the agent received an acceptance of the offer from vendees, with money, notes, and mortgage, in accordance with the agreement. Six days afterwards, it being discovered that the mortgage was not properly acknowledged, at the instance of vendor's wife, in whose charge the matter was during his absence, it was returned to Missouri for correction, and twenty-one days thereafter was, with notes and money, tendered to vendor and his wife, and a deed demanded; vendees having been given possession of the premises in the mean time by the wife. *Held*, in a suit for specific performance by the vendees, that the acceptance of and compliance with the contract by the vendees was within a reasonable time after the date thereof.

In bank. Appeal from superior court, San Bernardino county; HENRY M. WILLIS, Judge.

Action by E. A. Phillips and C. Newkirk against L. Deck for the specific performance of a contract for the sale of real estate. The defense was that the plaintiffs had not accepted the offer of sale within a reasonable time, and that it was therefore not binding. Defendant had signed a written contract or offer which gave a reasonable time to confer with plaintiffs, who lived in Missouri, while defendant lived at San Bernardino, Cal., to be sent to them for their acceptance by one Condee, who acted in the transaction as agent for both parties. The offer was dated and signed February 21st, when defendant left for Mexico, where he remained until April 19th, leaving a deed with his wife, whom he placed in full charge of the negotiation, to be delivered in the event of the acceptance of the option by plaintiffs, who, as was known by all parties, would not be at home for about four days. On the 6th of March, Condee sent the offer to plaintiffs, who accepted the same, and mailed back the cash payment, notes, and mortgage, as agreed upon, which Condee received on the 23d, and of which defendant's wife was notified on the 29th; but, the mortgage not being acknowledged, at the instance of defendant's wife and her attorney it was returned for correction. On the 15th of April the mortgage was returned corrected, and on the 19th Condee tendered to defendant and his wife the money, notes, and mortgage, which they refused to receive, and also refused to execute the deed as agreed upon. The court found the acceptance by plaintiffs to have been in a reasonable time. Defendant appealed.

C. J. Perkins and *Wicks & Ward*, for appellant. *Rowell & Rowell*, for respondent.

PER CURIAM. We find no error in the rulings upon the evidence. We are of opinion that the communication to and acceptance by plaintiffs of the proposal of defendant to sell the land in controversy were all within a reasonable time, and that the same is true of the compliance of plaintiffs with the proposal so accepted by them. Judgment and order affirmed.

76 Cal. 260

GRIFFETH *et al.* v. BROWN. (No. 11,100.)

(Supreme Court of California. May 25, 1888.)

ESTOPPEL—WHAT REPRESENTATIONS AMOUNT TO—INTENT TO DECEIVE.

A charge that if defendant made certain misrepresentations concerning his claim to the property in dispute, which misled plaintiffs, he is estopped to set up any claim to such property, but fails to state that such representations must have been made with the express intention to deceive, or with such culpable negligence as to amount to constructive fraud, is erroneous; and such error is not cured by another distinct charge which states the rule more accurately.

Department 2. Appeal from superior court, San Benito county; JAMES F. BREEN, Judge.

Action by Griffith & Dalzel against Henderson Brown for the recovery of certain wheat. Judgment for plaintiffs, and defendant appeals.

McCroskey & Hudner, for appellant. *Montgomery & Scott* and *N. C. Briggs*, for respondents.

McFARLAND, J. This is an action to recover 500 sacks of wheat, or the value thereof. The verdict and judgment were for plaintiffs, and defendant appealed. The action arose out of those prolific sources of litigation, leases of agricultural land, cropping contracts, and mortgages of growing crops. About the 1st of November, 1883, the defendant, Brown, being the owner of a certain tract of land, made a verbal contract, the terms of which are in dispute, about said land, with one Manuel Smith. Under this contract, whatever it was, Smith cultivated the land, and put in a crop of wheat. On February 19, 1884, Smith mortgaged his growing crop to plaintiffs to secure future advances. Under the terms of the mortgage, plaintiffs were authorized to take possession of the grain, and harvest, thresh, and sack it, which they did. They gave defendant one-fourth of the grain, and piled the other three-fourths in one corner of the premises, from which defendant took the 500 sacks sued for, claiming it to be his property. Plaintiffs' theory (supported by some evidence) was that the verbal contract between Brown and Smith, made in November, 1883, was simply a lease; Smith to pay as rent one-fourth of the crop, and the stubble and straw to go, also, to Brown. But Brown introduced a written instrument signed by himself and Smith, dated November 3, 1883, but shown to have been executed after plaintiffs' mortgage, which was a cropping contract, by the terms of which Brown was to be and remain the owner of all the wheat raised, not only until Smith should have delivered him one-fourth of the wheat raised, but until he should have delivered to him, also, an additional amount of the wheat sufficient to pay, at market price, the sum of \$576.22, and interest, which Smith owed him for certain horses and farming implements; and defendant's theory (supported, also, by some evidence) was that the written cropping contract was the same as the original verbal contract made in November, 1883, and was a mere reduction of the latter to writing. So that the jury may have found in favor of either party as to the real character of the original verbal contract. But the plaintiffs also introduced evidence tending to show that, when Smith came to them for advances, they went to defendant, Brown, and inquired of him what the contract was between him and Smith, and told him that Smith wanted them to make him advances; and that Brown said, as Smith had before told them, that he (Brown) was to receive one-fourth of the wheat, and the straw and stubble; and encouraged them to make the advances, and said nothing about any other lien on or interest in the wheat; and that by Brown's statements and representations they were induced to take the mortgage and make the advances. And for these reasons they claimed that Brown was estopped from setting up any claim under such cropping contract. The evidence as to what Brown said to plaintiff about the contracts was conflicting;

and it is evident that the instructions of the court about the issue of estoppel thus raised were important and material. The court instructed the jury, among other things, as follows: "If you find from the evidence that plaintiffs herein, Griffith and Dalzel, before receiving the mortgage from Smith, or before making advances on said mortgage, applied to Brown, lessor to Smith, to ascertain Smith's liability to him (Brown) under the said lease or contract, and that defendant, Brown, by his declarations or conduct, misled said Griffith and Dalzel, to their prejudice, as to the material terms of said contract or lease, he (Brown) is estopped from setting up the alleged lien, and shielding himself behind the stipulation that the grain was subject to a lien for the payment of claims other than rental, and which were not communicated to plaintiff." The court also gave another and longer instruction, substantially to the same effect as the one just quoted, and with no other important qualification.

It is quite evident that these instructions were erroneous. They lack the most important element of estoppel, namely, that the party against whom it is invoked made the declaration or did the act upon which the estoppel is sought to be based, either with the express intention to deceive, or with such careless and culpable negligence as to amount to constructive fraud. *Boggs v. Mining Co.*, 14 Cal. 368; *Davis v. Davis*, 26 Cal. 38. And the error is not remedied by the fact that in another and distinct instruction the rule was stated with more accuracy. The jury were at liberty to follow either instruction. We are aware that a judgment should not be reversed for every abstract error occurring in the preliminary steps which led to it. But the doctrine of estoppel *in pais* would be very harsh and unjust if allowed to go beyond its legitimate limits. Its practical meaning, generally, is that a man must lose property actually and legally his, on account of something which he has said about it. Brown was not under obligation to tell plaintiffs anything about his property or his business. Still if, with intent, either express or fairly to be implied, he did make false representations to plaintiffs for the purpose of deceiving them, or was guilty of fraudulent carelessness in his representations, and plaintiffs had not other reasonable means of knowing the truth, and relied on such representations, then he should suffer for his conduct. But these characteristics of the rule of estoppel should have been fairly and clearly given to the jury; and it is quite probable that this was the very point which determined the verdict. For this reason, therefore, we are of the opinion that the judgment should be reversed. Judgment and order denying a new trial reversed, and cause remanded for a new trial.

We concur: SEARLS, C. J.; SHARPSTEIN, J.

76 Cal. 318

DIGGINS v. BROWN *et al.* (No. 11, 115.)

(*Supreme Court of California.* May 29, 1888.)

MUNICIPAL CORPORATIONS—STREET ASSESSMENTS—WHAT PROPERTY SUBJECT TO—PARTIAL IMPROVEMENTS.

Under Acts Cal. 1871-72, c. 562, pp. 809-811, relating to improvement of streets in the city of San Francisco, which provides that the expenses incurred for any work authorized thereby shall be assessed on the lots and lands fronting thereon, and that, when such work is done on one side of the center line of the street, the lots or portions of lots fronting on that side only in front of which such work is done, shall be assessed to cover the expenses thereof, etc., where work is done on portions only of each side of the center line of a street, all the property on each side, for the whole length of the district ordered to be improved, should be assessed with the whole expense incurred on the side on which the property fronts, and not simply such property as fronts the portions of the street where such work is done.

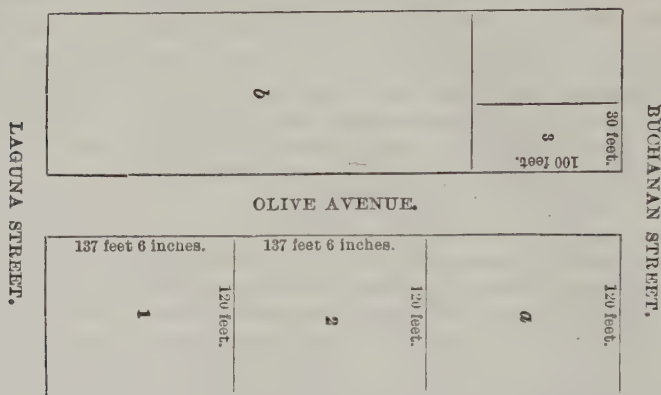
Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Action by A. C. Diggins against Morris Brown, T. W. Fenn, E. O'Neil, Cal. Rep. 16-19 P.—41

and D. C. Sullivan, to foreclose the lien of a street assessment on lot No. 3, (in diagram,) fronting on Olive avenue, between Buchanan and Laguna streets, in the city of San Francisco. The defendants insisted that the assessment was not levied as prescribed by law. Judgment for plaintiff, and defendants appealed.

J. C. Bates, for appellants. *J. M. Wood*, for respondent.

HAYNE, C. Action to foreclose the lien of a street assessment. The only point made is that the assessment shows upon its face that it was not made in accordance with the statute. The order under which the work was done, provides "that plank sidewalks be constructed on Olive avenue, between Laguna and Buchanan streets, where not already constructed; and that the roadway thereof be macadamized where not already done." The diagram attached to the assessment is as follows:



The items of the work, as shown by the assessment, are as follows:

3,937 5-10 square feet of macadam, at \$0.10,	-	-	-	\$393 75
375 front feet of sidewalks, at \$1.15,	-	-	-	431 25
Printing, \$18.90; engineering, \$33,	-	-	-	51 90

Total, - - - - - \$876 90

Number of front feet assessed, 375; rate per front foot, \$2.3384.

The distribution of the burden was as follows:

Nos.	Names of Owners.	Front Feet.	Amount.
1.....	Unknown	137 6-12	\$321 53
2.....	Unknown	137 6-12	321 53
3.....	Unknown	100	233 84
Total.....			\$876 90

It thus appears that the lots designated as *a* and *b* upon the above diagram were not assessed at all, although they fronted on Olive avenue between the streets mentioned. In making the assessment in this way the officer doubtless acted under what we conceive to be a mistaken construction of the provisions of the act of 1871-72, under which the proceedings were had. There are two provisions of that act which are relied upon by respondent as justifying the assessment, viz.: subdivisions 10 and 1 of section 8. The former is as follows: "Subd. 10. When any work mentioned in section 3 of this act * * * is done on one side of the center line of said street, * * * the

lots or portions of lots fronting on that side only in front of which said work is done shall be assessed to cover the expenses of said work," etc. Laws 1871-72, p. 811. In view of this provision, the officer was justified in assessing the lots on one side of the street for the work done on that half of the street, and the lots on the other side for the work done on the other half. But this does not meet the difficulty, even if we assume, in favor of the assessment, (as we think should be done,) that no work was in fact done on the half of the street in front of lots *a* and *b*. That is simply saying that they should not be assessed (and were not assessed) for work done on the opposite side of the street; but this is a different thing from saying that they should not be assessed for work done on their own side of the street. And the difficulty here is that the work done on one side of the street was not apportioned to all the lots on that side. It appears from the assessment itself that this is the case; for it is certain that work was done on the side of the street upon which lot *b* is situated, because lot No. 3, on that side, was assessed, and under subdivision 10 it could only have been assessed for work done on its side of the street; and it is equally certain that lot *b*, on the same side, was not assessed at all. And the same applies, *mutatis mutandis*, to lot *a* on the other side of the street. The practical result of the course which the officer pursued is that lot No. 3, which is the one involved in this suit, was assessed for the work done in front of it, and that this burden was not shared by the adjoining lot on the same side, (lot *b*,) nor by the lot opposite, (lot *a*.) This can only be justified upon the theory that the act requires each lot to be assessed for the portion of the work which was done upon the part of the street in front of it, and for no other work; and, although the statement of respondent's position in this regard is somewhat vague, we understand him to go to this extent. In support of his position, the counsel refers us to subdivision 1, of section 8 of the act of 1871-72, (Laws 1871-72, pp. 809, 810,) which is as follows: "Subdivision 1. The expenses incurred for any work authorized by section 3 of this act shall be assessed upon the lots and lands fronting thereon." The words "fronting thereon," says the counsel, "refer to the work done. It requires the assessment to be imposed upon the lands fronting on the work." It is not clear in what sense the counsel uses the word "work;" but, as above mentioned, the argument would not justify the assessment unless it goes to the extent stated. In order to save the assessment, it is necessary to construe the provision so as to read substantially as follows: "Subdivision 1. The expenses incurred for any portion of the work authorized by section 3 of this act shall be assessed upon the lots and lands fronting on such portion of the work." There is nothing in the language of the provision to indicate that such was the meaning of the legislature. The word "thereon" must refer to the phrase "any work authorized by section 3 of this act." And the natural meaning of the words used is that the expense of the whole work shall be assessed ratably upon all the lands fronting on the work. Nor is there anything in the nature of the proceedings to indicate a different construction. On the contrary, the method of assessing each lot for the work done in front of it has been condemned by high authority. See *Cooley, Tax'n*, (2d Ed.) 646, 647. It results that the assessment was improperly made, that it omits a lot which should have shared the burden with the one sought to be charged. Such being the case, the assessment is void. *People v. Lynch*, 51 Cal. 19, 20. We therefore advise that the judgment and order denying a new trial be reversed, with directions to dismiss the action.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying a new trial are reversed, with directions to dismiss the action.

70 Cal. 315

ARENDT v. MACE et ux. (No. 11,281.)

(Supreme Court of California. May 29, 1888.)

1. HOMESTEAD—ESTABLISHMENT OF CLAIM—EVIDENCE.

In ejectment, plaintiff claiming under an execution sale, uncontradicted evidence that the lot in question was inclosed by one fence with defendant's house lot when he filed a homestead; that the lot was used for a garden; and that a pump was upon it, from which water was taken for house purposes, — is sufficient to show that the lot was part of defendant's homestead, though the lot was not used for garden purposes in the year in which the execution was levied.

2. SAME—SELECTION FROM WIFE'S PROPERTY—CONSENT OF WIFE.

Under the California statute providing that a homestead may be selected from the community property of a husband and wife, or the separate property of the husband, or, with the consent of the wife, from her separate property, a homestead may be created on land consisting in part of separate and in part of common property, and a filing of such homestead by the wife is a sufficient consent to the filing on her separate property.

Department 2. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

Action of ejectment by Harris Arendt against John M. Mace and wife. Judgment for plaintiff, and defendants appeal.

G. W. Langan, for appellants. J. R. Palmer, for respondent.

THORNTON, J. Ejectment. Judgment for plaintiff, and defendant appeals. The action was brought to recover possession of lot 14, in block A, Pleasanton. The plaintiff claims under a sale by the sheriff by authority of an execution issued upon a judgment recovered against John M. Mace, one of the defendants herein, and on a deed executed by the sheriff thereon. The defense interposed was that, at the time of the levy and sale by the sheriff, lot 14 was the homestead of defendants, who were then husband and wife. The court found against this defense, and defendants here contend that the evidence is insufficient to sustain the decision, and that the lot in controversy was the homestead of the defendants at the time above stated. Lots 14 and 15 adjoined. A witness testifies "that, when he was on the lots with the sheriff, (which was when the levy was made,) there was a fence all around the two lots, except around the front of lot 15." This witness also says: "When I was there with the sheriff, I should judge that the house [the reference here is to the dwelling-house of defendants] was two or three feet from the fence between 14 and 15. * * * Previous to that time there was a fence between 14 and 15, but Mr. Mace had taken away a section of it, when he was going to move the house right on it." He says also that the lot was used as a garden lot by Mace; that he raised potatoes, a few trees, and garden vegetables on it. Mace testifies that, when the homestead was filed, he and his wife were residing on lots 14 and 15; that part of the house was on lot 14; that lot 14 was used for garden purposes, for the purposes of the family; that he had a pump standing right in the center of lot 14. This pump was used to pump water on lot 14 from a well on lot 15. In 1881, he put a fence all around lot 14, and raised potatoes and all kind of vegetables on it for their own use. Mrs. Mace testified that lot 14 was used for a garden "for vegetables, potatoes, and fruit." She also testifies to the pump on lot 14, put there for the purpose of irrigating. The well was on lot 15, and there were pipes from the well on 15 to the pump on 14; that the pump was put on 14 for the purpose of watering the garden, and for the convenience of the house and kitchen; that they got the water from this pump to use in the house in which they lived. She further states that when the homestead was filed by her, on the 10th of March, 1882, there was a fence all around lots 15 and 14. "They were both inclosed in one fence."

We think the above uncontradicted evidence shows that lot 14 was a part of the homestead of defendants when the levy and sale above mentioned were made by the sheriff. Plaintiff's counsel lays much stress on the circumstance

that no vegetables were raised on lot 14 in the year 1882, in which the levy and sale were made. We think this immaterial, in view of the fact of the use of the lot for other purposes. The pump from which water was procured for use by the family was on the lot, and there were trees growing on it, fruit trees, we infer, from the testimony of Mrs Mace. It is clear that this lot was used with lot 15 by the family. If a lot had been used, as this one had been, for a year or two just prior to the filing of the homestead for a garden, the circumstances that vegetables were not grown on it during the year in which the filing was made would, in our judgment, be entitled to but little weight on the question whether such lot, after the filing, constituted a part of the homestead, especially where other uses of the lot are shown. When the homestead filing was made, lot 15 was the separate property of the wife, and lot 14 was common property; and it is argued by plaintiff that a valid homestead could not be created on land, a part of which was the separate property of the wife, and the other part common property. The statute provides that "if the claimant be married, the homestead may be selected from the community property, or the separate property of the husband, or with the consent of the wife from her separate property." In this case the filing was by the wife, and such filing by her must be regarded as a consent to the filing on her separate property. Under the statute she can certainly create a homestead on her own or separate property. We see no valid reason why a homestead cannot be created on a lot of land consisting in part of separate and in part of common property, as was done in this case. We do not intend by what is said above to hold that a husband can, by adopting the course pursued in this case, create a homestead on the separate property of the wife. In accordance with the foregoing, the judgment and order must be reversed, and the cause remanded for a new trial. So ordered.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

76 Cal. 312

HAMIL v. McILROY. (No. 11,340.)

(Supreme Court of California. May 29, 1888.)

1. ASSIGNMENT—CONSIDERATION—PROOF OF—FINDINGS OF COURT.

In an action to compel a reassignment of a judgment alleged to have been assigned by plaintiff to defendant without consideration, findings that at the time of said assignment there were unsettled demands existing between plaintiff and defendant, and that said demands were the only consideration for said assignment; that thereafter plaintiff commenced an action against defendant, and recovered judgment therein; that in said action defendant filed a counter-claim, which was allowed, but no credit was given plaintiff for the judgment in question, or the assignment thereof, nor was the same in any manner litigated or alleged in said action; and that defendant has never paid plaintiff anything for or on account of said judgment, or the assignment thereof,—show that such assignment was made without consideration.

2. SET-OFF AND COUNTER-CLAIM—REJECTION BY THE COURT—RES ADJUDICATA, WHEN.

In an action to compel a reassignment of a judgment, a finding that one D. had previously recovered a judgment against plaintiff and assigned it to B., who had filed a petition joining D. with him, plaintiff appearing and joining in the petition, praying that the judgment in question be set off against his own judgment because D. was the real though not the nominal defendant in the action in which the judgment in question was recovered, and that such petition was refused on the ground that plaintiff had made a valid assignment of the judgment in question, does not show that the issue involved is *res adjudicata*.

Department 2. Appeal from superior court, San Benito county; JAMES F. BREEN, Judge.

Action by T. Hamil against R. H. McIlroy to compel a reassignment of a judgment alleged to have been assigned to defendant as trustee without consideration. It appeared that the assignment was made to secure an indebtedness from plaintiff to defendant on an open account, the balance of which was

subsequently found to be in plaintiff's favor. Judgment for defendant. Plaintiff appeals.

N. C. Briggs, for appellant. *Montgomery & Scott* and *B. B. McCroskey*, for respondent.

SHARPSTEIN, J. On May 12, 1884, appellant recovered a judgment against one Watson for \$111.30, and on the same day assigned it to respondent. Afterwards appellant demanded a reassignment of said judgment by respondent to him, (appellant,) which respondent refused to make. Appellant brought this action to compel respondent to assign said judgment to him, (appellant,) and, among other things, alleges that said assignment from him to respondent was made without consideration, and that respondent holds the same merely as trustee for appellant. Respondent in his answer denied that allegation, and alleged that there was a full and valuable consideration for said assignment; and for a further defense alleged that the same matter was adjudged between the same parties in an action in the superior court of San Benito county. The court found that appellant recovered judgment as alleged in his complaint, and that he assigned it to respondent; "that at the time of said assignment there were unsettled demands existing between appellant and respondent, and among them advances made by respondent to and for appellant's benefit in prosecuting said action above named; that these advances and said unsettled demands were the only consideration for said assignment." The next finding is that, after said assignment was made, appellant commenced an action against respondent, and recovered a judgment against him for the sum of \$28, and that in said action respondent filed a counter-claim for his said demands against appellant, which were allowed by the court; "that in said action no credit was given to Hamil, plaintiff, for said judgment, or the assignment thereof; nor was the same in any manner litigated or alleged in said action, and said defendant, McLroy, has never paid to plaintiff, Hamil, anything for or on account of said judgment, or the assignment thereof." These findings show that the assignment was made without any consideration, and appellant is entitled to a reassignment, unless the defense of *res adjudicata* is sustained by the facts found. On that issue the finding is that on March 20, 1883, one Dufresnoy recovered a judgment against Hamil, and assigned it to one N. C. Briggs, who filed a petition in the superior court of San Benito county, joining Dufresnoy with him, asking that the judgment against Watson be set off by the judgment against the judgment in favor of Dufresnoy to the amount of \$87, because Watson was the nominal and Dufresnoy the real party in the action of *Hamil v. Watson*. Hamil appeared in the proceeding and joined in the petition of Briggs and Dufresnoy in asking that the judgment be set off. The court denied the prayer of the petitioner, finding, as the record shows, that the judgment in favor of Hamil was by him in due form assigned to one R. H. McLroy, whether for the purpose of collection or control did not appear on the hearing of the motion; but the assignment will be by the court, as it was by counsel, treated as for a valuable consideration. The record further shows that the court then proceeded to find, and based its decision on the fact, that the judgment rendered against Watson was for the value of property which was exempt from execution in favor of Hamil, and the judgment therefor was also exempt in the hands of Hamil's assignee, and could not be offset. We think the refusal of the court to allow Hamil's judgment against Watson to be set off against Dufresnoy's judgment against Hamil did not involve the issue in this case; and, as it did not, the other facts found entitle appellant to the relief prayed in his complaint.

Judgment reversed, and the court below is directed to enter judgment upon the findings in favor of the plaintiff as prayed in his complaint

We concur: SEARLS, C. J.; McFARLAND, J.; THORNTON, J.

76 Cal. 360

TURLOCK IRRIGATION DIST. v. WILLIAMS. (No. 12,426.)*(Supreme Court of California. May 31, 1888.)***CONSTITUTIONAL LAW—IRRIGATION DISTRICT—BONDS—VALIDITY—MANDATE TO COMPEL SIGNING.**

The "act to provide for organization and government of irrigation districts," etc., (Sess. Laws Cal. 1887, p. 29,) authorizing such a district to issue bonds signed by its president and secretary for raising money to conduct necessary irrigating canals, etc., and levy assessments for the payment thereof upon the real estate of the district, is not unconstitutional as contemplating unequal taxation, or taxation for other than a public purpose; and the secretary of an irrigation district may be compelled by writ of mandate to sign bonds issued for such purpose.

Commissioners' decision. In bank. On application for writ of mandate.

Petition for writ of mandate to compel R. M. Williams, secretary of Turlock irrigation district, to sign bonds of the district. The "Act to provide for organization and government of irrigation districts," etc., (Sess. Laws Cal. 1887, p. 29,) under authority of which the bonds are sought to be issued, provides that such a district may issue bonds, signed by its president and secretary, for raising money to conduct necessary irrigating canals, etc., and levy assessments for the payment thereof upon the real estate of the district.

P. J. Hazen, Hatton & Fulkerth, and W. H. Beatty, for petitioner. Louttit, Woods & Levinsky, W. L. Dudley, and A. L. Hart, for respondent.

FOOTE, C. This is an application for a writ of mandate to compel the defendant, as the secretary of an irrigation district, under the "Act to provide for organization and government of irrigation districts," etc., approved March 7, 1887, (Sess. Laws, p. 29,) to sign certain bonds which the applicant proposes to issue under section 15 of that act. The refusal of the defendant to sign those instruments is based upon the ground that the statute is unconstitutional and void. One of the distinguished counsel for the defendant contends that the districts contemplated by the act are private corporations, formed for a private purpose; to use his own language, "Such an organization has none of the elements of a public municipal body." While another able attorney on the same side contends that "all the constituents of a public corporation are present, and to that class of corporations a district of the statute must be assigned;" and claims that the money sought to be raised under the act is a general tax, and that the system of organization of the corporations prescribed in the act is in conflict with the general plan of constitutional political organizations, and that the mode of taxation provided is different from that made necessary by the constitution for general governmental purposes, and therefore the act is void. We are inclined to agree with the last-mentioned advocate of the defendant's cause, but to the extent only that the districts, when organized as provided in the act under discussion, have all the elements of corporations formed to accomplish a public use and purpose, according to the rules of law laid down in *Hagar v. Supervisors*, 47 Cal. 223; *Dean v. Davis*, 51 Cal. 406; *People v. Williams*, 56 Cal. 647; *People v. La Rue*, 67 Cal. 526, 8 Pac. Rep. 84; *Reclamation Dist. v. Hagar*, 66 Cal. 54, 4 Pac. Rep. 915. The results to be derived from a drainage law, and one which has for its purpose the irrigation of immense bodies of arid lands, must necessarily be the same, as respects the public good. The one is intended to bring into cultivation and make productive a large acreage of land which would otherwise remain uncultivated, and unproductive of any advantage to the state, being useless, incapable of yielding any revenue of importance towards the support of the general purposes of state government, by reason of too much water flowing over or standing upon or percolating through them. The other has for its main object the utilizing and improvement of vast tracts of arid and unfruitful soil,—desert-like in character, much of it,—which, if water in sufficient quantity can be conducted upon and applied to it, may be made to pro-

duce the same results as flow from the drainage of large bodies of swamp and overflowed lands. Such a general scheme, by which immigration may be stimulated, the taxable property of the state increased, the relative burdens of taxation upon the whole people decreased, and the comfort and advantage of many thriving communities subserved, would seem to redound to the common advantage of all the people of the state, to a greater or less extent. It is true that incidentally private persons and private property may be benefited, but the main plan of the legislature, viz., the general welfare of the whole people, inseparably bound up with the interests of those living in sections which are dry and unproductive without irrigation, is plain to be seen pervading the whole of the act in question. This is not a law passed to accomplish exclusive and selfish private gain. It is an extensive and far-reaching plan, by which the general public may be vastly benefited; and the legislature acted with good judgment in enacting it. "If the use for which property is taken be to satisfy a great public want or public exigency, it is a public use within the meaning of the constitution, and the state is not limited to any given mode of applying that property to satisfy the want or meet the exigency." *Gilmer v. Lime Point*, 18 Cal. 252. "For the most part, the term 'public purposes' is employed in the same sense in the law of taxation and in the law of eminent domain." *Cooley, Tax'n*, (2d Ed.) 113. So that a law which is for a public purpose, and which mainly concerns the public welfare, which lays an assessment upon property according to approximate equality of benefits, is not unconstitutional because of that feature. Perhaps to a greater extent than any of the other states, California, speaking through the acts of her legislature, her court of last resort and constitution, seems to have considered the irrigation of lands, and the supplying of mines with water, as of great public concern. Code Civil Proc. § 1238; *Cummings v. Peters*, 56 Cal. 596; *Lux v. Haggin*, 69 Cal. 302, 305, 10 Pac. Rep. 674, Const. Cal. art. 16, § 1. And in no sense can it be said that under the act in question the assessment to pay the bonds is to be levied or collected in order that one man may take another's property for his own exclusive use. Therefore it is evident that the districts in question, as organized under the act, are not private corporations organized exclusively for the purposes of private gain. They are at least *quasi* public corporations, in the sense that the purpose for which they are to be organized is for the general public benefit. Nor does it follow that the method of assessments, and their collection, adopted, must be assimilated to and follow exactly the mode provided in the constitution for the assessment and collection of taxes for general state purposes. The nature of the assessment is one for local improvements, which, however, eventuate in the advancement of the public good, and such assessments and collections can be lawfully made. It is "clear that those clauses of the constitution which provide that taxation shall be equal and uniform, and which prescribe the mode of assessment, and the persons by whom it shall be made, and that all property shall be taxed, have no application to assessments levied for local improvements." *Hagar v. Supervisors*, 47 Cal. 222. And as was said of the drainage act, so it may be said of the one in hand relative to irrigation, that a system which has for its object the reclaiming from the desert of vast bodies of land "may justly be regarded as a public improvement of great magnitude, and of the utmost importance to the community." It has been planned by the legislature on the basis of "dividing the territory to be reclaimed into districts, and assessing the cost of the improvements on the lands to be benefited." In none of the states where such a course has been pursued, "has the power of the legislature to cause such improvements to be made in this method ever been denied; nor do we see any tenable ground upon which it can be questioned." *Hagar v. Supervisors*, *supra*. "The fact that the lands are situated in more than one county cannot affect the power of the state to delegate authority for the establishment of a reclamation district [or an irrigat-

ing district] to the supervisors of the county containing the greater part of the lands. Such authority may be lodged in any board or tribunal which the legislature may designate. * * * The expense of such works may be charged against parties specially benefited, and be made a lien upon their property. All that is required in such cases is that the charges shall be apportioned in some just and reasonable mode, according to the benefit received. Absolute equality in imposing them may not be reached; only an approximation to it may be attainable. If no direct or invidious discrimination in favor of certain persons, to the prejudice of others, is made, it is not an objection to the mode pursued that to some extent inequalities may arise. It may possibly be that in some portions of the country there are overflowed lands of so large an extent [or arid lands requiring irrigation] that the expense of their reclamation should properly be borne by the state. But this is a matter of purely legislative discretion. Whenever a local improvement is authorized, it is for the legislature to prescribe the way in which the means to meet its cost shall be raised, whether by general taxation or by laying the burden upon the district especially benefited by the expenditure." *Hagar v. Reclamation Dist.*, 111 U. S. 705, 4 Sup. Ct. Rep. 663; citing *Mobile Co. v. Kimball*, 102 U. S. 691-704. The provisions of the act relative to the condemnation of private property, land, water, etc., for the uses prescribed therein, are in harmony with the constitution and state laws, and in strict consonance with the views of the supreme court in the case of *Lux v. Haggin*, 69 Cal., *supra*.

There are many other points made by the various counsel for the appellant, which are some of them at war with others; but time and space do not suffice to advert to them all in detail. It seems plain that none of the objections raised to the signing of the bonds by the respondent are tenable. The act under discussion in all respects complies with the various provisions of the state constitution. We therefore advise that the demurrer to the answer be sustained, and the defendant commanded to sign the bonds by a peremptory writ of mandate.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the demurrer to the answer is sustained, and it is ordered that a peremptory writ of mandate issue commanding the defendant to sign the bonds.

76 Cal. 264

KNOX *et al.* v. HIGBY. (No. 9,726.)

(Supreme Court of California. May 25, 1888.)

1. TAXATION—SALE—ASSESSMENT—MINES.

A sale of a mine for a tax assessed upon such mine and upon improvements not situated upon the land including the mine, such sale being for a sum largely in excess of what either the mine or improvements were singly liable for, is invalid.

2. SAME—ACTION TO SET ASIDE TAX SALE—EVIDENCE.

In an action to set aside a certificate of purchase at a tax sale, a certified copy of the assessment roll, although it varies in some immaterial respects from the description thereof in the complaint, is nevertheless admissible in evidence, when objected to only as being incompetent, irrelevant, and immaterial, and not on the ground of a variance.

Commissioners' decision. Department 2. Appeal from superior court, Calaveras county; C. V. GOTTSCHALK, Judge.

Suit in equity brought by R. J. Knox and others against Charles B. Higby to quiet their title to a certain quartz claim known as the "Boston Quartz Mine." Defendant claimed title under a certificate of purchase issued on a tax sale. Judgment for plaintiffs. Defendant appeals. Exhibit F, referred to in the opinion, is as follows:

The portion of the complaint referring to such exhibit is as follows:

"That upon said Assessment Roll said Assessor described said property in the following manner, to-wit:

"BOSTON QTZ. MINE,
KNOX and OSBORN,
R. F. J. }

"Owp. of a certain Qtz. mine or lode, being mineral Entry No. 626, designated by the Surveyor General as Lot No. 44, embracing a portion

Mt. Diablo B. and M. Sec. T. N. R. E. A.

5. 5. 12. 28. 56-100.

Val. R. E. \$50,575. Situate in Buckeye Mining Dist., and embracing 3000 linear feet of the Esperanza Gold Qtz. Mine, and more fully described in book No. 4, pages 95 to 102, Records of Calaveras Co. Imp'ts, a 20-stamp water-power qtz. mill, boarding house, stable, office, &c. Value of imp'ts, \$16,100; pers. property, &c. Above property subject to mortgage dated Dec. 13, 1860, to W. L. Palmer.

Deductions on	Total val.	Total val.
apc. Mortgage, &c.	less deduct.	after equal.
\$12,000	\$55,250	\$55,250
	Total Tax,	\$1,381.25."

W. K. Boucher and A. C. Adams, for appellant. *Scrivner & McKinne, Gray & Haven*, and *Carter P. Pomeroy*, for respondents.

FOOTE, C. This action was brought to quiet the plaintiffs' title to property which the defendant had bought at a certain tax sale, and for which he held a certificate of purchase. The plaintiffs had judgment, from which and an order refusing a new trial the defendant appeals.

From the findings, which are we think supported by sufficient evidence, it appears that the assessment under which the sale took place was upon a certain quartz mine described by metes and bounds, and upon a mill and other improvements which were not situated upon the land which included the mine. In other words, that all the improvements which were assessed stood upon a different parcel or parcels or tracts of land from that which contained the mine assessed. The sale was made at one time of all the property assessed, both the mine and the improvements which stood upon different tracts of land, for the tax assessed upon the whole property. Thus it happened that the mine was sold for a sum of money assessed as a tax upon improvements which were situated on different tracts of land from that of the mine, and the improvements, which were not located on the same tract of land with the mine as assessed, were sold to pay an amount of money assessed as a tax upon the mine. It has been repeatedly held in this state that property cannot be sold for a sum of money in excess of the tax legally due and costs. *Bucknall v. Story*, 36 Cal. 67; *Treadwell v. Patterson*, 51 Cal. 637; *Harper v. Rowe*, 53 Cal. 236; *Axtell v. Gerlach*, 67 Cal. 483, 8 Pac. Rep. 34; *Tunnel Co. v. McKenzie*, 67 Cal. 485, 8 Pac. Rep. 22. Section 3718 of the Political Code provides: " * * * Every tax due upon improvements upon real estate assessed to others than the owner of the real estate is a lien upon the land and improvements." Of course a tax assessed and due upon improvements on the land of the owner is a lien upon both improvements and land. It therefore appears in this case when the sale took place it was for a sum of money many dollars in excess of what the improvements were bound for, and also in excess of what the mine was obliged to pay. And this is true whether it be assumed that the owners of the land on which the improvements stood were the same or different from those who owned the mine. Suppose that a tax is assessed upon improvements situated in one part of San Francisco on a certain lot of land, and a tax is assessed upon a certain lot in another part of the city, and both lots belong to the same person, can it be true

that it is admissible to sell both the improvements and the second lot of land at the same time for the total amount of both assessments? It would seem that each tract of land must be sold for the exact amount of taxes which are a lien upon and assessed on that land, and cannot be sold for taxes which are a lien upon and assessed upon some other property.

The defendant contends that Exhibit F to the plaintiffs' complaint, which was a certified copy of the assessment roll affecting the property in dispute, was not admissible in evidence, and that if admissible, it did not show that the assessment was made to the Boston Quartz Mine as well as Osborne & Knox as the owners. The ground of the exception taken on the trial to the introduction of this exhibit in evidence was not the one set out as an error of law in the statement on motion for a new trial. The exception taken on the trial was that the exhibit was immaterial, irrelevant, and incompetent, in that it did not support the allegations of the complaint. The assignment of error is that the evidence varied from the allegations of the complaint. It is clear from an inspection of the complaint that the exhibit was in support thereof, and the defendant, if he had intended to rely on any variance between the allegations and the proof offered, should have made the point then and there, so that if it were well taken the court might have allowed an amendment of the complaint. Besides, the variance, if it existed at all, is immaterial, and did not mislead the defendant to his prejudice. It is unnecessary to discuss other points made in the case, and we advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

76 Cal. 354

COON v. GRAND LODGE UNITED ORDER OF HONOR OF CALIFORNIA. (No. 11,377.)

(Supreme Court of California. May. 31, 1888.)

APPEAL—REQUISITES—TIME OF TAKING—NUNC PRO TUNC ENTRY OF JUDGMENT.

Rights of parties in respect of an appeal are determined by the date of the actual entry of the judgment, and cannot be affected by entry of judgment *nunc pro tunc* as of prior date.

Department 1. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

J. G. Severance, for appellant. R. Percy Wright, for respondent.

PATERSON, J. Judgment was entered for defendant on demurrer. The motion to dismiss the appeal herein, on the ground that it was prematurely taken, must be granted. The notice of appeal was filed and served on November 2, 1885. The judgment was not entered until December 10, 1885. It is not dated, but it is indorsed, "Judgment recorded December 10, 1885, *nunc pro tunc* as of October 30, 1885." The judgment is not signed by the judge, and there is no order directing the entry thereof as of October 30, 1885; but, if it be presumed that such an order was made, it would not avail the appellant. The rights of the parties in respect to an appeal are determined by the date of the actual entry of the judgment, and they cannot be affected by the entry of the judgment *nunc pro tunc* as of prior date. The time to appeal begins to run from the time of the actual entry. Section 939, Code Civil Proc.; *In re Fifteenth-Avenue Extension*, 54 Cal. 179; *Rubber Co. v. Goodyear*, 6 Wall. 155; Hayne, New Trials & App. § 204. The appeal is dismissed.

We concur: SEARLS, C. J.; MCKINSTRY, J.

76 Cal. 372

PAGE v. SUPERIOR COURT OF ALAMEDA CO. (No. 12,567.)

(Supreme Court of California. May 31, 1888.)

PRACTICE IN CIVIL CASES—DISMISSAL—WHEN COMPLETE—CODE CIVIL PROC. CAL. §§ 581, 668.

Under Code Civil Proc. Cal. §§ 581, 668, requiring, in the dismissal of certain actions, an entry of such dismissal in the clerk's register, and also an entry of the judgment in the judgment book, an action is not dismissed until the judgment is entered as required, though the dismissal be properly entered in the register.

In bank. Application for writ of review of proceedings in superior court, Alameda county; W. E. GREENE, Judge.

Code Civil Proc. Cal. § 581, provides that actions may be dismissed or judgments of nonsuit entered in certain cases, and that the dismissal in some cases shall be made by entry in the clerk's register, and judgment may be entered accordingly. Section 668 provides that the clerk must keep a judgment book in which judgments must be entered.

S. B. McKee, Jr., (*Flournoy & Mhoon*, of counsel,) for petitioner. Henry P. Bowie and James L. Crittenden, for respondents.

PER CURIAM. The record of the action for divorce wherein the petitioner is the plaintiff, and Emily C. Page is the defendant, having been brought here by *certiorari*, the petitioner prays that certain orders of the superior court (relating to alimony and counsel fee) be declared null, because they were made after an entry in the clerk's "Register of Actions" dismissing the action for divorce. The Register of Actions is a book in the possession and under the control of the clerk, and, in the absence of evidence to the contrary, all entries in the book are presumed to have been made by the clerk. For aught that appears, the entry of the dismissal of *Page v. Page* is in the handwriting of the clerk. On the face of the record the dismissal is attested by a deputy-clerk. The entry is regular in form. Code Civil Proc. § 581. But no judgment was "entered accordingly." Code Civil Proc. §§ 581, 668. The direction to enter a judgment in the judgment book is mandatory, because it imposes a public duty upon a ministerial officer. In a proper case, if the clerk's fee is paid, he will, on motion either of the plaintiff or defendant, be compelled by the superior court to enter a judgment of dismissal or nonsuit. The court will not require of the party interested to resort to *mandamus*; but until the judgment is entered the action is not dismissed. It is very commonly said that, where no answer or demurrer is filed in an action for money only, the plaintiff may take a default and judgment. The clerk must, on application of the plaintiff, enter the default, and immediately thereafter a judgment. When it is said that an action may be dismissed or a judgment of nonsuit entered by the plaintiff himself, no more is meant than that he may apply to the clerk for the entry of dismissal in the clerk's register, and a judgment accordingly. It would not be contended that the plaintiff dismisses an action by requesting the clerk to enter a dismissal in the register of actions, even though the action be one which the plaintiff has clearly the right to have dismissed. It was for the legislature to declare what should constitute the evidence of dismissal, and the statute requires both the entry in the register and the entry of a judgment. The power of the clerk to enter a judgment depends upon his power to make an entry of dismissal in the register. He has no power to enter a dismissal in the register if a counterclaim has been made by the defendant. True, in determining in a particular case whether he shall make the register entry, the clerk enters into an inquiry *quasi* judicial, but this does not make him a judicial officer. A ministerial officer is frequently required to make such an inquiry antecedently to official action. When the validity of the entry in the register, or of a judgment therein, is attacked, either directly or collaterally, the validity of the entry

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or judgment, and the power of the clerk to make it, must be decided by reference to the pleadings in the action. In an appropriate case the plaintiff may demand of the clerk to make record evidence of the dismissal of the action. If the demand is complied with, and the register order is made, and a judgment entered in the judgment book, the clerk having power to enter the order, a subsequent order of the superior court vacating the judgment is erroneous, and will be reversed on appeal. *James v. Center*, 53 Cal. 31. But such an order, however erroneous, is not void. It is an order after judgment is made in the exercise of the general jurisdiction of the court, and, if not appealed from, the order operates permanently to vacate and annul the entry in the clerk's register as well as the judgment. On the other hand, if the case be one in which the clerk has no power to make the entries because of a counter-claim or cross-complaint, the clerk's judgment may be set aside by the court, or may be appealed from. A void judgment is appealable, and it may be set aside as cumbering the records. After making the entry in his register, the clerk may justify a refusal to enter a judgment if he had no power to enter the dismissal in his register, or if, on demand, his fee for entering the judgment has not been paid. A judgment of nonsuit at common law was where the plaintiff, after giving his evidence, found that it would not sustain his case, and voluntarily made default by absenting himself when called on to hear the verdict. The court gave judgment against him for this default; but the proceeding was really for his benefit, because after nonsuit he could institute another action for the same cause, which was not the case (except in ejectment) after a verdict and judgment against him. The proceeding where a plaintiff seeks, under the Code, to dismiss the action before trial, is so far analogous; and it is no hardship to require of the plaintiff to see to it that all those things are done which are by the Code made necessary to complete the dismissal. When a formal entry of a judgment is made, the judgment and registry order are void if a counter-claim is set up in the answer. It is possible that under some circumstances a defendant might be estopped from asserting the invalidity, as by himself applying for the judgment of nonsuit, or perhaps by some other act or omission. But that is a question we need not consider here. If, as we hold, the action, *Page v. Page*, has never been dismissed, the orders sought to be annulled are not void.

The prayer of the petition is denied, and the proceeding is dismissed.

76 Cal. 230

HUGHES v. WHEELER. (No. 12,236.)

(*Supreme Court of California.* May 19, 1888.)

1. JUDGMENT—EFFECT—FOR DEFENDANT IN EJECTMENT.

In ejectment, a judgment for defendant for costs, based on findings that plaintiff is owner and entitled to possession of the land described in his complaint, and that defendant has at no time withheld possession of such land from him, is not conclusive as to plaintiff's title to the land.

2. APPEAL—REVIEW—OBJECTIONS WAIVED.

Where an amendment to the answer is treated at the trial as properly made, and as sufficient, and evidence is introduced in support of it without objection, the admissibility of such evidence cannot be questioned on appeal, on the ground that no such plea as that set up in the amendment had been filed.

3. BOUNDARIES—GOVERNMENT SURVEY—EJECTMENT.

In ejectment, it appeared that the line claimed by defendant to have been established by the parties to the action coincided with the one established by the government. The case was defended on the theory that plaintiff was estopped from claiming that the line was elsewhere. *Held*, that the verdict for defendant was proper, though the defense of estoppel may not have been made out.

4. TRIAL—INSTRUCTIONS—HARMLESS ERROR.

Where a jury, while deliberating on their verdict, return to the court-room, and asks for further instructions upon a matter which, whether it existed as a fact in the case or not, could have made no difference in their verdict, which instructions were given in the absence of plaintiff's counsel, there is no error prejudicing plaintiff.

5. SAME—READING EVIDENCE TO JURY.

Where a jury, while deliberating on their verdict, returned to the court-room, and a portion of the evidence was read to them from the reporter's minutes, the court will not consider objections thereto, where the record does not disclose what testimony was read.

Commissioners' decision. In bank. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

Ejectment by J. E. Hughes against C. C. Wheeler for the N. E. $\frac{1}{4}$ of section 19, township 14 S., range 21 E., Mt. Diablo meridian. Defendant at first put in a general denial; but on motion amended his answer at the trial, by pleading adverse possession, and that the plaintiff was estopped from claiming the land in dispute because he had recognized and acquiesced in the boundary line between the land claimed by him and that claimed by defendant; said boundary line being marked by a canal made by plaintiff, and a roadway reserved by him, which said boundary line was plainly marked by stakes and monuments well known to plaintiff. Under this plea, evidence of estoppel was introduced without objection. On trial, it appeared that the land actually in controversy was a strip about 130 feet wide on the east side of plaintiff's land. The undisputed evidence showed that the line established by the government was where defendant claimed it to be, but subsequent surveys threw it 130 feet further east. The defense was based on the theory that plaintiff and defendant had established the line as claimed by defendant, and that the latter, relying thereon, had made valuable improvements with the knowledge of plaintiff. While the jury were deliberating on their verdict, they returned to the court-room, and, in the absence of plaintiff's counsel, received certain instructions from the court. There was a verdict and judgment for costs for defendant, and plaintiff appealed.

The instructions complained of by the appellant are as follows: "If you believe from the evidence that plaintiff, before this action was brought, by unequivocal acts and declarations, showed an intention to act upon the line claimed by defendant as the dividing line between the lands, and silently stood by and saw defendant expend money in improving his land, such acts upon the part of plaintiff estop him from claiming that defendant does not own the land upon which he has expended money and made his improvements. Where a proprietor points out to a neighbor, on land adjoining his own, a line as the true boundary, acquiescing and assisting in a settlement and improvements thereon, he is thereby estopped from afterwards asserting claim to the lands covered by the improvements, though a subsequent survey prove it to be his own land. In a dispute between adjoining proprietors of land, it may be settled between them by a location made by both, or made by one and acquiesced in by the other for so long a time as to be evidence of an agreement as to the line."

W. D. Grady, for appellant. *S. J. Hinds*, (*Shaw & Dameron*, of counsel,) for respondent.

FOOTE, C. Action in ejectment. The jury found, upon particular questions of fact submitted to them—*First*, that the plaintiff was the owner and entitled to the possession of the quarter section of land described in the complaint; *second*, that the defendant at no time prior to the commencement of the action withheld any portion of that quarter section of land from the plaintiff; and returned a general verdict for the defendant. Thereupon a judgment for costs was rendered in favor of the defendant. From that and an order refusing a new trial the plaintiff appeals. The plaintiff contends that the judgment for costs is conclusive against him as to his title to the land described in the complaint, and, being opposed to the admissions of the defendant on the trial, cannot stand. In this he is mistaken. The judgment itself is one for costs, and by reference to the record and special verdicts of the jury it is made evident that the only matter which is made conclusive by the judgment

against the plaintiff is that the defendant is not in possession of, and does not withhold possession of, any of the land for which the plaintiff brought his action.

Some of the evidence to sustain the special verdict of the non-withholding by the defendant of the plaintiff's land is to the effect that, some years prior to the institution of this suit, the parties thereto, owning adjoining parcels of land, established, by agreement or acquiescence, the division or boundary line between them, and that the strip of land which the plaintiff sought to recover was upon the defendant's side of that line, and therefore not within the description of the land for which the action was begun. The plaintiff contends that no such evidence was admissible under the pleadings, because, as he alleges, no proper plea of estoppel was filed by the defendant. But we think that a plea was set up by the papers filed on suggestion of diminution of record. The amendment by which this plea was set up was treated at the trial as properly made, and as sufficient; and it is now too late to question its sufficiency. *Davis v. Davis*, 26 Cal. 23. If the evidence was admissible under the issues, it was proper for the jury to render a verdict thereon, and for the court to give them proper instructions for their guidance.

All the evidence in this case upon the point tended to show that the corner post upon the dividing section line between the tracts of land of the parties, as fixed by the United States survey, was the corner upon the dividing line which was claimed to have been established by agreement or acquiescence. The stake put into the ground by the United States surveyor marked this corner, and it became the true corner of the section line. Rev. St. U. S. § 2396. According to the provisions contained in the section *supra*, it appears that the lines of subdivisions as well as sections are thus established by law. *Chapman v. Polack*, 70 Cal. 494, 11 Pac. Rep. 764. It is said that a section line of United States government land is not ascertained by the survey, but is created. *Robinson v. Forrest*, 29 Cal. 325. The line about which the dispute arose in this case was one which had been created by the original survey under authority of the government, and hence no agreement or acquiescence between the parties, as shown in this case, could have made any difference as to the fact of where the true dividing line ran between their respective tracts of land. Therefore the verdict of the jury must have been in favor of the defendant, according to the showing of all parties. If this be so, it would seem to be unnecessary to determine whether the instructions of the court were right or wrong as to the existence of an agreement to fix the line made by the parties or their long acquiescence in its establishment. *Enright v. Railroad Co.*, 33 Cal. 233. Where the court lays down an erroneous principle of law, but it appears that nevertheless the verdict of the jury is necessarily correct upon the evidence before them, or where, as in this case, a new trial should have been granted if the jury had not returned the special verdicts, the error is harmless. *Robinson v. Railroad Co.*, 48 Cal. 424, 425.

The other instructions complained of are correct. *Sneed v. Osborn*, 25 Cal. 619; *Columbet v. Pacheco*, 48 Cal. 395; *Biggins v. Champlin*, 59 Cal. 116, 117; *Truett v. Adams*, 66 Cal. 223, 5 Pac. Rep. 96; *Johnson v. Brown*, 63 Cal. 393; 2 Herm. Estop. §§ 1129-1136. The evidence fully sustains the verdict of the jury, notwithstanding the plaintiff's contention to the contrary.

The objection made to the instruction given the jury, on their return into court for further enlightenment on a point of law, is untenable, the instruction being, as we have before shown, upon a matter which, whether it existed as a fact in the case or not, could have made no difference in their verdict. It is also assigned for error that, at the time when the jury were thus re-instructed upon a given point by the court, a portion of certain testimony was read to them from the short-hand reporter's notes which had been delivered by a witness on the trial, Mr. Choice. It does not appear what portion of the testimony was thus read; hence it is impossible to ascertain that it had any prej-

udicial effect on the jury. And, in the absence of anything going to show to the contrary, it must be presumed that the action of the court in the premises was unobjectionable. Error must be affirmatively shown by the record. Hayne, New Trials & App. § 285, p. 843.

It is further contended that the court erred in allowing a certain question to be propounded by the defendant's counsel to Mr. Tielman. It is sufficient to say that, the ground of the objection not having been made known to the court, the objector cannot be heard to complain that the question was allowed to be put. The record disclosing no prejudicial error, we advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

2 Cal. Unrep. 865

GREGORY v. KEATING *et al.* (No. 12,472.)

(*Supreme Court of California.* May 22, 1888.)

1. APPEAL—DISMISSAL—WHEN GRANTED.

From a decree of foreclosure defendants appealed. Respondent moved to dismiss the appeal, and in support thereof filed affidavits as follows: That appellants had threatened, in case of foreclosure sale, to resist the issuing of a writ of assistance to place the purchaser in possession thereof; that the property was insufficient security for the debt, its value decreasing, with danger, by reason of non-insurance, of further loss; that appellants were insolvent, and had stated their appeal to be for purposes of delay and vexation; that the amount of the undertaking on the appeal was insufficient to cover the probable deficiency that would arise from the foreclosure sale, and was fixed by a judge other than that of the trial court, in chambers, without notice to or knowledge of respondents; that the trial court refused to set aside said undertaking, or increase the amount thereof, because the supreme court alone had jurisdiction after the appeal was taken; and that appellants had deposited no money in court to perfect their appeal. *Held*, that this showing was insufficient to support such motion.

2. SAME—ISSUE OF EXECUTION PENDING APPEAL—WHEN ALLOWED.

In such case the facts alleged are insufficient to support a motion to issue an execution or grant an order of sale pending the appeal.

3. SAME—HEARING—MOTION TO ADVANCE.

In such case a motion to advance the hearing of the cause will be denied.

Department 2. Appeal from superior court, city and county of San Francisco; E. B. MAHON, Judge.

Motions by respondents to dismiss appeal, advance cause for hearing, and to direct court below to issue execution or to order a sale of the property in controversy. In support of the motions respondents filed two affidavits, which were as follows:

"James B. Gregory, being duly sworn, deposes as follows: I am the plaintiff and respondent in the above-entitled action. I reside in Scotland, and was residing there at the time of the commencement of the said action. By advice of my counsel, I came to San Francisco in December, 1886, to attend as a witness on the trial of said action. I am advised by my said counsel that it would not be prudent for me to be absent from the state of California in case the mortgaged property described in my complaint in said action should be sold to me under foreclosure, for the reason that the defendant Mary Jane Keating has threatened that she will resist any application that shall be made for a writ of assistance to place the purchaser into possession, and that in such case my presence and testimony would be necessary for the protection of my rights or the rights of any such purchaser against such opposition on the part of said Mary Jane Keating. There is now due to me on the judgment of foreclosure in said action the sum of \$12,822, with interest thereon from February 21, 1887, besides \$107, costs, and \$500, allowed for counsel fees. The only security which I have for the payment of said debt consists of a lease-

hold interest in the land described in said complaint, and of the buildings thereon. The value of said security does not now exceed \$12,000, and the value thereof diminishes from day to day as the lease under which the same are held will expire on the 1st day of June, 1893, and for the further reason that the said defendants neglect to keep the said buildings in repair, and refuse to insure the same for my benefit against loss by fire. The defendant Denis Keating has threatened and declared that he will hold possession of the said leasehold premises until the expiration of the term of the said lease, and, for the purpose of such delay and vexatious hinderance, he has taken an appeal from the said judgment, the transcript on said appeal being filed with the clerk of this honorable court on the — day of December, 1887, to which reference is hereby made. The defendants have no property, and neither of them has any property other than the leasehold interest aforesaid. The sum of \$3,300, specified in the undertaking on appeal set forth in said transcript, is totally inadequate to secure the payment of the deficiency arising, or that may arise, upon the sale under the said judgment. The said cause was tried by the Honorable James G. Maguire, judge of the superior court of the state of California, in and for said city and county, and the said amount was fixed for the stay of execution on said judgment by order of the Honorable E. B. Mahon, judge of the superior court of Marin county, made by him at chambers, and not in open court; that the said order was made without notice to me or to my attorney. After the notice of appeal was given, and undertaking on appeal was filed, in said action in the court below, I made a motion for an order to set aside the said order, and to set aside the undertaking given in pursuance thereof, and for the issuance of an order of sale pursuant to said judgment, on the ground that the said undertaking is insufficient for stay of execution on said judgment; that the amount fixed as aforesaid for such stay was inadequate, and on the ground that the said judge who made the said order fixing the said amount had no jurisdiction, and on the ground that the said order was made without notice to me or to my attorney. The said motion was heard in open court by the said Hon. James G. Maguire, the judge thereof, after due notice given to the attorney for the defendants, but was denied upon the sole ground that the said superior court had no jurisdiction of the matter after an appeal had been taken to the supreme court, and that my only remedy would be recourse to the supreme court.

"JAMES B. GREGORY.

"Subscribed and sworn to before me, January 6, 1888.

"CHAS. T. STANLEY, Notary Public."

"Alexander H. Loughborough, being duly sworn, deposes and says that he is the attorney for the respondent in the above-entitled action; that the said respondent has never waived the undertaking required for the perfection of the appeals, or any of them, in said action; that the appellants have not, and that neither of them has, made any deposit of money in court for the perfection of the appeals, or either of them, in said action; and that the said appellants have not, and that neither of them has, given or filed any undertaking or appeal further or other than appears in the transcript of appeal in said action filed in this court. And this deponent further says that the order fixing the amount of the undertaking set forth at folios 393 and 394 of the said transcript was made without notice to this affiant, and that the same was not made by the judge of the court which rendered the final judgment in that action, but was made at chambers by Hon. E. B. Mahon, who was then judge of the superior court of Marin county; that this affiant, upon behalf of the respondent, and upon due notice to the appellants, and upon affidavits showing the inadequacy of the amount fixed by the said order, moved the superior court of the city and county of San Francisco, department four, the Honorable James G. Maguire presiding, on the 30th day of November, 1887, for an order setting aside the aforesaid order made at chambers by the said Judge

Mahon, and to increase the amount required for the stay of execution; but the said motion was denied solely upon the ground that the superior court had no jurisdiction to grant such motion, and that such relief could be granted only by the honorable the supreme court of the state of California.

"A. H. LOUGHBOROUGH.

"Subscribed and sworn to before me this 27th day of January, A. D. 1888.

"CHAS. T. STANLEY, Notary Public."

Mich. Mullany, for appellants. *A. H. Loughborough*, (*Carter P. Pomeroy*, of counsel,) for respondent.

PER CURIAM. The motions of respondent herein to dismiss the appeals of the appellants, and to advance the hearing of the cause, and to direct the court below to issue an execution, or order of sale are hereby denied.

76 Cal. 387

SANTA CLARA VAL. M. & L. CO. v. HAYES *et al.* (No. 11,290.)

(*Supreme Court of California.* June 4, 1888.)

CONTRACT—VALIDITY—RESTRAINT OF TRADE—WHAT IS.

For the sole purpose of forming a combination among all the manufacturers of lumber at a certain point, increasing the price, limiting the amount, and giving plaintiff the control of the supply in four counties for a year, plaintiff, by contracts with the other manufacturers, either by lease of their mills or by purchase of their product for the year, secured control of the amount produced, among which contracts, and similar to the others, was one with defendants, whereby they agreed to sell plaintiff, during the year, a specified amount of lumber at a given price; and, further, to manufacture no lumber for sale in said counties during said year, except under the contract, and to pay plaintiff \$20 per M. for any lumber sold to others in that period. *Held*, that this contract was void as against public policy, being in restraint of trade, and could not be enforced as to any part thereof.¹

Department 1. Appeal from superior court, Santa Cruz county; T. K. WILSON, Judge.

Action for breach of contract by the Santa Clara Valley Mill & Lumber Company against Isaac N. Hayes and Thomas B. Hubbard. Finding and judgment for defendants, and plaintiff appealed.

T. H. Laine and *Charles B. Younger*, for appellant. *A. E. Bolton*, for respondent.

SEARLS, C. J. This is an action to recover \$10,000 for a breach of a contract entered into between plaintiff, a corporation, and defendants, who were engaged in the manufacture of lumber near Felton, in the county of Santa Cruz, whereby the latter agreed to make and deliver to the former, during the lumber year of 1881, 2,000,000 feet of lumber, at \$11 per thousand feet. Defendants agreed not to manufacture any lumber to be sold, during said period, in the counties of Monterey, San Benito, Santa Cruz, or Santa Clara, except under the contract, and to pay plaintiff \$20 per thousand feet for any lumber manufactured and sold to parties other than plaintiffs. Defendants failed to comply with the contract; hence this action. The court finds that plaintiff was the owner of three saw-mills near Felton, and that various other parties were likewise owners of similar mills in the same vicinity; that for the purpose of limiting the supply of lumber, and increasing the price thereof, a plan was devised by which plaintiff was to lease all the mills for the year 1881,

¹Contracts in restraint of trade are valid when the restriction is reasonable, *Mandeville v. Harman*, (N. J.) 7 Atl. Rep. 37; and whether the restraint is reasonable or not depends upon its being such only as to afford a fair protection to the interest of the party in favor of whom it is imposed, and not so large as to interfere with the interest of the public, *Id.* Concerning the question of the validity of contracts as affected by their being in partial or general restraint of trade, see *Dolph v. Machinery Co.*, 28 Fed. Rep. 553, and note; *Roller Co. v. Cushman*, (Mass.) 9 N. E. Rep. 629; *Smith's Appeal*, (Pa.) 6 Atl. Rep. 251; *Finger v. Hahn*, (N. J.) 8 Atl. Rep. 654; *Match Co. v. Roeber*, (N. Y.) 13 N. E. Rep. 419; *Bishop v. Palmer*, (Mass.) 16 N. E. Rep. 299.

where such leases could be obtained, and, where that could not be done, to contract with the parties owning mills, and not willing to lease, by contracts similar to the one entered into with defendants; that, during the year 1881, plaintiff should shut down two of its own mills, and also as many of the mills by it leased as might seem necessary, in order to limit the supply of lumber in the four counties hereinbefore named; that this contemplated scheme was carried out, including the contract with defendants as a part thereof; that the sole and only object, purpose, and consideration upon the part of plaintiff in entering into these contracts was to form a combination among all the manufacturers of lumber at or near Felton for the sole purpose of increasing the price of lumber, limiting the amount to be manufactured, and giving plaintiff the control of all lumber manufactured near Felton for the year 1881, and control of the supply of lumber for that year in the counties mentioned; that the direct effect of this was no wholesale market for lumber at Felton, and dealers could not purchase in any considerable quantity during 1881. The court further found that the contract was against public policy, and that plaintiff was not damaged, etc.

1. Was the contract with defendant in contravention of public policy? The general rule is that an illegal contract is absolutely void, and cannot form the basis of judicial proceedings. This is equally so in law and equity. The illegality vitiates the contract between the immediate parties, as well as in respect to third parties. A contract tainted with the vice of illegality creates no obligation, not because of the rights of the parties to it, but because the public is interested. In case of fraud or mistake, the wrong is usually personal to the injured party, and may be waived. In cases of illegality the wrong is far-reaching, is done to society. This illegality may be in the consideration or in the promises and stipulations of the agreement. Among the contracts illegal under the common law, because opposed to public policy, were contracts in general restraint of trade,—contracts between individuals to prevent competition, and keep up the price of articles of utility. Pom. Const. § 283; *Jones v. Caswell*, 3 Johns. Cas. 29; *Doolin v. Ward*, 6 Johns. 194; *Wilbur v. How*, 8 Johns. 346. The case of *Arnot v. Coal Co.*, 68 N. Y. 559, is in most respects similar to the case at bar. Arnot, the plaintiff, brought the suit as the assignee of the Butler Colliery Company, which company and defendants were corporations engaged in the business of mining and vending coal at or near Pittston, Pa. Defendant also had a depot for coal at Elmira, N. Y., and was there engaged in vending coal, the product of the Pittston mines, to a large extent of country north and west of Elmira. Defendant entered into a contract with the Butler Colliery Company by which said defendant agreed to take all the coal the Butler Company desired to send north of the state line, not exceeding 2,000 tons per month, and the Butler Colliery Coal Company on its part agreed not to sell coal to any other party, except defendant, to go north of the state line (between New York and Pennsylvania) during the continuance of the agreement. The Butler Company sold coal, during the term covered by the agreement, to parties other than the defendant; and having delivered to defendant, under the agreement, coal which the latter refused to pay for, the action was brought to recover for the coal so delivered under the agreement. It appeared that defendant had made similar contracts with all the other mining proprietors of Pittston, and that the object was to so control the shipment and supply of coal for the Elmira market as to maintain an unnaturally high price for coal in that market, and to prevent competition in the sale of coal therein. The court, in considering the appeal, said: "That a combination to effect such a purpose is inimical to the interest of the public, and that all contracts designed to effect such an end are contrary to public policy, and therefore illegal, is too well settled by adjudicated cases to be a question of this day. [Cites *Coal Co. v. Coal Co.*, 68 Pa. St. 182; *People v. Fisher*, 14 Wend. 9; *Sleeper v. Van Middlesworth*, 4 Denio, 434; *Bank v.*

King, 44 N. Y. 87.] Every producer or vendor of coal or other commodity has the right to use all legitimate efforts to obtain the best price for the article in which he deals; but when he endeavors to artificially enhance prices by suppressing or keeping out of market the produce of others, and to accomplish that purpose by means of contracts binding them to withhold their supply, such restraints are even more mischievous than combinations not to sell under an agreed price. Combinations of that character have been held to be against public policy and illegal. * * * Parties entering into contracts of this description must depend upon each other for their execution, and cannot derive any assistance from the courts." And the contract was held void. *Salt Co. v. Guitrie*, 35 Ohio St. 672; *Craft v. McConoughy*, 79 Ill. 349; and *Coal Co. v. Coal Co.*, 68 Pa. St. 182, are to the same general effect. In the case at bar the facts are, as we think, even stronger against the plaintiff than in *Arnot v. Coal Co.* Here it entered into a contract with the object and view to suppress the supply and enhance the price of lumber in four counties of the state. The contract was void as being against public policy, and the defendants, as they had a right to do, repudiated the contract. Plaintiff, who has parted with nothing of value, now seeks to recover damages for non-delivery of lumber under this contract. Plaintiff had an undoubted right to purchase any or all of the lumber it chose, and to sell at such prices and places as it saw fit; but when, as a condition of purchase, it bound its vendor not to sell to others under a penalty, it transcended a rule, the adoption of which has been dictated by the experience and wisdom of ages, as essential to the best interests of the community, and as necessary to the protection alike of individuals and legitimate trade. With the results naturally flowing from the laws of demand and supply the courts have nothing to do; but when agreements are resorted to for the purpose of taking trade out of the realm of competition, and thereby enhancing or depressing prices of commodities, the courts cannot be successfully invoked, and their execution will be left to the volition of the parties thereto.

2. It is claimed by appellant that the contract is divisible, and the first part can stand though the latter be illegal. If the whole vice of the contract was embodied in the promise of the defendants not to sell lumber to other persons, the illegality would lie in the promise alone, and it might be contended with great force that this promise was divisible from the agreement to sell. Under the findings of the court, however, the illegality inheres in the consideration. The very essence and mainspring of the agreement—the illegal object—"was to form a combination among all the manufacturers of lumber at or near Felton, for the sole purpose of increasing the price of lumber, limiting the amount thereof to be manufactured, and give plaintiff control of all lumber manufactured," etc. This being the inducement to the agreement, and the sole object in view, it cannot be separated, and leave any subject-matter capable of enforcement, as was done in *Granger v. Mining Co.*, 59 Cal. 678; *Treadwell v. Davis*, 34 Cal. 601; and *Jackson v. Shawl*, 29 Cal. 267. The case falls within the rule of *Valentine v. Stewart*, 15 Cal. 404; *Prost v. More*, 40 Cal. 348; *More v. Bonnet*, 40 Cal. 251; *Forbes v. McDonald*, 54 Cal. 98; *Arnot v. Coal Co.*, *supra*. The good cannot be separated from the bad, or, rather, the bad enters into and permeates the whole contract, so that none of it can be said to be good, and therefore the subject of an action.

We fail to see any inconsistency between the eighteenth finding and the first or sixth. The first finding declares that plaintiff and defendants entered into the contract set out in the amended complaint. The sixth finding is to the effect that the contract has not been rescinded, abrogated, or modified. The eighteenth finding is as to the real object and purpose of the contract. The judgment of the court below is affirmed.

We concur: MCKINSTRY, J.; PATERSON, J.

76 Cal. 299

SWAIN v. BURNETTE *et ux.* (No. 9,898.)

(Supreme Court of California. May 28, 1888.)

1. JUDGMENT BY DEFAULT—AGAINST PLAINTIFF—WHEN ERRONEOUS.

A judgment by default against a plaintiff, for failure to amend his complaint after obtaining leave to do so, will be reversed on appeal, if the complaint states a cause of action.

2. SPECIFIC PERFORMANCE—WHEN GRANTED IN PART—PLEADING.

A complaint for the specific performance of a contract for an exchange of lands which alleges that by reason of an error in the supposed boundaries of defendants' land, discovered by plaintiff since the contract was made, there is a deficiency in the quantity thereof, and they are therefore unable to fully carry out the contract, and which prays compensation for such deficiency, states a cause of action, as the plaintiff may, at his option, require defendants to execute the contract as far as possible, and make compensation for the residue.

3. SAME.

In an action for the specific performance of a contract to convey land, in which both husband and wife were defendants, an averment in the complaint that the land in question, although standing of record in the name of the wife only, was the community property of both, is material, as showing the propriety of joining the husband as a defendant, and should not be stricken out.

4. SAME.

Plaintiff, in an action for specific performance of a contract for exchange of lands, alleged in his complaint that, on a certain day, he tendered defendants a deed in accordance with their agreement, and also that on a later day he delivered to them, and they accepted, a like deed, and that they retained the same, and were thereby vested with title to the land described therein. On motion of defendants, the averments relating to the latter deed were stricken out. *Held*, while the tender of the first deed might have been sufficient, the other allegations should have been allowed to remain in the complaint, as they presented a stronger equity for plaintiff.

5. SAME—DECREE.

A plaintiff, in an action for the specific performance of a contract to convey land, is entitled, upon obtaining relief, to have an account of the rents and profits received by defendant.

6. PLEADING—MOTION TO STRIKE OUT.

If, in a complaint, an averment of a material fact is insufficient, the remedy is by demurrer, and not by motion to strike out.

7. APPEAL—WHAT APPEALABLE—MOTION TO STRIKE OUT.

An order granting a motion to strike out averments from a pleading is not appealable, but may be reviewed on an appeal from the final judgment in the action.¹

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; N. HAMILTON, Judge.

Action by William B. Swain against Eugene T. Burnette and Nettie C. Burnette, his wife, to compel the defendants to specifically perform a contract for the exchange of real estate. The complaint contained allegations to the effect that there was a deficiency in the area of defendants' land, caused by mistake in the boundary lines, which was discovered by plaintiff after the agreement, and prayed compensation therefor. On motion of defendants, certain parts of the complaint were stricken out; a demurrer was filed, but withdrawn, and leave given plaintiff to amend, which he declined to do, and judgment dismissing his action was entered, from which this appeal was taken.

Geo. W. Lewis, for appellant. *J. C. Plunkett*, *A. M. Rosborough*, *J. C. Martin*, and *Morgan & Lawson*, for respondents.

¹Concerning appealable orders, see *Dodd v. Una*, (N. J.) 5 Atl. Rep. 155, and note; *Farson v. Gorham*, (Ill.) 7 N. E. Rep. 104, and note; *Burroughs v. Gaither*, (Md.) 7 Atl. Rep. 243, and note; *Bicklin v. Kendall*, (Iowa.) 34 N. W. Rep. 283; *Nelson v. Brown*, (Vt.) 10 Atl. Rep. 721; *Winter v. Frankel*, (La.) 3 South. Rep. 226; *State v. Seddon*, (Mo.) 6 S. W. Rep. 342; *McMillan v. State*, (Md.) 12 Atl. Rep. 8; *Thompson v. Thompson*, (Utah.) 16 Pac. Rep. 400; *U. S. v. Corporation*, (Utah.) Id. 723; *Railroad Co. v. Railroad Co.*, (Mo.) 6 S. W. Rep. 691; *Stevenson v. Felton*, (N. C.) 5 S. E. Rep. 399; *Mining Co. v. Weinstein*, 17 Pac. Rep. 108; *Railroad Co. v. Burkhard*, (N. Y.) 16 N. E. Rep. 550; *Clement v. Foster*, (N. C.) 6 S. E. Rep. 186; *Manufacturing Co. v. Clark*, (Neb.) 37 N. W. Rep. 628.

HAYNE, C. Suit to compel specific performance of an agreement to exchange lands. The defendants demurred to the amended complaint, and moved to strike out portions of the same. Both matters came on to be heard at the same time. The court granted the motion to strike out; "and, in the matter of the demurrer, counsel for plaintiff asking leave to amend the amended complaint herein, and the demurrer, by consent of all parties, being withdrawn," leave to amend was granted. Plaintiff failed to amend within the time allowed by the court, and thereupon final judgment was entered against him by default. The appeal is taken from the judgment; a bill of exceptions incorporating the proceedings on the motion to strike out having been settled and filed.

1. The demurrer, having been withdrawn, cannot be considered. The judgment was by default, and if the complaint (as it stood after the granting of the motion to strike out) states a cause of action the judgment cannot stand. It is well settled that a judgment by default in favor of the plaintiff will be reversed on appeal from the judgment, unless the complaint states a cause of action. *Hallock v. Jaudin*, 34 Cal. 172; *Choynski v. Cohen*, 39 Cal. 592; *Mining Co. v. Greenwood*, Id. 71; *Rhoda v. Alameda Co.*, 52 Cal. 350, and see *Howard v. Galloway*, 60 Cal. 11. And upon analogous principles a judgment by default in favor of the defendant will be reversed on appeal from the judgment if the complaint states a cause of action. The judgment by default against the plaintiff is in effect an adjudication that he has no case, or, in other words, that his complaint does not state a cause of action. If it does state a cause of action, the judgment is erroneous. It makes no difference that the plaintiff asked leave to amend. It is quite possible that the complaint could be improved in some respects; and it is to be presumed that plaintiff, at the time he asked leave to amend, desired to improve it. But if it stated a cause of action, this was not necessary. And the plaintiff had a right to change his mind, and stand upon it as it was. The case is like the very common one where a demurrer is sustained, and upon request of plaintiff, leave to amend is granted, but not availed of, and judgment goes by default. No one could doubt that in such a case, if the complaint states a cause of action, the judgment must be reversed. The question, therefore, is whether the complaint states a cause of action. And we think it does, although it is very loosely drawn. It proceeds upon the principle that, where the defendant is not able to perform the whole of his contract, he may, at the option of the plaintiff, be compelled to perform it as far as he can, with compensation for the deficiencies. See 2 Story, Eq. Jur. § 779; *Marshall v. Caldwell*, 41 Cal. 614, 615. In this regard it is to be observed that the compensation which plaintiff seeks does not consist of damages for false representations, as might be supposed from a cursory reading of the complaint. If that were the case, we should be inclined to doubt whether his claim for such damages would be available in a suit like the present. The averment is that the defendants agreed to convey the things which plaintiff says he has since found they did not own. The complaint seems full of contradictions, uncertainties, and ambiguities; but we think it states a cause of action even after being stripped of some of its averments by the motion to strike out.

2. The respondent objects to the right of appellant to be heard as to the motion to strike out, on the ground that no appeal was taken from the order granting that motion. But such an order is not mentioned among the interlocutory orders which the statute makes the subject of an appeal. Hence it is not itself appealable. It can be reviewed, however, upon appeal from the judgment, as an intermediate order which involves the merits or necessarily affects the judgment. Code Civil Proc. § 956. And we think the order was erroneous in several respects: (a) The plaintiff, after alleging that on the 9th of July he tendered to the defendants a deed of the land which he was to convey to them, proceeded to allege that on the 15th of the same month he

delivered such deed to their agent, and that said deed was accepted, and that "ever since that date the said defendants have held, and do now hold, said deed and title papers, whereby the unincumbered title of said lands and premises of said plaintiff now vests in the said defendants." The court below struck out the allegation as to the delivery on the 15th of July, but left the remainder. This leaves the averments upon the subject in a somewhat unintelligible shape. We think this part of the complaint should have been allowed to remain as it was pleaded. It is true that the tender on the 9th of July might have been sufficient without the rest of it. But the subsequent delivery and acceptance presents a stronger equity. And, besides, if it should turn out that the plaintiff is not entitled to enforce the agreement of exchange, he would at least be entitled to a reconveyance of what he conveyed to the defendants. And this relief, we think, should be had in the present action. (b) Paragraph 9 should not have been stricken out. It went to excuse a slight delay on the part of the plaintiff. See *Brown v. Covillaud*, 6 Cal. 571; *Fowler v. Sutherland*, 68 Cal. 415, 9 Pac. Rep. 674. If it be an insufficient excuse, the remedy was by demurrer, and not by motion to strike out. *Jackson v. Lebar*, 53 Cal. 258, 259. (c) The averment that the property, although standing of record in the name of Nettie C. Burnette, was the community property of both defendants, should not have been stricken out. It went to show that Eugene T. Burnette was properly joined as a defendant. (d) The averment as to rents and profits should not have been stricken out. If plaintiff shall succeed, he will be entitled to an accounting of the rents and profits upon principles of equity. See Fry, Spec. Perf. § 889; *Worrall v. Munn*, 38 N. Y. 137; *Heinlen v. Martin*, 53 Cal. 322. As has been stated, if the averments on the subject are defective, the remedy is not by motion to strike out.

The other matters discussed do not require special notice. We therefore advise that the judgment and orders be reversed, and the cause remanded for further proceedings in accordance with the above opinion.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and orders are reversed, and the cause remanded for further proceeding, in accordance therewith.

76 Cal. 323

LARKIN v. LARKIN. (No. 11, 333.)

(Supreme Court of California. May 29, 1888.)

1. APPEAL—JURISDICTION—APPEALABLE ORDERS—REFUSING NEW TRIAL.

An order refusing a new trial, and dismissing the motion therefor, being appealable, an order refusing to set aside said order is not appealable.¹

2. SAME—WHAT REVIEWABLE—DEFECTIVE TRANSCRIPT.

Where the transcript contains no statement on appeal, no bill of exceptions, and no papers identifiable as the papers used on the hearing of a motion for new trial, the order dismissing the motion is not reviewable on appeal.

Commissioner's decisions. Department 2. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

This was an action by Stephen Larkin against Jennie Larkin. Defendant appeals from the final judgment, from the order refusing a new trial, and dismissing the motion therefor, and from an order refusing to set aside and vacate the order above mentioned.

Charles F. Hanton, (*L. L. Cory*, of counsel,) for appellant. *Thos. H. Smith and Mastick*, *Belcher & Mastick*, for respondent.

FOOTE, C. This is an appeal from a final judgment in divorce proceedings, from an order refusing a new trial and dismissing the motion therefor, and

¹Concerning appealable orders, see *Swain v. Burnette*, *ante*, 394.

from an order refusing to set aside and vacate the order above mentioned. As the appellant confesses, there is no record here upon which an appeal from the judgment can be considered. The order refusing a new trial, and dismissing the motion therefor, was itself appealable. It has been often held by this court that it will not take jurisdiction of an appeal taken from an order refusing to set aside an order itself appealable. *Tripp v. Railroad Co.*, 69 Cal. 632, 11 Pac. Rep. 219, and cases cited. So that it alone remains to be determined what course is to be taken as to the appeal from the order refusing a new trial and dismissing the motion therefor. The order appealed from shows that the motion was heard upon affidavits and oral testimony. There being in the transcript no statement on appeal, no bill of exceptions, and no papers identifiable as the papers used on the hearing of the motion to dismiss, the validity and regularity of the order of dismissal is not reviewable on appeal. "The presumption is that the order was properly made, and, in the absence of a bill of exceptions or statement on appeal making the motion and order part of the record of the case, that presumption is conclusive." *Strathern v. Dakin*, 63 Cal. 479; citing *Nash v. Harris*, 57 Cal. 242. We therefore advise that the appeal from the judgment and order last made, refusing to set aside the order denying a new trial and dismissing the motion therefor, be dismissed, and that the order last mentioned be affirmed.

PER CURIAM. For the reasons given in the foregoing opinion the appeal from the judgment and order last made, refusing to set aside the order denying a new trial, and dismissing the motion therefor, is dismissed, and order denying a new trial is affirmed.

76 Cal. 325

AMES v. CITY AND COUNTY OF SAN FRANCISCO. (No. 11, 266.

(*Supreme Court of California.* May 29, 1888.)

1. **OFFICE AND OFFICER—SALARY—ALLOWANCE BY AUDITOR—ACT CAL. MARCH 4, 1878.**
Under act Cal. March 4, 1878, providing that gas inspectors "shall be entitled to a salary to be paid and allowed" by the board of supervisors, it is not necessary that a claim for such salary be presented to the auditor to be allowed or audited by such officer.

2. **SAME—SALARY—ALLOWANCE BY BOARD OF SUPERVISORS—WHEN BARRED.**
Under consolidation act Cal. § 90, providing that a demand on a city treasury shall be barred by limitation, unless "presented for payment, properly audited, within one month after such demand became due and payable; or, if it be a demand which has to be passed and approved by the board of supervisors, etc., then within one month after the next regular session of the board held next after the demand accrued," etc.,—a claim for a salary, due at the end of each month, having never been presented for payment, nor presented to the board of supervisors to be passed or approved, is barred after the lapse of one month.

Department 2. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

George Flournoy, Jr., City and County Atty., for appellant. *Rhodes & Borden*, for respondent.

THORNTON, J. Action to recover salary due plaintiff as gas inspector of the city and county of San Francisco for a period extending from the 7th of September, 1884, to the 20th of November, inclusive. Judgment was rendered for plaintiff, and defendant appeals. In the view we take of this case it is only requisite to pass on the points hereinafter considered, and therefore we say nothing as to the other points presented by counsel for the defendant. It is contended that plaintiff cannot recover because his claim was not properly presented for payment, as it was never presented to the auditor for allowance, and it is also contended that his right of action is barred by section 90 of the consolidation act.

It may be conceded that it was not necessary for plaintiff to present his claim to the auditor of the city and county for allowance. The statute author-

izing the appointment of gas inspector provides that "such gas inspector shall be entitled to a salary to be paid and allowed by said board." See act of March 4, 1878; St. 1877-78, p. 168. The board here mentioned is the board of supervisors of the city and county. By that board the allowance is to be made. As the claim is to be allowed by the board, we say it may be conceded that the board was the auditing tribunal, and therefore it was not necessary for plaintiff to present his claim to the auditor to be allowed or audited by that officer.

We proceed to consider the point made on section 90 of the consolidation act. That section is as follows: "Sec. 90. The salaries, fees, and compensation of all officers, including policemen and employes of all classes, and all teachers in common schools, or others, employed at fixed wages, shall be payable monthly; and any demand whatsoever upon the treasury, hereafter accruing, shall not be paid, but shall be forever barred by limitation of time, unless the same be presented for payment, properly audited, within one month after such demand became due and payable; or, if it be a demand which has to be passed and approved by the board of supervisors or board of education, then within one month after the regular session of the proper board, held next after the demand accrued, or unless the board of supervisors shall, within six months after the demand accrued as aforesaid, on a careful investigation of the facts, certify that the same is in all respects just and legal, and that the presentation of it, as above required, was not in the power either of the original party interested or his agent, or the present holder; in which case it shall be barred in the same manner, unless presented for payment within twenty days thereafter." The salary of gas inspector is to be paid monthly. It is so provided by the statute authorizing his appointment, (see act of 4th of March, 1878, St. 1877-78, p. 168,) and by the section of the consolidation act above quoted. This salary is then due and payable at the end of each month of the gas inspector's term of office. The claim of plaintiff was never at any time presented for allowances to the board of supervisors. If the board of supervisors was the auditing tribunal, it was never at any time presented to the board to be audited. As said above, the salary was due and payable at the end of each month of plaintiff's term of office, and, it appearing that it was never presented for audit at all, it follows that it was not and could not be presented for payment, properly audited, within one month after it became due and payable at the close of each month. If the provision in section 90 that a demand on the treasury of the city shall not be paid, but shall be forever barred by limitation of time, "unless the same be presented for payment, properly audited, within one month after such demand became due and payable," is not applicable, it must then come under that portion of section 90 which immediately follows the provision just referred to. Under either portion of the section, we think the claim of plaintiff was barred when this action was begun, and no recovery should be had on it. It is barred by the last portion of the section because it was never presented to the board of supervisors to be passed or approved.

The judgment must be reversed, and cause remanded, and it is so ordered.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

76 Cal. 376

PACIFIC MUT. LIFE INS. CO. *v.* SHEPARDSON *et al.* (No. 12,435.)

(Supreme Court of California. May 31, 1888.)

1. APPEAL—SERVICE OF NOTICE—SUFFICIENCY OF AFFIDAVIT.

An affidavit of service of notice of appeal, which states simply that affiant "alleges and believes" that he served the notice, is fatally defective, as not stating positively the fact of the service.

2. SAME—SERVICE OF NOTICE BY MAIL—SUFFICIENCY OF AFFIDAVIT.

An affidavit of service of notice of appeal by mail is fatally defective, unless stating that affiant and the person served had their offices in different places, and that there was communication by mail between such places.

In bank. Appeal from superior court, Colusa county; E. A. BRIDGFORD, Judge.

Action by the Pacific Mutual Life Insurance Company of California against Dudley Shepardson and others. Judgment for plaintiff and Dudley Shepardson and wife, two of the defendants, appeal. Defendant's attorney, upon whom the notice of appeal was served by mail, had his office at San Francisco, and the notice was mailed at Colusa.

Shepardson & Moore and *Joe Hamilton*, for appellant. *C. N. Fox*, for respondent.

SEARLS, C. J. This is a motion to dismiss an appeal, and must be granted for the following reasons:

1. The affidavit of service of the notice of appeal does not state positively its service, but only that the affiant alleges and believes he served it.

2. The affidavit fails to show that the affiant and the person served resided or had their offices in different places (*Cunningham v. Warnekey*, 61 Cal. 507,) or that there was any communication by mail between Colusa and San Francisco, (*Reed v. Allison*, 61 Cal. 461; *Steele v. Supervisors*, 62 Cal. 6.) The appeal is dismissed.

We concur: SHARPSTEIN, J.; PATERSON, J.; MCKINSTRY, J.; THORNTON, J.

76 Cal. 381

THOMPSON v. WHITE. (No. 9,885.)

(Supreme Court of California. June 1, 1888.)

1. APPEAL—REVIEW—SUFFICIENCY OF EVIDENCE—FAILURE TO INSTITUTE APPELLATE PROCEEDINGS.

Where no motion for a new trial is made, and appeal is not taken within 60 days from the rendition of final decree, the sufficiency of the evidence to justify either such final decree or a previous interlocutory decree will not be considered.

2. EQUITY—DECREE—INCONSISTENT WITH INTERLOCUTORY ORDER—EFFECT.

That a final decree is inconsistent with an interlocutory decree is immaterial, as the latter may be modified on final hearing as the law and evidence may require.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Action, by James M. Thompson against George W. White, to compel specific performance of an agreement to assign an interest in a patent. Judgment for defendant. Plaintiff appeals.

L. D. Smoot, for appellant. *M. A. Wheaton*, for respondent.

HAYNE, C. This case was originally in the Nineteenth district court. That court made certain findings of fact, and an interlocutory decree therein, and referred the case to Gordon N. Mott, the court commissioner. This official made a report, which was "confirmed" by Judge CARY of the superior court, the successor of the Nineteenth district court; and the case then went to his successor, who made an order setting aside all the proceedings, upon the theory that there had been a mistrial, and that a case could not be tried by piecemeal by different judges, neither of whom had before him the evidence on which the other acted. Upon appeal, this order was reversed, and the cause was remanded "for further proceedings not inconsistent with this opinion." 63 Cal. 505. The case then came before Judge MAGUIRE, of the superior court, who had succeeded to the office, for "further proceedings." Neither party offered additional evidence; the case being submitted upon the pleadings and papers on file, which included the interlocutory de-

creed, and the report of Commissioner Mott above mentioned. A final decree was rendered, from which the plaintiff appeals. The argument for the appellant ranges itself under two heads, which we will consider separately.

1. The learned counsel contends that "the decree of September 11, 1884, [which is the final decree,] is erroneous in ascertaining an indebtedness of \$5,000 from Thompson to White, when the testimony taken by Commissioner Mott shows that White, upon a fair statement of the account, is largely indebted to Thompson." It is not entirely accurate, under our system, to say that the evidence does not justify a decree. The evident intention, however, is to say that the evidence does not justify the decision. But no motion for a new trial was made, and the appeal was not taken within 60 days from the rendition of the final decree, (and, of course, not for a long time after the interlocutory decree and findings,) and hence no question of the sufficiency of the evidence can be considered, whether to justify the decree or the decision.

2. It is contended that the final decree is inconsistent with the interlocutory decree. As a matter of course, whatever was decided on the former appeal has become the law of the case, and must govern on this appeal. The question is whether it was there decided that the final decree cannot be inconsistent with the interlocutory one. And we do not think that it was. The court below had proceeded upon the theory that there could not be, under our system, such a thing as an interlocutory decree except in partition cases; in other words, that the court had no power to make such a decree. All that was necessary for the appellate court to decide was that the trial court had such power, and that the proceedings should not be set aside as for want of power. And this is what we think it did decide; its language being, "There was no warrant for its vacation upon the theory that it was beyond the power of the court to make." It was not necessary for the court to say that the trial court could not, on the final hearing, modify the interlocutory decree as the law and the evidence might seem to require; and it did not say it. It was not even necessary for it to say what kind of interlocutory decree it referred to. The opinion is not entirely clear in this regard, but we think it sufficiently shows that the court referred to the interlocutory decree of the old equity practice. It could not have referred to the interlocutory decree established by our statutes in partition cases, because that kind of a decree is itself appealable, and is not reviewable on appeal from the final decree; whereas the opinion says of the interlocutory decree that it "is also reviewable on appeal from the final judgment." Page 509. And, unless the court intended to evolve something entirely new, (which cannot be supposed,) it must have had reference to the interlocutory decree of the old equity practice. Its language is consistent with this idea; for it said that the intention of the codifiers was not "to abolish the power of a court of equity to pronounce what in equity was called an interlocutory decree or decretal order." And what is said with reference to new trials evidently refers to the findings of fact upon which the interlocutory decree rested, which findings had been set aside by the court below, along with the decree resting upon them. If this be the true interpretation of the opinion; it does not matter whether the final decree is inconsistent with the interlocutory one or not; for, under the old equity practice, the interlocutory decree could be modified on the final hearing as the law and the evidence should require. *Fourniquet v. Perkins*, 16 How. 82.

The foregoing covers all the points made. We therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

76 Cal. 535

BURNETT v. KULLAK. (No. 12,362.)

(Supreme Court of California. June 11, 1888.)

SPECIFIC PERFORMANCE—REQUISITES OF CONTRACT.

Defendant made a contract with plaintiff as follows: "Received of L. G. Burnett the sum of \$100, being a deposit on the one-quarter interest of the Callis tract of forty-three and one-half acres. * * * The terms of this transaction are \$4,000 for said interest in said tract; \$1,500 cash within sixteen days from date, as soon as L. G. Burnett is satisfied as to the title of said tract, and \$2,500 on mortgage, as per deed and agreement from Callis (Tom) to Kullak & Winchester. It is hereby agreed that Burnett shall pay the interest on a certain promissory note for \$1,700, at 10 per cent. interest, from April 5th." *Held*, that such a contract is too indefinite and uncertain to sustain an action of specific performance.¹

In bank. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

Action by L. G. Burnett against Louis F. Kullak for specific performance of a contract to convey land. A demurrer to the complaint was sustained, and plaintiff appealed.

Thomas McNulta, for appellant. *W. C. Stratton*, for respondent.

SEARLS, C. J. This action was brought to compel specific performance of a contract, which contract is in the following words: "SANTA BARBARA, CAL., April 19, 1887. Received of L. G. Burnett the sum of \$100, being a deposit on the one-quarter interest of the Callis tract of forty-three and one-half acres, or one-half interest of the undersigned in said tract. The terms of this transaction are \$4,000 for said interest in said tract; \$1,500 cash within sixteen days from date, as soon as L. G. Burnett is satisfied as to title of said tract, and \$2,500 on mortgage, as per deed and agreement from Callis (Tom) to Kullak & Winchester. It is hereby agreed that Burnett shall pay the interest on a certain promissory note for \$1,700, at 10 per cent. interest, from April 5th. LOUIS F. KULLAK." The complaint alleges "that the said land mentioned therein as the Callis tract was, at the date of said contract and still is, commonly known and called by that name, and that the same is situated in the Carpenteria valley, and contains forty-three and one-half acres." It further alleges offer of performance on the part of plaintiff within the period prescribed by the agreement, and refusal of defendant to comply, etc. A demurrer was interposed by defendant to the amended complaint, which was sustained by the court, and, on the refusal of plaintiff to amend, judgment was entered in favor of defendant, from which judgment plaintiff appeals.

A glance at the agreement shows that it was loosely and inartificially drawn. We are of opinion that the description of the premises might be held sufficient. A description of land by name is or may be sufficient if the boundaries so known are well defined. *Haley v. Amestoy*, 44 Cal. 132; *Truett v. Adams*, 66 Cal. 218, 5 Pac. Rep. 96. The name of the county in which the land is situate may be useful as a part of the description, but, if otherwise sufficient, is not essential, as in a pleading, where it usually performs the office of showing the subject-matter within the jurisdiction of the court. In other respects we think the agreement and complaint fatally defective. To mention one: We suppose a mortgage was to be given for \$2,500, part of the purchase price.

¹Equity will not specifically enforce a contract wanting in definiteness or mutuality. *Bourget v. Monroe*, (Mich.) 25 N. W. Rep. 514; *Hall v. Loomis*, (Mich.) 30 N. W. Rep. 374; *Moses v. McClain*, (Ala.) 2 South. Rep. 741; *Recknagle v. Schmalz*, (Iowa,) 33 N. W. Rep. 365; *Durkee v. Cota*, (Cal.) 16 Pac. Rep. 5; *Fogg v. Price*, (Mass.) 14 N. E. Rep. 741; *Appeal of Holthouse*, (Pa.) 12 Atl. Rep. 340; *Magee v. McManus*, (Cal.) 12 Pac. Rep. 451; *Johnston v. Trippe*, 33 Fed. Rep. 530; *Duff v. Hopkins*, Id. 599; *Stembridge v. Stembridge's Adm'r*, (Ky.) 7 S. W. Rep. 611; *Gallagher v. Gallagher*, (W. Va.) 5 S. E. Rep. 297; *Angel v. Simpson*, (Ala.) 3 South. Rep. 758; *Iron Co. v. Todd*, (Del.) 14 Atl. Rep. 27; *Lasher v. Gardner*, (Ill.) 16 N. E. Rep. 919; *Zeringue v. Railway Co.*, 34 Fed. Rep. 239.

The language of the agreement, which is not helped by averment, is: "Twenty-five hundred on mortgage, as per deed and agreement from Callis (Tom) to Kullak & Winchester." For how long is the mortgage to run? At what rate of interest? Suppose defendant had made default, how could the court have determined as to the sufficiency of a mortgage, under this clause to be given by the plaintiff to entitle him to a deed? Or, what is the same thing, had plaintiff proved all the allegations of his complaint, the court would have been left in the dark as to the terms of the mortgage he was to give. It is not necessary to pass upon the sufficiency of the complaint had the deed and agreement from Callis to Kullak been set out or pleaded, for the reason that it was not done. We are of opinion the agreement is too indefinite and uncertain to support a judgment for specific performance, and that the demurrer was properly sustained. Judgment affirmed.

We concur: THORNTON, J.; MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; MCKINSTRY, J.

76 Cal. 521

PEOPLE v. MADDEN. (No. 20,403.)

(*Supreme Court of California.* June 9, 1888.)

1. CRIMINAL LAW—INSTRUCTIONS—RECONCILING CONFLICTING EVIDENCE.

An instruction, in a criminal case, that it was the duty of the jury to make a reasonable and conscientious endeavor to reconcile the facts and evidence with defendant's innocence, was properly refused, since the jury should reconcile conflicting evidence if they can, regardless of the conclusions to which it might lead.

2. SAME—EVIDENCE—RES GESTÆ.

On a trial for assault with intent to commit murder, evidence of a conversation between defendant's brother and another, on the day before the alleged assault, was properly admitted, where the evidence showed that the same matter spoken of in the conversation was again brought up by defendant's brother just before the fight in which the assault was made, and that the person who engaged with the brother in the conversation offered in evidence participated in the fight.

3. ASSAULT AND BATTERY—CRIMINAL PROSECUTION—INSTRUCTIONS.

Where the evidence showed that one on trial for an assault with intent to commit murder had fired a pistol shot at another during a fight at a saloon, it was not error to refuse to instruct the jury that they might find defendant guilty of simple assault.

In bank. Appeal from superior court, Humboldt county; J. J. DE HAVEN, Judge.

McQuaid & Wheeler, for appellant. *George A. Johnson*, Atty. Gen., for the People.

THORNTON, J. The defendant was tried on an information for an assault with intent to commit murder, and was convicted for an assault with a deadly weapon. He moved for a new trial, which was denied. This appeal is prosecuted by him from the judgment and the order denying a new trial. Our attention is first called by defendant's counsel to several requests on behalf of defendant, which were refused by the court, and to which exceptions were reserved. It is contended that the court erred in refusing to give the requests numbered 4, 7, 10, 11, and 14, asked by defendant. There was no error in refusing request 4, because it had been given in the instructions 1, 2, 3, asked by defendant. Request 7 is embraced in 5 and 6, which were given as asked by defendant. Therefore there was no error in refusing it. Request 10 is embraced in 12 and 13, which were given, and there was no error in refusing it. Request 10 relates to the law of self-defense. We think the law on that point was sufficiently set forth to the jury in instructions 12 and 13, and that no error was therefore committed by the court below in refusing it. Request 14 was properly refused. The request embraced this proposition: That it was the duty of the jury to make a reasonable and conscientious endeavor to reconcile the facts and evidence in the case with defendant's innocence. While

it is the duty of the jury to endeavor to reconcile, and to reconcile, if they can, discrepant and conflicting evidence, we do not know that they are bound to reconcile it with defendant's innocence. If, after reconciling conflicting evidence, the conclusion reached is that defendant is innocent, they must so declare in their verdict; if the conclusion reached is that defendant is guilty, they are bound so to declare. What we desire to say is that the jury must reconcile inharmonious and conflicting evidence if they can, regardless of the conclusions it may lead to. We hold that the court committed no error in refusing the request above asked.

We find no error in the directions given by the court of its own motion; nor in refusing to direct the jury that they might find the defendant guilty of a simple assault. The defendant having fired his pistol at Jacobson during the fight which occurred at Ferris' saloon, if guilty at all, was guilty of something beyond a simple assault. In this view, we think defendant sustained no injury in the refusal to direct the jury that they might render a verdict against defendant of a simple assault.

There was no error in the ruling of the court in admitting the testimony of the witness Axton as to the conversation which took place at Renfro's saloon. The conversation took place between George Madden and Chub Hitchings. There was evidence tending to show that the defendant and his brothers George and Mike, with Chub Hitchings, went together, on the next day, to Ferris' saloon; that the same matter mentioned in the conversation was there spoken of by George Madden to Ferris, just before the fighting there commenced; and that Hitchings participated in the fight. Under these circumstances, we are of opinion that the court committed no error in admitting the testimony. We find no error. Judgment and order affirmed.

We concur: SEARLS, C. J.; MCFARLAND, J.; SHARFSTEIN, J.; PATERSON, J.; MCKINSTRY, J.

76 Cal. 355

SHADBURNE v. DALY. (No. 11,364.)

(Supreme Court of California. May 31, 1888.)

1. CONTRACT—CONSIDERATION—FORBEARANCE TO FILE CLAIM AGAINST AN ESTATE.
Forbearance by a creditor of a deceased person to present and pursue his claim against the estate, there being no agreement on his part to that effect, is not a sufficient consideration to support a promise by the widow of deceased to pay the claim.
2. BILL OF EXCEPTIONS—CONTENTS—SPECIFICATION OF ERRORS.
Under Code Civil Proc. Cal. § 650, prescribing the preparation, settlement, etc., of bills of exceptions, and requiring that they contain "all the exceptions taken upon which the party relies," etc., specifications of the particular errors of law on which the appellant will rely are not necessary in a bill of exceptions.
3. SAME.
Where no point is made on appeal as to the insufficiency of the evidence to sustain the verdict, a specification of the particulars in which the evidence is insufficient is not necessary in the bill of exceptions.
4. PLEADING—AMENDMENT.
A motion for permission to file an amended answer, which would not change the issues, is properly overruled, where the motion was made on the eve of the trial, while the jury were in attendance.
5. ATTORNEY AND CLIENT—ACTION FOR FEES—EVIDENCE.
In an action involving attorney's fees, a question asked of such attorney as a witness, as to whether, when he gave his client certain advice, he knew a certain principle of law rather inconsistent with such advice, was properly excluded, where the principle of law, as stated in the question, was incorrect, the purpose of the question being to show corrupt advice tending to promote litigation.

Department 2. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Action by George D. Shadburne against Annie E. Daly. The order copied in the opinion was drawn in payment of attorney's fees. Defendant attempted to show that Mr. Plunkett, the attorney, in giving certain advice,

was acting corruptly, and trying to promote litigation for his own benefit; and in this connection the question of evidence passed upon in the opinion was raised. Code Civil Proc. Cal. § 650, treats at length of the preparation, contents, and settlement of bills of exceptions. It requires, among other things, that the bill contain "all the exceptions taken upon which the party relies." Judgment was for plaintiff, and defendant appeals.

E. W. McGraw, for appellant. *George D. Shadbourne*, for respondent.

THORNTON, J. This action was brought against the defendant as drawer of an order of which the following is a copy:

"\$315.

SAN FRANCISCO, August 8, 1885.

"*William Younger*: Please pay William A. Plunkett, or order, the sum of \$315, and charge the same to my account. ANNIE E. DALY."

This order was on the 10th of August, 1885, indorsed by Plunkett to plaintiff. The order was presented to Younger, who refused to accept it, of which defendant was duly notified.

The point is made by the respondent that the bill of exceptions contains "no specification of particulars," and should therefore be disregarded. We find no defect in this regard in the bill. No point is made by appellant as to the insufficiency of the evidence to sustain the verdict, and therefore no specification of the particulars in which such evidence is insufficient is required. No specification of the particular errors of law on which the appellant will rely is made in her bill. But while this is required in a statement of the case, (Code Civil Proc. § 659, sub. 3,) it is not in a bill of exceptions, (Code Civil Proc. § 650.) The point of respondent, therefore, is not tenable. We have examined the testimony given in the case on behalf of the plaintiff, and are of opinion that defendant's motion for a nonsuit was properly denied. There was some evidence on each point on which defendant based her motion.

The court did not err in refusing to the defendant leave to file an amended answer. The motion for leave was made on the eve of the trial, when a jury was in attendance. Moreover, we cannot perceive that defendant was injured by the refusal. The cause was tried as if all the matters set forth in the amended answer were pleaded. Counsel for appellant urges nothing to the contrary of this. He states in his points that "the amended answer did not materially change the issues, but tendered them in more proper legal form, bringing the defense directly under" certain sections of the Civil Code, the numbers of which he gives.

W. A. Plunkett, assignor of plaintiff, was attorney for George Daly, the husband of defendant, in certain proceedings in bankruptcy prosecuted under the United States bankruptcy act of March 2, 1867. Daly's petition in bankruptcy was filed on the 14th of March, 1873. After the commencement of the proceedings, two actions were commenced against Daly: one by Goodwin & Co., for furniture, and the other by Frank G. Edwards, for carpets. The suit of Goodwin & Co. was commenced on the 15th of March, 1873, in the Third district court. The suit of Edwards was commenced in the same court on the 27th of March, 1873. In the suit of Goodwin & Co., the plaintiffs attached the furniture for the price of which they were suing. Under Plunkett's advice, Daly filed no answer in either of the cases. Undertakings were given to release the property attached, and the causes proceeded, it would seem, to judgment. Plunkett testified that he told Daly not to answer, as he could not do so without committing perjury. After obtaining the judgments, the plaintiffs tried to enforce them, and Plunkett commenced a suit in equity in the United States district court asking for a restraining order. A restraining order was procured in the action, and, some days later, a perpetual injunction was had restraining the enforcement of the judgments. The plaintiffs were thus defeated, and the furniture was set aside to Daly in the bankruptcy proceedings. The order on which this action was brought was given to Plunkett

in payment of fees for professional services rendered by him to George Daly in the injunction suit above mentioned and some other suits, including Daly's application in bankruptcy. There was evidence tending to show that the defendant (Mrs. Daly) assumed the payment of this claim against George Daly, in consideration that Plunkett would not present his claim for these services against Daly's estate, Daly having died in 1881, leaving an estate amounting to \$159,000. On cross-examination of Plunkett, who was called by plaintiff at the trial of the cause, the following question was put to him by attorney for defendant: "Were you aware, as an attorney, at the time you advised Mr. Daly that he could not answer the Goodwin and Edwards suits without committing perjury, that he might have put in answers setting up the adjudication in bankruptcy, and that would have ended the suits?" The adjudication in bankruptcy referred to in the interrogatory just quoted was the adjudication of Daly, a bankrupt; and inasmuch as the setting up such adjudication in bankruptcy would not have put an end to the suits, but only stayed them provisionally under section 21 of the United States bankrupt act, (see section 14, St. at Large, p. 526,) we see no error in the ruling of the court. It will be seen, on examination of this section, that the suit will, "upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided there be no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge." If the witness had answered the question in the affirmative, it would not have here been in accordance with the act, for such a course would not have put an end to the suits; if he had answered it in the negative, it would not have shown ignorance, but acquaintance with the act. And, as the showing would not have put an end to the suits, we cannot see that the court erred in not allowing the question.

The defendant asked the court to instruct the jury: "Forbearance by a creditor to present a claim to the executor of a will of a deceased person is not consideration for a promise on the part of the widow of the testator to pay such claim against him, unless there was an agreement for forbearance." In such a case as this, there must be a consideration to sustain the promise. It is urged herein that the forbearance by the creditor to present his claim against the estate of the deceased, and actual forbearance, is a sufficient consideration, and that, in consideration of the forbearance by Plunkett to present his claim against the estate of George Daly, the defendant, his widow, agreed to become responsible for it. We cannot see how it became a consideration unless the minds of the parties met on an agreement for such forbearance. There must not only be an agreement to forbear, but actual forbearance. *Robinson v. Gould*, 11 Cush. 55. The mere forbearance to sue is not a sufficient consideration for a promise to pay the debt of another. *Mecorney v. Stanley*, 8 Cush. 85. So here the mere forbearance by Plunkett to present and pursue the claim, there being no agreement to that effect, would not be a consideration sufficient to support a promise by the defendant to pay the claim. The court, therefore, erred in refusing the instruction above quoted. We have examined the various other points, and find no error in them. We wish to say that, in our opinion, the question whether the cause of action against George Daly was barred prior to his death is not a material one in the action on the promise of the defendant, and that we do not find in the cause anything tending to show fraud or undue influence by respondent over appellant.

For the error above pointed out the judgment is reversed, and the cause remanded for a new trial. So ordered.

We concur: SHARPSTEIN, J.; McFARLAND, J.

Cal. Rep. 16-19 P.—43

In re BOWMAN. (Nos. 12,528, 20,391.)

(Supreme Court of California. May 31, 1888.)

Department 2. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

This is an appeal from an order adjudicating Arthur W. Bowman, an insolvent debtor, guilty of a contempt of court.

E. W. McGraw, for appellant. *John S. Bugbee* and *James L. Crittenden*, for respondents.

PER CURIAM. We have examined the record in this appeal, and find no error therein. The judgment of the court therein must be affirmed. It is unnecessary to pass on the motion to dismiss the appeal herein. Ordered as above.

76 Cal. 373

DRAGHICEVICH v. VULICEVICH. (No. 11,389.)

(Supreme Court of California. June 1, 1888.)

AWARD AND ARBITRATION—SUBMISSION—FAILURE TO STIPULATE TO ENTER AS ORDER OF COURT—DISCONTINUANCE.

A submission of a pending action to arbitration, which does not stipulate that it shall be entered as an order of court, operates as a discontinuance of the action.

Department 2. Appeal from superior court, Santa Clara county; D. BELDEN, Judge.

Action by John Draghicevich against Marco Vulicevich for dissolution of partnership, pending which plaintiff died, and the action was revived in the name of his administratrix, Catherine Draghicevich. Judgment for plaintiff, and defendant appealed.

Archer & Bowden, for appellant. *Wm. Gill*, for respondent.

SHARPSTEIN, J. This action was brought to obtain a dissolution of partnership which it was alleged existed between the parties, and for a distribution of the assets. The answer does not deny the partnership, but denies some other material allegations of the complaint; and for a further defense alleges that after the complaint was filed, and before the answer was filed, the plaintiff had died, and the defendant, as surviving partner, had taken into his possession all the personal property of the partnership for the purpose of winding up the affairs thereof, and that he had ever since been engaged in doing so, and that he is ready at any time to render a full and complete account of his acts as such surviving partner. And for a further defense defendant alleges that after the filing of said complaint, and before the death of said Draghicevich, said plaintiff and defendant agreed in writing to submit all matters in dispute between them as copartners to the award of arbitrators, who, after hearing said parties, published their award. Therefore defendant prayed to have the action dismissed, with costs, and for such other or further relief as might be meet. Afterwards, and before any further proceedings were had in the case, a stipulation, of which the following is a copy, was filed: "It is hereby stipulated that this action was commenced in May, 1883; that John Draghicevich, the plaintiff, died on the 22d day of August, 1883, while he and defendant were still copartners, as alleged in plaintiff's complaint herein. That no receiver was or ever has been appointed in this action; that, after the death of the said plaintiff, the defendant, as he was advised and believed it to be his duty, took, as surviving partner of said copartnership, into his business all the personal property of said partnership belonging thereto at the date of the death of said decedent, for the purpose of winding up the business of said copartnership, and ever since has been engaged in winding up the affairs of said copartnership; that on the 18th day of June, 1883, the plaintiff and defend-

ant entered into the submission attached to the defendant's answer, and marked 'Exhibit A;' and all the allegations of said answer in reference to the arbitration in pursuance of said submission, and the acts of the parties thereunder subsequent to said arbitration agreement, and to the date of the death of decedent, as true, as in said answer alleged. It is further stipulated that this action shall be submitted for decision of the court upon the foregoing facts, and upon the further stipulation that all the allegations contained in said complaint are true, and upon the answer of defendant, as the pleading in said action. *Dated San Jose, February 19, 1884. WM. L. GILL, Plaintiff's Attorney. BURT & PFISTER, Attorneys for Defendant.*" The case was tried by the court, findings filed, and judgment entered.

Appellant insists that the submission to arbitration, and the acquiescence of the parties therein, operated as a discontinuance of the action, and cites *Gunter v. Sanchez*, 1 Cal. 45, in which the court said: "If the reference of the cause was a submission to arbitration, the suit ceased to be pending in court, for the submission of a cause to arbitration operates as a discontinuance." In the agreement to submit the matters in controversy to arbitrators, it was not stipulated that it be entered as an order of the court, nor does it appear to have been filed with the clerk. Therefore it cannot be treated as an arbitration under the Code. Code Civil Proc. § 1283. The case is not unlike *Heslep v. San Francisco*, 4 Cal. 1, in which the court said that the agreement to submit the matters in dispute to arbitrators "was a voluntary withdrawal of the case from the jurisdiction of the court, by which the court lost all control over the cause." It was further said in that case that, if it should be contended that it was a common-law submission to arbitration, then the plaintiffs had lost all standing in court, and must resort to their remedy on the award. We think the submission of the cause to arbitrators operated as a discontinuance of the action, and that after such discontinuance the proceedings of the court were without jurisdiction. The conclusion renders it unnecessary to consider the other points presented by appellant.

Judgment reversed, and the court below is directed to dismiss the action.

We concur: MCFARLAND, J.; THORNTON, J.

76 Cal. 294

PEOPLE v. ROACH. (No. 11,386.)

(*Supreme Court of California.* May 23, 1888.)

ESCHEAT—WHEN PROCEEDINGS MAY BE INSTITUTED—DEATH OF PERSON WITHOUT RESIDENT HEIRS.

Civil Code Cal. § 1404, provides that "no non-resident foreigner can take by succession, unless he appears and claims within five years after the death of decedent;" section 1405 provides that, "when the succession is not claimed, as provided in the preceding section, the district court, on information, must direct the attorney general to sell such property, and deposit the proceeds of in the state treasury for the benefit of the non-resident foreigner, to be paid him whenever, within five years after such deposit, proof is produced * * * that he is entitled thereto;" and section 1406 provides that, "if no one succeeds to the estate, as herein provided, the property of the decedent devolves and escheats to the state." *Held*, that a proceeding brought by the attorney general under Code Civil Proc. Cal. tit. 8, pt. 3, to secure, as an escheat to the school fund, the property of an intestate who has no resident heirs, is premature, when brought within five years after the death of such intestate.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Geo. A. Johnson, Atty. Gen., and *Wm. M. Pierson*, for the People. *John A. Wright* and *McAllister & Bergin*, for respondents.

PATERSON, J. On April 4, 1883, Thomas H. Blythe, a citizen of the United States and resident of the city of San Francisco, died intestate, leaving property valued by the appraisers at \$2,490,236.54. Defendant was appointed administrator of the estate on June 12, 1883, and duly qualified. On June 23,

1883, the notice to creditors to present their claims within 10 months from said date was first published. Before the expiration of said 10 months, viz., on March 21, 1884, the information herein was filed by Attorney General Marshall in behalf of the state of California, praying for a decree that said property has escheated to the state; that defendants, about 30 in number, be enjoined from asserting any claim or interest in or to said estate. The information alleges the death of T. H. Blythe; that he was the owner in fee of the property described; that he was never a citizen of the United States, but was an alien and a subject and citizen of the kingdom of Great Britain and Ireland; that he died without leaving any wife, kindred, or heirs to succeed to his estate; that defendant is the administrator of the estate; that the estate is still open and undistributed; that defendant has collected rents amounting to about \$90,000; that Florence Blythe and others claim to be the heirs at law of Thomas H. Blythe; that none of the defendants are heirs, or entitled to share in, or succeed to, his estate; that the state of California is, by law, entitled to the estate. A motion was made to dismiss the information, and, upon the hearing thereof, a showing was made to the court of the citizenship of Blythe, that he was a citizen of the United States, and a resident of the state of California; that the defendant Roach was duly appointed administrator; that notice to creditors was first published June 23, 1883, and inventory filed on the 15th of November, 1883; that 84 claims had been presented to the administrator against the estate, amounting in the aggregate to the sum of \$618,000; that divers suits are pending against the administrator as such; that applications for the sale of portions of the estate, valued at \$150,000, had been made, etc. The court thereupon denied the application for a restraining order, and dismissed the information. We think that the judgment should be affirmed.

1. In *State v. Smith*, 70 Cal. 156, 12 Pac. Rep. 121, Mr. Justice McKINSTRY, in his opinion for the court, said: "All aliens take by succession. Civil Code, § 671. The failure of a non-resident alien to 'appear and claim' within five years after descent cast operates a bar of his right to assert any title in the property as against the state. And this not on the idea that the property has escheated to the state, as of the date of the death of the ancestor, but because by the law the non-resident takes subject to the loss of his right by a failure to make claim within the five years. * * * It would seem to follow that a non-resident alien would have no defense to an inquest to 'vest the title in the state' in the nature of office found, except a defense based on his appearance and claim within the five years, and it necessarily follows that a proceeding brought by the attorney general under title 8, pt. 3, is premature, if commenced within the five years after the death of the ancestor." That case is conclusive of this, unless, as claimed by appellant, the allegation that there are no heirs at all makes this a case of an absolute escheat, and the cause of action one which accrued the moment Blythe died. But was the court bound by this averment? Is it possible in law or in fact for a party to know that there are no heirs so soon after the death of the intestate? A fact impossible in law cannot be admitted by demurrer. *Railroad Co. v. Palmes*, 109 U. S. 253, 3 Sup. Ct. Rep. 193. Alien heirs have five years after descent cast to appear and claim their right by succession. Can any one affirm within that time that there are no heirs? Does not the affirmation of such a proposition presuppose acquaintance with every non-resident alien and his genealogy? The averment is clearly one of fact, impossible in law, and which cannot be admitted by demurrer. In estates of over \$10,000 in value creditors have 10 months within which to present their claims. Would the allegation, in any proceeding had within that time, that there are no claims against the estate, conclusively establish upon demurrer, or motion to dismiss, that no claims exist? How, until the expiration of the time allowed by law, is it possible for any one to say there are no creditors? The ascertainment of such a fact is practically impossible, and as a matter of law cannot be admit-

ted on demurrer or motion to dismiss. The legislature did not intend that a proceeding of this kind should be commenced before the expiration of five years. The Codes of this state, like all other laws, proceed upon the theory that things have happened according to the ordinary course of nature and the ordinary habits of life; and it is a presumption of law that every intestate has left some one on earth entitled to claim as his heir, however remote. Code Civil Proc. § 1963, subd. 28; Abb. Tr. Ev 85, 86. In every provision of our Codes relating to the administration of estates, and germane to the subject, this presumption is indulged. These provisions are numerous, and it is unnecessary to copy them here. We cite a few sections: 1365, 1371, 1726, 1728, 1729, 1737, 1739, Code Civil Proc.; 1405, 1406, 1407, Civil Code. Every provision is made for administration upon the estates of persons dying intestate. Provision is made for the election of an officer, and his duties are prescribed for the administration of all estates where parties in interest omit or neglect to administer thereon. Every public administrator "must take charge of the estates of decedents who have no known heirs." Section 1726, Code Civil Proc. He is subject to the control and direction of the court. If, after the final settlement of the affairs of any estate, there be no known heirs or claimants thereof, the county treasurer must pay into the state treasury all property in his hands belonging to the estate, upon order of the court; and, if any such moneys or property escheat to the state, they must be disposed of as other escheated estates. Id. §§ 1739, 1743. It is clear from these provisions that the estates of persons dying without heirs are as much subject to the operation of the law as other estates. It is apparent that after the public administrator has taken charge of estates which have escheated, or are liable to escheat, he alone is entitled to proceed with administration of the estate as provided in the Code. Section 1445, Civil Code, provides that "when succession is not claimed as provided in the preceding section, the court on information must direct the attorney general to reduce the property to the possession of the state, or to sell and deposit the proceeds in the state treasury for the benefit of the non-resident foreigner, to be paid to him whenever, within five years after such deposit, proof to the satisfaction of the state controller and treasurer is produced that he is entitled to succeed thereto." This section would seem to imply that it is only when succession is not claimed within five years after the death of the decedent that proceedings may be commenced to reduce the property to the possession of the state. Section 1406, Civil Code, provides: "If no one succeeds to the estate or the proceeds, as herein provided, the property of the decedent devolves and escheats to the people of the state, and is placed by the state treasurer to the credit of the school fund." Thus it would appear that the state will take possession of property when no one claims it within five years after the death of the decedent, but that the property will not escheat until five years thereafter. Section 1407 confirms this view. It provides that "real property passing to the state under the last section, whether held by the state or its officers, is subject to the same charges and trusts to which it would have been subject if it had passed by succession, and is also subject to all the provisions of title 8, pt. 3, Code Civil Proc." The procedure in the last section referred to is the procedure which is here instituted by the attorney general. Administration is clearly one of the "charges and trusts" to which the property would have been subject, if it had passed by succession. Title 8, referred to in section 1407, *supra*, makes no provision for the payment of funeral expenses, expenses of last illness, or the debts of the decedent. There must be a certain and uniform system of administration on the property of decedents. For this purpose, chiefly, public administrators have been appointed and required to give bonds for the faithful discharge of their duties, and creditors have been given the right of administration. We think that the information filed by the attorney general is premature. Judgment affirmed.

16 Cal. 386

PEOPLE v. COIN. (No. 20,354.)

(Supreme Court of California. June 1, 1888.)

CRIMINAL LAW—INSTRUCTIONS—REASONABLE DOUBT.

It is reversible error, in a criminal case, to refuse to instruct the jury that the burden is upon the prosecution of proving every element of the crime charged, beyond a reasonable doubt, where no other instruction is given stating the law of reasonable doubt in criminal cases.¹

In bank. Appeal from superior court, Los Angeles county; H. K. S. O'MELVENY, Judge.

Robert Hardie, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

MCKINSTRY, J. The defendant asked the court to instruct the jury: "The burden is upon the prosecution of establishing every element of the crime of which the defendant may be convicted, beyond a reasonable doubt." Through inadvertence, or for some reason which does not appear in the record, the court refused to give the instruction requested, and omitted to give any other instruction of a like character, or stating or bearing upon the rule as to reasonable doubt in criminal cases. Defendant took proper exception to the refusal of the court to give the instruction requested. Judgment and order reversed, and cause remanded for a new trial.

We concur: SEARLS, C. J.; THORNTON, J.; SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.

76 Cal. 401

MAGUIRE v. DE FREMERY *et al.* (No. 9,960.)

(Supreme Court of California. June 6, 1888.)

HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE—WHAT IS—EVIDENCE.

A deed conveying land to a single woman sufficiently shows the land to be her separate estate, though followed after her marriage by a second deed from the same grantor to her in her married name, and upon an expressed money consideration.

Repartment 2. Appeal from superior court, Alameda county; A. M. CRANE, Judge.

Action by John Maguire against W. C. B. De Fremery, executor of Rose Maguire, deceased, and Peter Maguire, to quiet title. Judgment for defendants, and plaintiff appeals.

P. J. Van Loeben Sels, (*James M. Haven*, of counsel,) for appellant. *Charles F. Hanlon*, for respondents.

¹ A reasonable doubt is one for which a sensible man can give a good reason, based on the evidence or want of evidence. It is such a doubt as a sensible man would act upon, or decline to act upon, in his own concerns. *U. S. v. Jones*, 31 Fed. Rep. 718. The guilt of an accused is proven beyond a reasonable doubt when, upon the entire comparison and consideration of all the evidence, the minds of the jurors are in that condition that they can say from the evidence they have and feel an abiding conviction to a moral certainty of the truth of the charge. A reasonable doubt does not consist of possible or conjectural doubts not growing out of the evidence, but is one which, when considering the evidence alone, leads the juror to hesitate, and upon which he would refuse to act in the important concerns of life. It is error to charge the jury that it is a doubt for the having of which the juror can give a reason derived from the testimony. *Carr v. State*, (Neb.) 37 N. W. Rep. 630. Respecting "reasonable doubt" in criminal cases, see *Knarr's Appeal*, (Pa.) 9 Atl. Rep. 878; *People v. Lee Sare Bo*, (Cal.) 14 Pac. Rep. 310; *McCullough v. State*, (Tex.) 5 S. W. Rep. 175; *White v. State*, (Tex.) 3 S. W. Rep. 710, and note; *U. S. v. Jackson*, 29 Fed. Rep. 503, and note; *People v. Kernaghan*, (Cal.) 14 Pac. Rep. 566; *Cowan v. State*, (Neb.) 35 N. W. Rep. 405; *State v. Robinson*, (S. C.) 4 S. E. Rep. 570; *Kidd v. State*, (Ala.) 3 South. Rep. 442; *State v. Maher*, (Iowa,) 37 N. W. Rep. 2; *People v. Cox*, (Mich.) 38 N. W. Rep. 235; *Lang v. State*, (Ala.) 4 South. Rep. 193; *Ochs v. People*, (Ill.) 16 N. E. Rep. 662; *U. S. v. King*, 34 Fed. Rep. 302.

SHARPSTEIN, J. Appeal from an order granting a new trial. Action by surviving husband of defendant's testatrix against him and her sole surviving child to quiet the alleged title of plaintiff to a certain lot of land in the city of Oakland. Judgment and decree in favor of defendants. The plaintiff moved for a new trial on the grounds—*First*, insufficiency of the evidence to justify the judgment, decree, and findings, and that it is against law; *second*, errors in law occurring at the trial, and excepted to by plaintiff. The motion was made upon a statement of the case, a bill of exceptions, and the minutes of the court. The record before us contains a statement on motion for new trial. There is no copy of a bill of exceptions, or of the minutes of the court. The particulars in which the evidence was insufficient to justify the judgment and findings is specified as follows: "*First*. The evidence shows that the property was conveyed to Mrs. Maguire, during coverture, for money consideration, which raised the presumption that it was common property; and no evidence whatsoever was introduced to show that any of the moneys paid for said property was not the common property of the parties to the marriage. *Second*. No evidence was offered to show that the property was acquired by said Rose Barker as her separate property, or that it was acquired by any money other than common money. *Third*. The evidence shows that the estate was common property. Errors in law occurring at the trial, excepted to by the plaintiff. The court erred in holding that the property was not the common property of Maguire and wife." The error of law specified is that "the court erred in holding that the property was not the common property of Maguire and wife." The evidence contained in the statement is as follows: "Plaintiff took the stand and testified: 'I married the mother of the defendant, Peter Maguire, on the 21st of September, 1868, in Oakland. Her maiden name was Rose Barker. Defendant, Peter Maguire, is my only child, and is the issue of said marriage.' Plaintiff introduced in evidence a deed in writing of the premises in suit, dated the 10th of November, 1869, from James De Fremery to Rose Maguire, wife of [plaintiff] John Maguire, whereby said James De Fremery, in consideration of the sum of five dollars, (\$5,) gold coin, to James De Fremery in hand then paid by the said Rose Maguire, granted, bargained, sold, remised, conveyed, and quitclaimed to her, said Rose Maguire, the premises in suit, and which deed was recorded at the request of A. G. Lawrie, November 15, 1869, at 8:32 A. M., in Liber 48 of Deeds, pp. 313 and 314, in Alameda county recorder's office. Plaintiff rests. Defendant offers in evidence a deed from the same James De Fremery to the same woman, Rose Barker, dated 19th September, 1868, of the premises in suit, whereby said James De Fremery, for and in consideration of the sum of \$500, gold coin of the United States, to him in hand then paid by said Rose Barker, granted, bargained, sold, conveyed, and confirmed to her, said Rose Barker, the premises in suit, and which deed was recorded at the request of A. G. Lawrie, November 15, 1869, at 8:30 A. M., in Liber 48 of Deeds, pp. 310, 311, in same recorder's office." The evidence shows beyond a doubt that the lot in controversy was the separate property of Rose Maguire at the time of her death. The conveyance of De Fremery to her before her marriage with the plaintiff is conclusive upon that point. The subsequent conveyance to her by the same grantor did not affect the title conveyed in the former deed. It certainly did not change the character of the property from separate to community property. Being unable to discover any sufficient ground for granting a new trial, the order granting it must be reversed. Order reversed.

We concur: MCFARLAND, J.; THORNTON, J.

76 Cal. 424

HOLLAND v. WILSON. (No. 12,078.)

(Supreme Court of California. June 7, 1888.)

1. MECHANICS' LIENS—FILING CLAIM—SPECIFICATIONS REFERRED TO IN CONTRACT.

Under a contract to erect a building "conformable to the drawings and specifications made," the drawings and specifications are a part of the contract, and should be filed under Code Civil Proc. Cal. § 1183, regarding mechanics' liens, providing that "all such contracts shall be * * * filed in the office of the county recorder."

2. PLEADING—ANSWER—SUFFICIENCY OF AVERMENTS.

In an action for work and materials furnished for the erection of a building, where defendant sets up a special contract for its erection according to certain plans and specifications, an averment in the answer as to filing the contract in the recorder's office, that "the said agreement was filed in the office of the county recorder," as required by Code Civil Proc. Cal. § 1183, is not an averment that the plans and specifications were filed.

In bank. Appeal from superior court, San Diego county; JOHN D. WORKS, Judge.

This was an action by J. C. Holland against Warren Wilson on the common counts for work and materials furnished by the plaintiff to the defendant. The defendant, in the third paragraph of his answer, set forth a special contract, made a part of the answer, and alleged non-performance thereof by plaintiff, to defendant's damage. The special contract provided, among other things, that the plaintiff should erect the building "conformable to the drawings and specifications made by C. E. Sanger, and signed by the parties, within the time aforesaid, in a good, workman-like, and substantial manner, to the satisfaction and under the direction of the said C. E. Sanger, architect, * * * and also shall and will find and provide such good, proper, and sufficient materials, of all kinds whatsoever, as shall be proper and sufficient for completing and finishing all the said brick-laying and plastering, and other works of said building mentioned in the brick-layers' specifications." Code Civil Proc. Cal. § 1183, regarding the liens of mechanics and others upon real property, provides, as to contracts between the owner of the land and his contractor, that "all such contracts shall be in writing when the amount agreed to be paid thereunder exceeds one thousand dollars, and shall be subscribed by the parties thereto, and shall, before the work is commenced, be filed in the office of the county recorder of the county, or city and county, where the property is situated, who shall receive one dollar for such filing; otherwise they shall be wholly void, and no recovery shall be had thereon by either party thereto; and in such case the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof." The answer of defendant regarding the filing alleged "that before the work therein mentioned was commenced, to-wit, on or about the 5th day of March, A. D. 1886, the said agreement was filed in the office of the county recorder of San Diego county, state of California, in the county where the said property is situated." The plaintiff demurred to the third paragraph, and the demurrer was sustained. Trial was had with jury waived, and judgment was entered for the plaintiff, from which the defendant appeals.

M. A. Luce, for appellant. Collier & Collier, for respondent.

THORNTON, J. We think the court below ruled correctly in sustaining the demurrer to the portion of the answer numbered 3. The "plans and specifications" referred to in the agreement were a part of the contract, and should have been filed in the recorder's office, under section 1183, Code Civil Proc.

The averment as to filing is insufficient, in failing to show that the plans and specifications were filed. Judgment affirmed.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; McFARLAND, J.; McKINSTRY, J.; PATERSON, J.

76 Cal. 436

PEOPLE *ex rel.* DANIELS v. HENSHAW. (No. 11,724.)

(Supreme Court of California. June 7, 1888.)

1. STATUTES—REPEAL—BY IMPLICATION.

St. Cal. 1865-66, p. 193, (act March 10, 1866,) established a police court in the city of Oakland, and provided for the election of a police judge, with jurisdiction of certain offenses, mainly petty, committed in the city, violation of ordinances, etc., such as was possessed by justices. St. 1885, p. 213, (act March 18, 1885,) vested the judicial power of cities having 30,000, and less than 100,000, inhabitants (Oakland being such city) in a police court to be held by the city justices, or by one of them to be designated by the mayor, to which it gave exclusive jurisdiction of certain offenses, violation of ordinances, etc., in almost precisely the language of the former act, providing for fees, seal, appeals, records, etc., following in most respects the framework of the former act, and concluded by providing that the act should take effect at the expiration of the terms of office of the police judges of said cities, or when a vacancy should occur therein. *Held*, that the latter act was intended to embrace the city of Oakland in its provisions, and was an implied repeal of the former act. McKINSTRY, J., dissenting.

2. CONSTITUTIONAL LAW—STATUTES—UNIFORMITY OF OPERATION.

Said act of 1885 does not, by reason of its provision for taking effect at the expiration of the terms of such judges, conflict with Const. Cal. art. 1, § 11, providing that all laws of a general nature shall have a uniform operation.

3. SAME—LOCAL LAWS—WHAT ARE.

Nor is said act in violation of Const. Cal. art. 4, § 25, which provides that the legislature shall not pass local or special laws in any case where a general law can be made applicable.¹ McKINSTRY, J., dissenting.

4. SAME—TITLE OF LAW—UNITY OF SUBJECT.

The title of said act of 1885, "An act to provide for police courts in cities having 30,000, and under 100,000, inhabitants, and to provide for officers thereof," is sufficiently comprehensive to designate the matters stated in the act, under Const. Cal. art. 4, § 24, which provides that no act shall contain more than one subject, which shall be expressed in its title.

In bank. Appeal from superior county, Alameda county; W. E. GREENE, Judge.

Action of *quo warranto*, brought at the relation of S. F. Daniels against F. W. Henshaw, to try the right of defendant to the office of judge of the police court of the city of Oakland. Judgment for plaintiff, and defendant appealed. Const. Cal. art. 4, § 25, provides that the legislature shall not pass any local or special law where a general law can be made applicable. Article 4, § 24, provides that no act shall contain more than one subject, which shall be expressed in its title.

Jas. A. Johnson, (Geo. E. Whitney, Henry Vrooman, and Moore & Reed, of counsel,) for appellant. Geo. A. Johnson, Atty. Gen., J. C. Martin, John Yule, and Fox & Kellogg, for the People.

SEARLS, C. J. This action was brought against the defendant, F. W. Henshaw, for usurpation of an office, as provided by Code Civil Proc. §§

¹The classification of cities into classes on the basis of population, and the passage of laws applicable thereto, are not void as local or special legislation. *State v. Graham*, (Neb.) 19 N. W. Rep. 470; *State v. Hunter*, (Kan.) 17 Pac. Rep. 177. For a definition of a special act, see *City v. Gillett*, (Kan.) 4 Pac. Rep. 800. The fact that a law may be accepted in one county, and not in another, and in consequence of this a person might be punished in one county, and not in another, does not invalidate it. *State v. Pond*, (Mo.) 6 S. W. Rep. 469; *Marmet v. State*, (Ohio,) 12 N. E. Rep. 463. A law operating throughout a state upon all persons and localities of a class, or who are brought within the relations and circumstances provided for, is not objectionable as wanting uniformity of operation. *State v. Berka*, (Neb.) 30 N. W. Rep. 267.

803-810. The judgment in the court below was against defendant, who appeals. The case comes up on the judgment roll, containing the following agreed statement of facts: "It is hereby stipulated and agreed by and between the respective parties hereto, plaintiff and defendant, (1) that there was a municipal election held in the city of Oakland on the 8th day of March, 1886, at which relator, S. F. Daniels, received the highest number of votes cast for police judge of the city of Oakland, for the full term of two years next ensuing after such election, to succeed himself, he then being the duly elected, qualified, and acting incumbent of the office. (2) That within the time prescribed by law he took the oath of office, and duly qualified, as required by law. (3) That he is eligible, qualified, and competent to discharge and perform the duties of the office. (4) That he is of right entitled to have, hold, and enjoy the rights and emoluments of the office of police judge of the city of Oakland for the full term of two years from and after his said election, and that he should be let and put into possession of the said office, and should receive its emoluments, if such office now exists. (5) It is further stipulated and agreed that the only question involved in this proceeding is whether or not the office of police judge of the city of Oakland was abolished by an act of the legislature of the state of California, entitled: 'An act to provide for police courts in cities having thirty, and under one hundred thousand, inhabitants, and to provide for officers thereof,' approved March 18, 1885. It being further stipulated and agreed that if the act above named did abolish the office of police judge of the city of Oakland, as provided by an act of the legislature entitled 'An act so establish a police court in the city of Oakland, and define its jurisdiction, duties, and fees of courts and its officers,' approved March 10, 1866, and the supplementary and amendatory acts thereto, then the defendant is entitled to have and hold the said office, and exercise its functions; but that, if the said act did not abolish said office, then, and in that event, the relator, S. F. Daniels, should be let and put into possession of the said office, and have and receive its emoluments, and exercise the functions of said office."

As will be seen, the agreed statement of facts, by conceding the right of the relator, Daniels, to the office of police judge, if "such office now exists," and the right of respondent, Henshaw, to the office of judge of the police court, if there is no such office as police judge, eliminates from the problem all questions except one, viz.: Was the office of police judge of the city of Oakland abolished by an act of the legislature of the state of California, entitled "An act to provide for police courts in cities having thirty thousand, and under one hundred thousand, inhabitants, and to provide for officers thereof," approved March 18, 1885? St. 1885, p. 213. The city of Oakland was incorporated as a municipal corporation by an act of the legislature, approved March 25, 1854. St. 1854, p. 183. The charter provided for various officers, among them a mayor, upon whom, among other powers, was conferred jurisdiction of all violations of the city ordinances, and like jurisdiction as is conferred upon justices of the peace. On the 4th day of April, 1864, an act of the legislature was passed under which one justice of the peace was provided for in said city, with like powers within the city of Oakland as justices of the peace in the county of Alameda. St. 1863-64, p. 393. On the 10th day of March, 1866, an act of the legislature was approved, entitled "An act to establish a police court in the city of Oakland, and define its jurisdiction, duties, and fees of court and its officers." St. 1865-66, p. 193. This last statute provided for the election of a police judge in and for said city of Oakland, who should serve for two years. To the police court was given jurisdiction of certain public offenses committed in the city, such as petty larceny, assault and battery, breaches of the peace, riots, affrays, misdemeanors, etc.; all actions for the violation of city ordinances, both civil and criminal; and in certain civil actions in which the city was a party or interested,—his jurisdiction being limited in civil and criminal cases, as is that of justices of the peace. This law, with

certain amendments to it, not material to the present inquiry, entitles relator to the office of police judge, unless repealed by the act of 1885, specified in the agreed statement of facts.

The question presented naturally suggests a division under two heads: (1) Did the legislature seek, by the act of 1885, to repeal the act of 1866? (2) Had it the power to do so by the method pursued? The act itself must furnish the *data* for the solution of the first question. Section 1 of the act of 1885 is as follows: "The judicial power of every city having thirty thousand and under one hundred thousand inhabitants shall be vested in a police court, to be held therein by the city justices, or one of them, to be designated by the mayor, but either of said city justices may hold such court without such designation; and it is hereby made the duty of said city justices, in addition to the duties now required of them by law, to hold said police court." Sec. 2. "The police court shall have exclusive jurisdiction of the following public offenses committed in the city." Then follows a list of the offenses, among which are petty larceny, assault and battery breaches of the peace, riots, affrays, willful injury to property, and all misdemeanors punishable by fine or imprisonment, or by both; of proceedings respecting vagrants, etc.; following almost precisely the language of the act of 1866. Section 3 gives exclusive jurisdiction for violation of ordinances, and for the collection of any license provided by said ordinances, as was provided in section 4 of the act of 1866. Section 6 provides for a clerk of the police court, to be appointed by the city council; prescribes his duties, etc. The subsequent sections provide for the payment of the fees of the court into the city treasury, for a seal for the court, for appeals to the superior court, authentication of records, etc.; following in most respects the framework of the law of 1866. The language of the first clause of the first section of the act of March 13, 1885, in terms comprehends every city having a population of 30,000 and under 100,000 inhabitants. The second and third sections give exclusive jurisdiction to the court therein provided for, in the very cases previously confided to the former court. This power is incompatible with that exercised by the former court. Both cannot exist together. If the latter has exclusive jurisdiction, the former cannot exist and transact business as a court. The last section of the act of 1885 shows, as we think, the intention of the law-making power. It is as follows: "This act to go into effect upon the expiration of the term of office of the present police judges of said cities, or when a vacancy occurs therein." Evidently the object of this last section was to leave the police judges in office until the expiration of their terms, or until a vacancy should occur in the office, and then to succeed them by the new courts created by the statute. We peruse the statute in vain for evidence of any intention to limit its application to a portion only of the corporations included within its general terms. We therefore conclude the intention of the legislature to have been to provide for police courts and judges thereof in all the cities of the state having 30,000 and less than 100,000 inhabitants. The law does not favor the repeal of statutes by implication, and will, in all proper cases, in the absence of an express clause repealing a former act, so construe the new law that both may stand; but where, as in the present case, the latter statute is repugnant to the former, and both cannot stand together, the latter will repeal the former. It was said in *City and County of Sacramento v. Bird*, 15 Cal. 295: "Every statute must be considered according to what appears to have been the intention of the legislature, and even though the statutes relating to the same subject be not in terms repugnant or inconsistent, if the latter statute was clearly intended to prescribe the only rule which should govern in the case provided for, it will be construed as repealing the original act." See, also, *State v. Conkling*, 19 Cal. 512; *Norris v. Crocker*, 13 How. 429; Sedg. St. & Const. Law, 124; *Fraser v. Alexander*, 16 Pac. Rep. 757. We think the intention of the legislature to frame a general law, the frame-work of which should in-

clude the class of cities in question, the repugnancy of such law to the former statute, and the intention to repeal the former statute, are all apparent upon the face of the act of March 18, 1885.

The more difficult question remains: Had the legislature power to pass the act of March 18, 1885, in the form which it assumed, and thereby repeal the former law? It is contended by counsel for relator that the legislature had no such power; that, by the method adopted in the act of 1885, the legislature had no power, either directly or by implication, to alter, amend, or repeal the whole or any part of the act of 1866, for the reasons (1) the act of 1885 is in conflict with section 11 of article 1 of the constitution, in that by its own terms it must take effect in different cities at different times; that is to say, when the term of the police judge expires, or when there shall be a vacancy in his office. Section 11 of article 1 of the constitution provides that "all laws of a general nature shall have a uniform operation." In order to constitute the uniformity of operation specified in the constitution, it is not necessary that the general law must operate alike upon all the subjects or persons to which it applies, independent of all other considerations, but that it shall operate uniformly upon all persons standing in the same category, and upon rights and things in the same relation. The law which punishes the different grades of crime differently, each according to its grade, is not lacking in uniformity of operation because it metes out one punishment to the burglar, and another to the murderer, or because it fails to punish the innocent. A law which required railway engineers to give notice by blowing a steam-whistle or ringing a bell upon approaching a road or street crossing would not be lacking in uniformity of operation because a like warning was not required of footmen or drivers of ox-teams. To similar facts under like circumstances, to persons similarly situated, the law must apply uniformly. The law must be as general as the subject to which it relates, and its application must be uniform as to all persons and things embraced within it; or, if the subject of the law is divided into classes, the provisions applicable to each class must apply to all matters or persons included in such class. *Smith v. Judge*, 17 Cal. 554. It must not grant to any citizen or class of citizens privileges which, upon the same terms, and under like circumstances, shall not equally belong to all citizens. *Brooks v. Hyde*, 37 Cal. 366; *Ex parte Smith*, 38 Cal. 710. In this last case it was said in substance that it was not intended by the provision under consideration to prevent legislation which is local in its operation, or special in its effect, or that all differences founded upon class or sex should be ignored.

It is mainly urged under this head that the law does not have a uniform operation, in that by its own terms it must take effect in different cities at different times; that is to say, in each city to which it applies at the expiration of the term of the then incumbent in the office of police judge in such city, etc. It is argued that, as the terms of the police judges must expire, or vacancies occur, at different periods of time, and as the law only takes effect when the term expires, or the vacancy occurs, there can be no uniformity as to time, and hence no uniformity of operation in the law. This argument involves the consideration of what is meant by the term "uniform operation," as used in the constitution. Does it involve, as an essential, identity of time, so as to make it necessary that it take effect at the same time upon all subjects to be governed by it? In an extreme sense this question must be answered in the negative. Nearly all general laws, however uniform in their operation, apply to—or may apply to—and affect persons or property, or both, not *in esse* at the date of their passage. This certainly cannot be urged as an argument against uniformity. If the law operates equally upon all the objects embraced within it when they come within the circle or scope of its authority, the uniformity of operation contemplated by the constitution is attained. A general law to fill vacancies in office cannot be void for want of uniformity of opera-

tion, because such vacancies must occur at different periods. If it meets every contingency when it arises, and treats all the contingencies of like character in like manner, it is uniform in its operation. We do not think identity as to the time of operation essential, except where it is coupled with identity of facts or circumstances. Under the same circumstances, existing at the same period of time, the law must apply equally at the same time, or uniformity of operation is not attained. Beyond that, identity as to time of application is not necessary.

It would seem the last objection we have been considering is more properly referable to another head suggested by counsel for relator, viz.: Is it local and special legislation? In support of the affirmative of this proposition we are referred to the case of *Miller v. Kister*, 68 Cal. 145, 8 Pac. Rep. 813. In that case the court held that section 4 of the act of March 18, 1885, amending the act of March 14, 1883, (County Government Act,) was local or special legislation, and unconstitutional. The grounds of the decision, so far as important here, were: (1) That the amendment in question was a general law; (2) that, as a general law, its operation was restricted, so that as to certain salaries it did not apply until the expiration of the terms of the incumbents then in office, except as to the officers of counties coming under three classes, and as to them it took effect at a date named in the law. The court held, under these circumstances, that, while the legislature could suspend the operation of the general laws of the state, yet that, when it did so, the suspension must be general, and that it could not be made in individual cases, or for particular localities; citing *Cooley*, Const. Law, 391; *Railroad Co. v. Baldwin*, 57 Cal. 165; *French v. Teschmaker*, 24 Cal. 544; and holding the law in violation of subdivision 29, art. 4, Const., and as having the effect of destroying the uniformity of the operation of the law. The distinction attempted to be made by the statute under consideration in that case is not found here. It dealt with forty-eight classes of officers, and was to take effect as to all of them except three classes, upon the expiration of the terms of office of the incumbents. It was a general law, applying alike to all the classes, but took effect at different times upon different classes. No such distinction is made by the law under consideration here. The statute we are reviewing operates alike upon all the persons to whom it applies, and it applies equally to all persons in the same category. Under the authority given by our constitution, we think it scarcely necessary to discuss the power of the legislature to classify municipal corporations according to population. The manner of their classification is a subject for legislative control, and the courts may not interfere with the discretion vested in a co-ordinate branch of the government. The manifest object of classifying municipal corporations according to population, and in preventing their creation by special laws, as provided by section 6 of article 11 of our constitution, was to avoid the necessity of special legislation. That cities containing a large population require different legislation from those composed of a few hundred inhabitants is evident. To so classify them that general laws applicable to these separate classes will meet the necessities of the case was a wise provision; and a law which applies to one or more, but not to all, of these classes, is not, for that reason, special legislation. The case of *Earle v. San Francisco*, 55 Cal. 488, relating to salaries of public school teachers, was held special legislation and void, because it selected from the general class of public school teachers of the state those within certain cities and counties, and regulated their salaries in a manner different from that of others without such localities. To fix the salaries in a class of towns, and leave the balance to be regulated by the local authorities, was said to be special legislation. We are of opinion the act of 1885 is a general law. The decision of this court in *Thomason v. Ashworth*, 14 Pac. Rep. 615, renders it unnecessary for us to dwell upon the question of the right of the legislature to pass general laws affecting municipal corporations without

reference to whether such corporations were formed before or after the constitution of 1879.

The title of the law, "An act to provide for police courts in cities having thirty thousand and under one hundred thousand inhabitants, and to provide for officers thereof," is explicit and sufficiently comprehensive to designate the matters stated in the act.

Some of the questions discussed by counsel in the briefs on file are eliminated from the record by the agreed statement of facts, and need not be mentioned; others are not of controlling importance, and we do not pause to notice them beyond saying our opinion of them does not militate against the general conclusion that the office of police judge of the city of Oakland was abolished by the act of March 18, 1885, and, as a consequence, that, under the agreed statement of facts, the defendant, F. W. Henshaw, is entitled to have and hold the office of judge of the police court of the city of Oakland, and to exercise the functions of said office.

The judgment appealed from is reversed, and the court below directed to enter judgment in favor of defendant.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

THORNTON, J., (*concurring*.) In the case of *Ex parte Henshaw*, on *habeas corpus*, 15 Pac. Rep. 110, I expressed my opinion on the questions involved in this case. That opinion is in harmony with that of the chief justice herein. I have seen no reason to change my views on the questions involved herein since the opinion was pronounced in *Ex parte Henshaw*, and concur in the foregoing opinion of the chief justice.

MCKINSTRY, J., (*dissenting*.) The question presented is. Were the act "to establish a police court in the city of Oakland, and define its jurisdiction, duties, and fees of court and its officers," approved March 10, 1866, and the acts supplementary thereto and amendatory thereof, repealed by the act entitled "An act to provide for police courts in cities having thirty and under one hundred thousand inhabitants, and to provide for officers thereof," approved March 18, 1885? The act of March 10, 1866, as supplemented and amended, was part of the charter of the city of Oakland prior to the adoption of the present constitution. Upon that subject I fully concur with the views of Hon. W. T. WALLACE, judge of the superior court of San Francisco, (late chief justice of the supreme court,) as expressed in his recent decision in *Ex parte Casselli*. That learned judge said. "It" (the act of 1866) "provided for the election of a police judge 'at the charter election of 1867,' and that in the mean time the office should be filled by an incumbent to be elected by the 'city council of Oakland.' The police court thus established, and its incumbency thus provided for, had a jurisdiction, local and criminal, coterminous with the boundaries of the city, embracing certain offenses when committed therein. These were all cases of petit larceny, * * * and 'all proceedings for violation of any ordinance of said city,' etc. It was vested besides with a civil jurisdiction, also local to the city,—actions for the collection of taxes and assessments 'levied in said city for city purposes;' or for the erection or improvement of school-houses, and of public buildings; laying out, opening, and improving streets, sidewalks, lanes, alleys, etc.; the purchase or improvement of public grounds, etc. In short, without further reciting the provisions of the act, it is seen to have been in its entire scope distinctly municipal in character, spending its whole force upon the government, civil and criminal, of the city of Oakland, and the regulation of its internal municipal affairs." Again: "Had its title been 'An act to amend the charter of the city of Oakland,' instead of 'An act to establish a police court in the city of Oakland,' there can be little doubt that it would have equally well com-

ported with the substance and body of the act. * * * But the distinctive character of a legislative act is to be determined by the substance of its provisions as found in the body of the statute, rather than by reference to the phraseology of the title prefixed. Especially is this so in considering the legislation occurring under the former constitution of the state. Under the legislative practice then prevailing, the title was rarely a matter of legislative debate or scrutiny," etc. *Adams v. City and County of San Francisco*, 50 Cal. 118. And, after further argument and illustration, the learned judge concludes that the act of March 10, 1866, was incorporated into, and became part of, the municipal charter of the city of Oakland. In the same decision, Judge WALLACE—conceding what, in his view, it was not necessary to dispute, that by the sixth section of article 11 of the constitution the charter of the city of Oakland was subject and controlled by general laws, even such as might change the constitution of all municipal organizations existing when the state constitution was adopted—proceeds to prove that the act of March 18, 1885, entitled "An act to provide for police courts in cities having 30,000 and under 100,000 inhabitants, and to provide for officers thereof," was not a general law, within the meaning of the constitution. "Cities and counties" and "towns" are omitted both from the title and body of the act. "Cities with population between thirty thousand and one hundred thousand inhabitants are the only municipalities selected for the operation of the act; 'cities and counties' with population between thirty thousand and one hundred thousand are omitted altogether; so are 'towns,' regardless of population." *Ex parte Casselli*.

For myself, I am of opinion that the "general laws" mentioned in the last clause of section 6 of article 11 of the constitution do not include laws which change the charters of cities organized before the adoption of the constitution. As said by Mr. Justice SHARPSTEIN, in *Stande v. Commissioners*, 61 Cal. 325: "It is clear to my mind that, when the constitution declares that cities organized before its adoption shall be subject to and controlled by general laws, it means as to matters not specially provided for in charters which existed at the date of the adoption of the constitution; otherwise they would be subject to and controlled by general laws passed for the incorporation of cities and towns, without having first voted to organize under such laws." The sixth section of article 11 of the constitution reads: "Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization, and classification, in proportion to population, of cities and towns, which laws may be altered, amended, or repealed. Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith; and cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws." The city of Oakland, in my opinion, is not subject to nor controlled by the act of March 18, 1885, even if that act can be treated as in any sense a general law. Assuming that the framers of the constitution did not intend to insert contradictory provisions in the same section,—that, after having declared that cities or towns organized before the adoption of the constitution should not be brought within the operation of the general laws providing for the incorporation, organization, and classification, in proportion to population of cities and towns, without the consent of a majority of their electors, they did not intend immediately afterwards to declare that cities and towns existing before the adoption of the constitution should be subject to and controlled by such general laws,—section 6 of article 11 is not difficult of interpretation: *First*. Corporations for municipal purposes may not be created by special laws. *Second*. The legislature must provide by general laws for the incorporation, organization, and classification in

proportion to population of cities and towns, which (general laws) may be altered, amended, or repealed. (The general laws under which, after the adoption of the constitution, cities and towns are to be incorporated and organized, must provide for the classification according to population of the cities and towns incorporated and organized under them.) *Third.* A city or town, organized while the former constitution was in force, may become organized under the general laws passed by direction of the present constitution for the incorporation, etc., of cities and towns, whenever a majority of its voters shall so determine. (And it cannot be made subject to such general laws, or any part of them, without the consent of a majority of its electors.) *Fourth.* A city or town, organized under the general laws for the incorporation of cities and towns, cannot be made subject to any statute changing its organization, except the statute is amendatory of the general laws under which it was incorporated, and is a statute operative, at least, upon all of its class, as cities and towns are classified under such general laws. *Fifth.* The legislature has complied with the mandate of the constitution by the enactment of the law of March 2, 1883, "to provide for the classification of municipal corporations," and the law of March 13, 1883, "to provide for the organization, incorporation, and government of municipal corporations." St. 1883, pp. 24, 93. The first of these acts provides. "All municipal corporations within this state are hereby classified as follows: Those having a population of more than one hundred thousand inhabitants shall constitute the first class; those having a population of more than thirty thousand, and not exceeding one hundred thousand inhabitants, shall constitute the second class," etc. The act of March 18, 1885, which is claimed to be operative in the city of Oakland, attempts to create a single class for a particular purpose,—a different class from any provided for in the general law, passed in obedience to the behest of the constitution for the classification of municipal corporations. It attempts to provide for a police court in every city "having 30,000 and under 100,000 inhabitants." If the act of March 18, 1885, is a general law, within the meaning of section 6, art. 11, of the constitution, it applies to all cities, whether organized before the adoption of the constitution or afterwards, under the general law of 1883, having a population of 30,000 and less than 100,000. It applies to all of that supposed class, (at least,) or it is not a general law. But will any one contend that, after general laws have been passed for the incorporation, organization, and classification of cities, in proportion to population, the legislature may create, not merely a new classification of all cities and towns for a special municipal purpose, but a single class, differing from any included in the general classification, for a special municipal purpose? *Sixth.* If, however, the act of March 18, 1885, can be treated as operative with respect to cities of the second class, formed under the general law of 1883, it constitutes an amendment of the general law providing for the incorporation, etc., of cities. An amendment is incorporated into, and becomes a part of, the statute amended. It seems very plain that, inasmuch as the city of Oakland, created before the adoption of the constitution, cannot be forced to organize under, or be subject to, the general laws for the incorporation, organization, and classification of cities and towns, without the consent of a majority of its electors, it cannot be made subject to a part of such general laws for the incorporation of cities and towns, without the consent of its voters. If it can, the city of Oakland may, without the consent of a majority of its voters, by means of a series of amendments of the general laws providing for the incorporation, etc., of cities, be transferred entirely under the *regime* of such general laws.

It being morally demonstrable that the "general laws" to which cities and towns organized before and after the adoption of the constitution are subject, are not laws which would change the provisions of charters existing prior to the adoption of the constitution, full force and effect may be given to the last

clause of section 6, art. 11, by holding it to refer to laws general as opposed to local laws, or such as are limited in their operation to certain places, as to all or a particular class of cities and towns. Upon this matter I have nothing to add to what I had occasion to say in *Thomason v. Ashworth*, 14 Pac. Rep. 623, 624. A city is a collective body of inhabitants, incorporated, etc. The citizens are incorporated, the charter is their charter. They are subject to general laws, in common with all the citizens of the state. But a law operative only in one, two, or all cities is not a general law, within the meaning of section 6, art. 11, but is a local law. I dissented from the opinion of the court in *Thomason v. Ashworth*, and I should not deem it necessary to dissent from the decision of a majority of the justices herein were it not that, in my view, there is a clear distinction between that case and this. Previous to the decision in that case, this court had held that a certain provision of the constitution had "struck dead" the street law of 1872,—part of the charter of San Francisco. If, as had been held by a majority of this court, the street law of 1872—part of the charter of San Francisco—was struck dead on the 1st day of January, 1880, then there were no provisions in the charter of San Francisco relating to or providing for street work when the "street law" of 1885 was passed. St. 1885, p. 147. The street law of 1885, held valid in *Thomason v. Ashworth*, 14 Pac. Rep. 615, did not, therefore, interfere with or repeal any express provision of the statutes incorporating or organizing the city and county of San Francisco. But the case here is different. The act of March 10, 1886, to "establish a police court in the city of Oakland," was in full force and effect, as part of the charter of the city of Oakland, when the statute of March 18, 1885, "to provide for police courts in cities having 30,000," etc., was passed. If the last act became operative in Oakland, it altered, in a matter of most material concern, the city government there existing.

76 Cal. 457

RUDDLE v. GIVENS, Sheriff. (No. 12,541.)

(*Supreme Court of California.* June 7, 1888.)

FRAUDULENT CONVEYANCES—WHAT CONSTITUTES—CHANGE OF POSSESSION.

Plaintiff purchased certain horses, and a day or two after the purchase, in company with his vendor, went to a pasture, took possession of the horses, and removed them, but subsequently had them put back. Some time afterwards the vendor took the horses from such pasture to another party, and contracted for their pasturage, claiming to be the owner. In the absence of plaintiff, the vendor had sold some of the horses, and had sufficient control to have sold them all. *Held*, that under Civil Code Cal. § 3440, providing that a sale of such personal property, made by a person in possession, is conclusively presumed to be fraudulent against his creditors unless accompanied by immediate delivery, and followed by an actual and continued change of possession, such a sale was not valid as against the creditors of the vendor.

In bank. Appeal from superior court, Merced county; C. H. MARKS, Judge.

Action by Joseph A. Ruddle against John H. Givens, sheriff. Judgment for plaintiff; and defendant appealed. Civil Code Cal. § 3440, provides that "every transfer of personal property other than a thing in action, or a ship or cargo at sea or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or *respondentia*, is conclusively presumed, if made by a person having, at the time, the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or incumbrancers in good faith subsequent to the transfer."

Cal. Rep. 16-19 P.—44

Frank H. Farrar, for appellant. *R. H. Ward*, for appellee.

SEARLS, C. J. This is an action of claim and delivery, brought by plaintiff to recover possession or the value of two brown work horses, one bay work horse, one roan work horse, and four two-year-old colts, branded "X" on left hips; also, two yearling colts not branded. Plaintiff claims title to the property and right of possession under a bill of sale dated June 2, 1886, executed by one John K. Walling in favor of himself. This bill of sale, in addition to describing the horses in dispute here, also purported to convey title to other horses not in dispute. Plaintiff also claims right of possession by virtue of a delivery of such possession to him made one or two days after the bill of sale was executed. Defendant justifies, as sheriff of Merced county, under an execution levied by him upon the property in an action wherein A. Zirker and R. W. Hammatt, under the firm name of Zirker & Hammatt, were plaintiffs, against the said John K. Walling, defendant; and also denies right of possession in plaintiff, and sets up ownership, right of possession, and possession in the said John K. Walling. The case was tried by a jury. Plaintiff had a verdict upon which judgment was entered. The appeal is by defendant from the judgment, and from an order denying a new trial. The important question for consideration is as to the sufficiency of the evidence to support the verdict. There is very little conflict in the testimony. Taken in its most favorable aspect to plaintiff, it shows that on the 2d day of June, 1886, he received a bill of sale of the horses in dispute, and of others not in dispute, from John K. Walling, his brother-in-law. The horses, at the time of the sale, were at the pasture of a man by the name of Davis. A day or two after the sale, plaintiff and Walling went to Davis' pasture, where plaintiff took possession, and removed a part of the horses to George Barfield's and part to Schaffer's pasture. After the horses had been in Barfield's pasture for sometime, plaintiff told Davis to take them from Barfield's and to put them back in his pasture. Walling took the horses in dispute here, and put them into the pasture of a man named Asbury, where they remained until taken by defendant as sheriff, under a writ of attachment against the property of Walling, on the 9th day of June, 1887. E. Asbury was sworn for defendant, and testifies as follows: "The horses described in the complaint were placed on my ranch by John K. Walling. I don't remember the time they came, but have a memorandum. The pasturage was charged to John K. Walling, and he told me they were his horses. Walling and the plaintiff were present when the horses were brought to my place. Walling made the contract with me for the pasturage, and Ruddle had nothing to say about it." On cross-examination, he testified as follows: "Walling told me he brought the horses to put them in pasture, and he and I made a bargain, and he put the horses in. I don't know how many were taken out after that, nor how long they were away. I don't know who took them away, nor who returned them. Neither Walling nor Ruddle paid the pasturage, but it was paid by the defendant. I know the plaintiff, and have known him since he was a little boy. I met Walling and the plaintiff on the road. I might be mistaken about the plaintiff being with Walling at the time; it might have been some one else. I am not certain it was the plaintiff; it might not have been." Kahl, being duly sworn for the defendant, testified as follows: "I was at Mr. Asbury's place about October, 1886, when the horses in dispute in this action were brought there. Mr. Asbury and I met them on the road, and Mr. Walling asked if he could get the horses in the pasture. Asbury told him he could. I think it was the plaintiff that was with Walling at the time. I kept the pasture accounts, and charged the pasturage to Walling." Plaintiff denies that he was with Walling when he placed the horses with Asbury. He went to Idaho about October, 1886, and was absent some three or four months. During this time, Walling sold some of the horses, and, as plaintiff says, "had control enough of the

horses to have sold all of them while I was away." Plaintiff paid \$900 for all the horses purchased by him, the number of which does not appear. There are some other items of testimony bearing more or less remotely on the subject of possession, but nothing to change our view that the evidence failed to show such a continued change of possession of property as is contemplated by section 3440 of the Civil Code, and as required by said section to render a valid sale as against creditors of the vendor. That Walling was indebted to Zirker & Hammatt; that an action was brought, a writ of attachment issued in due form, and was placed in the hands of the defendant as sheriff, and by him regularly levied upon the property in dispute; that a judgment was taken, and the property levied upon and sold under an execution issued on said judgment,—are all admitted in the record. We are of opinion the verdict was not supported by the evidence, and the judgment and order appealed from are reversed, and a new trial ordered.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; THORNTON, .; PATERSON, J.; MCKINSTRY, J.

76 Cal. 454

ROUSSINET v. REBOUT. (No. 12,345.)
(Supreme Court of California. June 7, 1883.)

PLEADING—VARIANCE—IMMATERIAL ALLEGATIONS.

Where a complaint alleged that defendant leased land to plaintiff, to be used for cultivating flowers and plants, reserving the product of certain orange trees, with the right to care for and clean said trees; that the lease provided that the care of the trees must not cause damage to the tenant's plants; that defendant carelessly and negligently used a stream of water upon the trees, thereby washing certain destructive insects upon the plants, injuring and destroying them for sale: *held*, that plaintiff was entitled to recover for any injury to the plants caused by defendant in the care of the trees, either with or without negligence on his part, the allegation as to negligence being surplusage.

In bank. Appeal from superior court; Los Angeles county; H. K. S. O'MELVENY, Judge.

Action by Theophile Roussinet against F. Rebout. The complaint alleged that defendant leased a lot of land to plaintiff, to be used for cultivating flowers and plants, reserving the product of certain orange trees, with the right to care for and clean said trees; that the lease provided that the care of the trees must not cause damage to the tenant's plants; that defendant carelessly and negligently used a stream of water upon the trees, thereby washing certain destructive insects upon the plants, injuring and destroying them for sale. Nonsuit was granted, and plaintiff appealed.

M. V. Biscailus and *Shaw & Damron*, for appellant. *George J. Denis* and *Chapman & Hendrick*, for respondent.

SEARLS, C. J. Defendant was the owner of a lot of land in the city of Los Angeles, which he leased to the plaintiff. The following is a copy of the lease, as translated, the original being in the French language: "LOS ANGELES, 16th of July, 1885. (Contract made in duplicate.) I declare having rented to Mr. Theophile Roussinet 9,975 square feet on Vignes street. The conditions are that I must take care of the trees and clean them, and the orange crop belongs to me. The contract is good for two years, with a three-months privilege. The rent for the land is \$3, and for the house \$5, per month; and the water shall be paid by the landlord and the tenants equally; payable in advance from the 1st day of August, 1885. The care given to the orange trees must not cause any harm to the plants raised by the tenant. [Signed] F. REBOUT." The court below, after hearing the testimony of the plaintiff, upon motion of defendant, granted a judgment of nonsuit, from which plaintiff appeals, and brings up the evidence in a bill of exceptions.

The whole problem is confined within narrow limits. There were upon

the premises leased by defendant, say 15 orange trees, the care and product of which he retained. Plaintiff leased the land to be used and used it for the cultivation of flowers, shrubs, trees, and rare and ornamental plants. The lease made by defendant contained these clauses: "I [the defendant] must take care of the trees and clean them, and the orange crop belongs to me. * * * The care given to the orange trees must not cause any harm to the plants raised by the tenant." There was abundant evidence tending to show that defendant's orange trees were infested with the insect known as the "White Cottony Cushion Scale;" that defendant, for the purpose of freeing his trees therefrom, used a stream of water from a garden hose upon the trees, whereby the insects were washed from the trees upon the ground, and upon plaintiff's plants and flowers, the effect of which was to injure and destroy them, and render them unfit for market, etc. The court below, in granting the nonsuit, so far as we can judge from the record, proceeded upon the theory that defendant was charged in the complaint with having conducted the washing of his trees in a careless, negligent manner; and, as the evidence failed to show negligence on his part, there could be no recovery. It is true, the complaint charges the acts of washing the trees to have been negligently performed; but this was an immaterial averment. Defendant, having covenanted that "the care given to the orange trees must not cause any harm to the plants raised by the tenant," is liable, under the terms of his lease, if harm came to the plaintiff's plants from the care given the orange trees, either with or without negligence on his part. It is a case of the alleged violation of a contract, which violation resulted in injury to plaintiff; and, as there was testimony tending to sustain the material allegations of the complaint, the nonsuit was improperly granted. Judgment reversed, and a new trial ordered.

We concur: THORNTON, J.; SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.; MCKINSTRY, J.

(76 Cal. 400)

PEOPLE v. PEARSON. (No. 12,539.)

(*Supreme Court of California.* June 5, 1888.)

WRITS—PUBLICATION—VALIDITY.

A judgment rendered on a summons, by publication, where it appears that no affidavit was made, and no order of court directing a summons by publication, is void, and will be vacated.

in bank. Appeal from superior court, Fresno county. J. B. CAMPBELL, Judge.

Action by the people of the state of California to foreclose the interest of J. W. Pearson in certain lands. There was judgment by default. Defendant afterwards moved to vacate the judgment. Motion was denied, and defendant appealed.

Frederick S. Stratton and Bruce Gavatt, for appellant. *W. H. Creed and R. B. Terry*, for the People.

THORNTON, J. This action was brought to foreclose the interest of the defendant, as a delinquent purchaser from the state, in a certificate of purchase of lands in Fresno county. The judgment was by default, and was entered after an alleged constructive service of the summons by publication. The judgment was entered in favor of plaintiff on the 25th of October, 1876. Defendant moved to vacate the judgment on the ground that there had never been any affidavit made or order directing the service of summons by publication. The motion was denied, and defendant excepted. It appears from the bill of exceptions that no affidavit was ever made or any order of court directing service of summons by publication. The court, therefore, never acquired any jurisdiction of defendant, and the judgment rendered is erroneous and

void. This conclusion is sustained by *People v. Applegarth*, 64 Cal. 229, and *People v. Mullan*, 65 Cal. 396, 4 Pac. Rep. 348. The court erred in denying defendant's motion to vacate the judgment. The application for such vacation is a direct proceeding, (*People v. Mullan, supra*,) and was made in time, (*People v. Greene*, 16 Pac. Rep. 197.) The order is reversed, and cause remanded, with directions to vacate the judgment.

We concur: SEARLS, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; MCKINSTRY, J.

76 Cal. 460

PEOPLE v. HANSELMAN. (No. 20,380.)

(*Supreme Court of California.* June 7, 1888.)

1. LARCENY—INDICTMENT.

Under Pen. Code Cal. § 484, defining larceny to be the felonious taking away the "personal property of another," an indictment which does not allege the property taken to have been that of some person other than the defendant is fatally defective even after verdict.

2. SAME—EVIDENCE—CONSENT.

An officer, to detect the author of certain thefts, feigned a drunken slumber, with intent to allow any thief to rob him in order to make a case of larceny against him, having no suspicion that defendant would be the one. While in this condition, perfectly conscious and making no resistance, defendant took money from his person. *Held*, that the conduct of the officer did not constitute such consent as to take away a material element of the crime, and that defendant was guilty of larceny.

In bank. Appeal from superior court, Los Angeles county; WILLIAM A. CHENEY, Judge.

Pen. Code Cal. § 484, defines larceny to be the felonious taking away "the personal property of another."

Shaw & Damron, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

MCFARLAND, J. The defendant, who is appellant here, was convicted of the crime of grand larceny, averred to have been committed by taking three dollars from the person of F. O. Slianker. The motion in arrest of judgment should have been granted. There is no pretense of an averment in the information that the thing alleged to have been taken was the property of any person other than the appellant. The attorney general admits this omission to be a fatal defect "unless the Code had changed the rule." But the Code does not make any change which would justify a pleader in omitting from an indictment any essential element of the crime sought to be charged; and, under all definitions of larceny found in the books, the ownership of the property averred to have been stolen in some other person than the one charged with stealing it is an essential element of the crime. The Code of this state provides that it must be the property "of another;" and all the authorities are concurrent to the point that this essential part of the crime must be stated in the indictment. 2 Archb. Crim. Law, 357 *et seq.*; 2 Russ. Crimes, 107. To disregard this firmly-fixed and universal rule, in order to condone the faultiness of the information in this case, would be to commit an act of judicial usurpation. The case of *People v. Hicks*, 66 Cal. 103, 4 Pac. Rep. 1093, cited for respondents, is against them. In that case the court held that there was a sufficient averment that the property stolen belonged to the prosecuting witness; and the opinion went upon the theory that such an averment was necessary. For this reason, therefore, the judgment must be reversed.

But, as the case may possibly be tried again under another information or indictment, it is proper to notice the second point made by appellant. The appellant claimed that he was not present at the time of the alleged commission of the larceny, and introduced some evidence tending to prove an *alibi*. The jury, however, had a right to believe the testimony of the prosecuting wit-

ness, Slanker. But the appellant contends that Slanker's testimony, taken as true, does not make out a case of larceny, because it shows that the money was taken with his (Slanker's) consent. The statement of Slanker was substantially this: He was a constable in the town of Pomona, and, some crimes having been committed in the town, he, for the purpose of detecting the thieves, on the night of the alleged larceny, disguised himself, and feigned drunkenness. After staggering around the streets awhile, he lay down in an alley, and pretended to be in a drunken stupor. Shortly afterwards the appellant and another person came to him, and took from his person three dollars, which he had put in the pocket of his overalls. He was perfectly conscious at the time, and made no resistance, and intended that any thief who tried it should be allowed to take the three dollars, in order that a case of larceny might be made out against him. He had no previous suspicion, however, of the appellant, and was surprised at his participation in the act. And, under these circumstances, counsel for appellant contends that the thing done was not larceny, because the money was not taken against the consent of the prosecuting witness. It is, no doubt, true, as a general proposition, that larceny is not committed when the property is taken with the consent of its owner, but it is difficult, in some instances, to determine whether certain acts constitute, in law, such "consent;" and, under the authorities, we do not think that there is such consent where there is mere passive submission on the part of the owner of the goods taken, and no indication that he wishes them taken, and no knowledge by the taker that the owner wishes them taken, and no mutual understanding between the two, and no active measures of inducement employed for the purpose of leading into temptation, and no preconcert whatever between the thief and the owner. And some of the circumstances were present in all the cases cited by counsel for appellant. In the case of *Rex v. McDaniel*, *Fost. Cr. Cas.* 121, which was a case of robbery, Salmon, the person alleged to have been robbed, entered into a conspiracy with one Blee, by which Salmon was to be robbed by Blee and certain other persons whom Blee was to entice into the scheme, and the court held that the acts done in carrying out the conspiracy, which looked like robbery, were not robbery at all, because Salmon was an active participant in and had planned the whole affair; and Justice FOSTER, delivering the opinion of the court, in noticing the case of one Norden, makes a distinction between that case and the *McDonald Case* which may well be applied to the case at bar. He says: "I come now to the case which I promised at the beginning to consider, and distinguish from the present case. One Norden, having been informed that one of the early stage-coaches had been frequently robbed by a single highwayman, resolved to use his endeavors to apprehend the robber. For this purpose he put a little money and a pistol into his pocket, and attended the coach in a post-chaise till the highwayman came up to the company in the coach and to him, and, presenting a weapon, demanded their money. Norden gave him the little money he had about him, and then jumped out of the chaise with his pistol in his hand, and with the assistance of some others took the highwayman. The robber was indicted about a year ago in this court for a robbery on Norden, and convicted. And very properly, in my opinion, was he convicted. But that case differed widely from the present. In that case Norden set out with a laudable intention to use his endeavors for apprehending the highwayman in case he should that morning come to rob the coach, which at that time was totally uncertain; and it was equally uncertain whether he would come alone or not. In the case now under consideration, there was a most detestable conspiracy between Salmon and the rest of the prisoners that his property should be taken from him under the pretense and show of a robbery; and time, place, and every other circumstance were known to Salmon beforehand, and agreed to by him." In *U. S. v. Whittier*, 5 Dill. 35, cited by appellant, the defendant was tempted to send

obscene matter through the mails by a decoy letter sent to him for the express purpose of inducing him to commit the offense. In *Dodge v. Brittain*, Meigs, 84, the court merely holds that there would have been no larceny "if the master had directed the servant to deliver the property to the thief, instead of directing him to furnish facilities for his arriving at the place where it was kept." This case, indeed, is most strongly against the contention of appellant. Bishop, under the head of "Plans to Entrap," sums up the authorities on the subject as follows: "If a man suspects that an offense is to be committed, and, instead of taking precautions against it, sets a watch, and detects and arrests the offenders, he does not thereby consent to their conduct, or furnish them any excuse; and, in general terms, exposing property, or neglecting to watch it, under expectation that a thief will take it, or furnishing any other facilities or temptations to such or any other wrong-doer, is not a consent in law." 1 Bish. Crim. Law, § 262. From the authorities, and upon principle, we are of opinion that the conduct of the witness Slanker, as detailed by him in his testimony, did not amount to consent in law, and affords no reason why the act of appellant in taking the money (if he did take it in the manner as sworn to by Slanker) was not larceny. If there had been preconcert of action between Slanker and appellant, a different question would have been presented.

We think that the instructions of the court were, upon the whole, correct; but the record does not show any exceptions taken to them. At all events, if there shall be another trial the court can readily make its instructions comply with this opinion. Judgment and order appealed from reversed, and cause remanded.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; PATERSON, J.; MCKINSTRY, J.; THORNTON, J.

76 Cal. 472

STALLARD v. CUSHING *et ux.* (No. 11,314.)
(Supreme Court of California. June 9, 1888.)

1. WAYS—WHAT CONSTITUTES.

The owner of a city lot divided a portion of it into smaller lots, bounded at one end by a street, and leaving at the other an alley-way 10 feet wide, upon which all the lots abutted, and conveyed said lots to different persons, including in each deed the right of way over the alley, which was a *cul-de-sac* 87 feet long, and opening on a street. For about 20 years the alley was used by the owners of the lots and their employes, and persons visiting them. The alley was marked on the map of the city engineer, but not on the official map of the city. There being no other evidence of dedication to public use, and none of acceptance by the public, these facts constituted such alley a private way appurtenant to the lots, and not a public highway.

2. SAME—OBSTRUCTION—INJUNCTION.

The owner of a lot having a way appurtenant may, by a mandatory injunction, compel the removal of a stairway which obstructs such way; equity having jurisdiction on the principle of avoiding a multiplicity of suits.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; M. A. EDMONDS, Judge.

Action, by Joshua H. Stallard against Clinton Cushing and Jennie Cushing, to compel the abatement of a nuisance to a private way. Judgment for plaintiff, and defendants appealed. In addition to the facts stated in the opinion, it was proved that the lots abutting on the alley also fronted on Sutter street, and that the alley had been used for about 20 years by the owners thereof, and their employes and others, such as grocers, milkmen, peddlers, etc., having occasion to visit there. It further appeared that the map of the city engineer showed the alley, but that the official map did not. There was no other evidence tending to establish a dedication to public use, and none of acceptance by the public.

Wm. & Geo. Leviston, for appellants. Wm. F. Herrin, for respondent.

FOOTE, C. This action is to compel the removal of an obstruction, in the shape of a stairway, placed by the defendants in an alley through and over which the plaintiff has the right of way as an appurtenance to the lot upon which stands his dwelling-house. The plaintiff had judgment as prayed for, and from that, and an order denying a new trial, the defendants have appealed. The alley over which the right of way is alleged to exist in favor of the plaintiff is 10 feet wide, and is a *cul-de-sac*, running easterly 87 feet from Taylor street, near Sutter. The land on which the alley is laid out was originally a 50-vara lot belonging to a single individual. He sold the easterly 50 feet of this lot to a man named Hagerman, and divided the other part of it into six lots in such a way as that they all abutted on this alley. As these six lots were sold to different parties, the right of way over this alley was reserved to each of the purchasers in the several deeds of conveyance made thereto. Stalard, the plaintiff, by and through mesne conveyances from the original owner of all the lots, became the possessor of one of them so abutting on the alley, and the defendants also of another such lot. The plaintiff's lot is further down in the alley from Taylor street, where the alley debouches, than is that of the defendants, so that the stairway of the defendants very materially obstructs the ingress and egress of the plaintiff to and from his lot and Taylor street.

From the evidence it is very clear to us that the alley was never dedicated to the use of the public as a highway. There is an absence of all appearance of any intention so to dedicate it on the part of the man who first laid it out and opened it, and there does not appear to have been any acceptance of it as a street or public highway for the general public. To the contrary, it seems to have been intended for and used as a means of approach to the lots and houses there situate for the private use only of those few persons who might dwell there, and those who approached them to minister to their wants. Being a private way, to the unobstructed use of which the plaintiff was entitled, and which use was peculiarly his own, and that of the few persons only who dwelt on the lots which had formerly comprised the 50-vara lot, the injury which the plaintiff suffered was not one in any way common to the general public, and he was entitled to have it abated as a nuisance, as its existence violated his legal rights, which could only be maintained by an injunction ordering its discontinuance, or a resort to a multiplicity of suits for damages, which last alternative action, rather than the first, the law does not force him to take. *Wood, Nuis.* §§ 782, 783. There is no prejudicial error shown by the record, and the judgment and order should be affirmed.

We concur: **BELCHER, C. C.; HAYNE, C.**

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

PORTER et al. v. PACIFIC COAST RY. CO. (No. 12,484.)

(*Supreme Court of California. June 9, 1888.*)

1. EMINENT DOMAIN—COMPENSATION—CONSTITUTIONAL LAW.

Under Const. Cal. art. 1, § 14, providing that private property cannot be taken or damaged for public use save upon compensation first made, a railroad company is not entitled to right of way over a street, save upon compensation to the owner of the fee, allowed by a jury.

2. HIGHWAYS—TITLE TO FEE—OBSTRUCTION—EJECTMENT.

The owner of the fee of land subject to an easement for a public highway may maintain ejectment for it against an intruder. Following *Weyl v. Railroad Co.*, 10 Pac. Rep. 510.

In bank. Appeal from superior court, San Luis Obispo county; **D. S. GREGORY**, Judge.

Ejectment by Uriah Porter and others against the Pacific Coast Railway Company. It appeared that defendant had constructed its line of road along a public highway running through the land in question. Judgment for plaintiffs. Defendant appeals.

R. B. Treat, for appellant. *W. H. Spencer*, for respondents.

SHARPSTEIN, J. There is no material difference between this case and *Weyl v. Railroad Co.*, 69 Cal. 202, 10 Pac. Rep. 510, and on the authority of that case the judgment herein is affirmed.

We concur: **SEARLS, C. J.**; **McFARLAND, J.**; **PATERSON, J.**; **McKINSTRY, J.**; **THORNTON, J.**

76 Cal. 469

BARR et al. v. O'DONNELL et al. (No. 11,309.)

(*Supreme Court of California.* June 9, 1888.)

1. STATUTE OF FRAUDS—AGREEMENTS RELATING TO LAND—PLEADING.

In an action to enforce a trust in land, where it appears on the face of the complaint that the alleged trust rests on a parol agreement to reconvey, the defense of the statute of frauds may be taken advantage of on demurrer.

2. SAME—EXPRESS TRUST.

Plaintiff and defendant purchased a tract of land as equal owners, holding as tenants in common. Thereafter they divided the same, each conveying to the other by deed absolute; plaintiff receiving less land than defendant. This partition was not intended as final, but it was agreed by parol that defendant should hold in trust to convey to plaintiff sufficient of the land to make their shares equal. *Held*, that under Civil Code Cal. § 852, and Code Civil Proc. § 1971, providing that an express trust in real property can be created only by an instrument in writing, subscribed by the party creating it, such agreement was insufficient to charge the land conveyed to defendant with an express trust in plaintiff's favor.

3. TRUSTS—RESULTING.

In such case, under Civil Code Cal. § 2217, declaring that "an involuntary trust is one which is created by operation of law;" and section 2224, providing that "one who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained for the benefit of the person who would otherwise have had it,"—no trust arises in favor of plaintiff by operation of law, defendant having gained possession of the land by none of the wrongful means enumerated.

Commissioners' decision. Department 1. Appeal from superior court, Marin county; **J. G. MAGUIRE**, Judge.

Action by William Barr and others against Connell O'Donnell and others to establish a trust in certain real property in the town of San Rafael. Judgment for defendants. Plaintiffs appeal.

C. B. Darwin and *Joseph Kirk*, for appellants. *Hepburn Wilkins*, for respondents.

BELCHER, C. C. This action was brought to establish a trust in relation to certain real property in the town of San Rafael. The defendant interposed a general demurrer to the complaint, which was sustained, and, the plaintiff declining to amend, judgment was entered that he take nothing by his action. The material facts stated in the complaint are as follows: In March, 1879, the plaintiff William Barr and the defendant Connell O'Donnell purchased and became equal owners as tenants in common of a described tract of land. In January, 1881, they divided this tract of land; each conveying to the other, by a deed absolute in form, a described portion thereof. The portion described in the deed to Barr contained 31,388 superficial feet, and the portion described in the deed to O'Donnell contained 57,608 superficial feet. It was not intended that this partition should be final; and at the time the deeds were made it was mutually agreed in parol, by and between Barr and O'Donnell, "that said O'Donnell should hold the said land in trust to transfer to said Barr,

when said Barr should thereafter require him to do so, such portion thereof as would make the parts owned by each in severalty of equal value, without improvements, and would thereafter effect such partition of the 'original purchase' as would be equal." In August, 1881, Barr demanded that O'Donnell should convey to him "such portion of said lot which he (O'Donnell) had the legal title to as would make the interests of each of them of equal value," but O'Donnell declined to comply with the demand. The prayer is that O'Donnell be declared to hold the land conveyed to him by Barr in trust, "and that it be ascertained, under the direction of the court, what portion of the land deemed to O'Donnell in severalty would be sufficient, when conveyed to said Barr, to make the shares of O'Donnell and Barr, realized from the 'original purchase,' equal in value," and for general relief.

The demurrer was properly sustained. It is clear that the complaint does not state facts showing an express trust in favor of the plaintiff. Such a trust can be created only by an instrument in writing, subscribed by the party creating it. Civil Code, § 852; Code Civil Proc. § 1971. If land be conveyed by an absolute deed, no express trust in favor of the grantor can be raised by proof of a parol agreement by the grantee to hold the property in trust or reconvey it. *Burt v. Wilson*, 28 Cal. 632; *Gallagher v. Mars*, 50 Cal. 23; *Fouty v. Fouty*, 34 Ind. 433; *Movan v. Hays*, 1 Johns. Ch. 339. And if it appears from the face of the complaint that the alleged trust rests in a parol agreement to reconvey, the defense of the statute of frauds may be taken advantage of on demurrer. *Ward v. McNaughton*, 43 Cal. 159; *Walker v. Locke*, 5 Cush. 90; *Slack v. Black*, 109 Mass. 496. Does the complaint state facts showing a trust created "by operation of law?" Section 2217 of the Civil Code declares that "an involuntary trust is one which is created by operation of law;" and section 2224 provides that "one who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." There is no allegation in the complaint that the defendant gained any part of the land in question by any of the wrongful means above enumerated. It is not charged that, at the time of making the partition and interchanging the deeds, either party deceived, misled, or imposed upon the other; but it appears that they executed these conveyances advisedly, and at the same time made a parol agreement that O'Donnell should hold an undefined portion of the land in trust, and retransfer it at some future time to Barr. It is then further charged only that at a subsequent time O'Donnell violated this parol agreement, and refused to retransfer the unascertained and undefined part of the land to which Barr was entitled. The complaint does not, in our opinion, make a case which comes within the provisions of the Code above cited, or within the well-settled rules of law in regard to implied and constructive trusts. The judgment, we think, should be affirmed.

I concur: FOOTE, C.

HAYNE, C. I concur. It is not contended by counsel that the relation between the parties was what the law recognizes as confidential.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

76 Cal. 474

RYALL v. CENTRAL PAC. R. CO. (No. 11,305.)

(Supreme Court of California. June 9, 1888.)

RAILROAD COMPANIES—INJURIES TO PERSONS ON TRACK—CONTRIBUTORY NEGLIGENCE.
Plaintiff, an experienced railroad man, yard-master for a railroad company, was injured by defendant's train, which was backed against him, being run in a manner

prohibited by a city ordinance, with no light on the rear end. The night was dark. Plaintiff stood between two tracks, in a place he knew to be dangerous, and where he need not have been in the discharge of his duty, his back towards the approaching train, and the track on which it was running. There was evidence that the bell was ringing at the time. The accident occurred in a yard where there were many tracks, and trains constantly being made up. *Held*, that the proximate cause of plaintiff's injury was his own negligence, and that he could not recover, though defendant had violated the ordinance, and was guilty of negligence in running its train.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; M. A. EDMONDS, Judge.

Action for damages by Jeremiah Ryall against the Central Pacific Railroad Company for injuries received by being run over by defendant's train. It appeared on the trial that plaintiff, who was an experienced railroad man, and yard-master of another railroad company, was struck by defendant's train, which backed against him, on a dark night, while he was standing between the tracks, with his back towards the approaching train, and towards the track on which it was running. The accident occurred in a yard where there were many tracks, and trains being constantly made up. There was also evidence that the bell was ringing at the time. Other facts appear in the opinion. The instructions given and excepted to by plaintiff, referred to in the opinion, were upon the subject of contributory negligence, and were in substance the same as the views expressed therein with reference to the weight of evidence and the motion for a new trial. Judgment below for defendant, and plaintiff appealed.

Royce & Cummins, for appellant. *W. H. L. Barnes*, for respondent.

FOOTE, C. This action was brought to recover damages for injuries received from the cars of the defendant corporation while the plaintiff was engaged in the alleged performance of his duty as an employee of the Southern Pacific Railroad Company. The cause was tried before a jury, and a verdict rendered in favor of the defendant, from which, and an order denying a new trial, the plaintiff has appealed. The negligence of the defendant is alleged as the proximate cause of the injuries received by the plaintiff, while the defendant contends that the carelessness of the plaintiff resulted in his being seriously hurt. Conceding, without deciding, all that the plaintiff can possibly claim from the evidence,—that defendant was guilty of negligence in running its cars against the plaintiff and maiming him, and that no light was displayed upon the rear of the train, or any of the precautions taken which an ordinance of the city of San Francisco required should be done; that, in running its train as it did, the defendant was guilty of a misdemeanor,—nevertheless, the evidence shows that the plaintiff, when struck, was not at the place where he should have been in the proper performance of his duty, in attending to the business of his employer; that, fully informed of the danger which he ran, he unnecessarily and carelessly placed himself between two tracks, where a train moving upon one or both tracks would have endangered his being crushed, either if one was standing still and the other in motion, or both had been in motion; that his back was turned towards the approaching train which struck him, and it is very doubtful, even if there had been a light on the rear end of it, that he would have seen or noticed it. When struck, he was between two trains, one on each track on both sides of him. In other words, we are clearly of opinion that the plaintiff's gross negligence, and not that of the defendant, was the proximate cause of the damage done to his person of which he complains. This being so, we do not see how the jury could have found in his favor without doing so against the weight of evidence. The court did not commit error in granting the portion of the instructions which was excepted to, and we cannot consider a possible mistake as to those instructions which were not excepted to. No prejudicial error appearing in the record, the judgment and order should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

2 Cal. Unrep. 870

STRAUS *v.* WILLIAMSON *et al.* (No. 12,483.)

(Supreme Court of California. June 1, 1888.)

APPEAL—REVIEW—CONFLICTING EVIDENCE.

In an action to amend a mortgage on the ground of mistake, and to foreclose the mortgage as amended, a judgment for defendant upon a finding that no mistake occurred, will not be disturbed on the ground that the evidence did not support the finding when the evidence on the material points of the case is conflicting.

In bank. Appeal from superior court, San Luis Obispo county; D. S. GREGORY, Judge.

Action, by J. Straus against A. Williamson and J. H. Orcutt, to have the description in a mortgage made by defendant Williamson reformed so as to embrace property other than that described in the mortgage, on the ground of mistake, and, when so reformed, to foreclose the same. The defendant Orcutt was made a party because he was a grantee of the land intended to be described in the mortgage, subsequent to its making. Judgment went for plaintiff, against Williamson, for the money secured by the mortgage; but the court below refused to reform the mortgage, and found against plaintiff as to the alleged mistake. From this judgment, and an order refusing him a new trial, plaintiff appealed.

J. M. Wilcoxon, for appellant. W. H. Spencer and V. A. Gregg, for respondents.

PER CURIAM. The contention of appellant in this case is that the evidence is insufficient to justify the decision. We find, on an examination of the record, that the evidence is conflicting on the material points, and therefore the judgment and order must be affirmed. So ordered.

78 Cal. 487

CARPENTER *v.* EWING. (No. 11,140.)

(Supreme Court of California. June 9, 1888.)

TRIAL—INSTRUCTIONS—FAILURE OF RECORD TO SET OUT EVIDENCE.

Where the record does not disclose the evidence on which the instructions objected to were given, it will be presumed that it was such as to justify the giving of the instructions, unless it appears that they would be erroneous under every conceivable state of facts.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Caroline Carpenter brought ejectment against Robert Ewing to recover certain real estate. There was judgment for the defendant, and the plaintiff appealed.

Geo. N. Williams, for appellant. Lloyd & Wood, for respondent.

BELCHER, C. C. This is an action of ejectment to recover a strip of land eight inches wide and twenty-four feet long. The complaint contains the ordinary allegations of ownership and ouster, and is not verified. The answer contains a general denial, with allegations of actual and *bona fide* possession by defendant and his grantors for more than five years before the commencement of the action, and the plea of the statute of limitations. The case was tried before a jury, and a verdict returned for defendant, on which judgment was entered. The plaintiff appealed from the judgment, and has brought up in the transcript the pleadings, judgment, and nine instructions given to the

jury at the request of the defendant, but none of the testimony on which the instructions were based. The appellant insists—and this is the only point made—that the first five instructions, though admitted to be sound as abstract propositions of law, were misleading and erroneous, because not applicable to the issues raised under the plea of the statute of limitations. The instructions complained of relate to an agreed line between contiguous owners of real property, and an acquiescence therein for the period of five years.

Whether evidence as to an agreed line and long acquiescence, if objected to, was admissible under the pleadings or not, it is not necessary to determine. If the case was tried upon the theory that such evidence was admissible, and it was offered and received without objection, it became the duty of the court to instruct the jury upon the law of the case as presented, and the losing party cannot be permitted here for the first time to raise an objection on this ground. *Boyce v. Stage Co.*, 25 Cal. 460; *Bell v. Knowles*, 45 Cal. 193; *Yik Hon v. Water-Works*, 65 Cal. 619, 4 Pac. Rep. 666. None of the evidence being brought up in the record, and there being nothing to show its purport or tendency, it will be presumed that it was such as to justify the instructions, and that they were properly given. The settled rule is that, where the record contains no part of the evidence, the judgment will not be disturbed on account of instructions alleged to be erroneous, unless it appears that such instructions would have been erroneous under every conceivable state of facts. *People v. Dick*, 34 Cal. 663; *Baldwin v. Bornheimer*, 48 Cal. 433; *People v. Smith*, 57 Cal. 130; *People v. Gilbert*, 60 Cal. 108. It is not pretended that the instructions complained of here would be erroneous under every conceivable state of facts, and the judgment should therefore be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

76 Cal. 511

MCCLOSKEY v. KRELING et al. (No. 11,272.)

(*Supreme Court of California.* June 9, 1888.)

1. MUNICIPAL CORPORATIONS—ORDINANCES—VALIDITY—CONTROL OF BUILDINGS WITHIN FIRE LIMITS.

Under Const. Cal. art. 11, § 11, authorizing cities, towns, etc., to make such local, police, sanitary, and other regulations as are not in conflict with general laws, a city ordinance providing that no building within the fire limits shall be built or enlarged except with brick or stone; that before any building shall be enlarged, its safety shall be certified to by the board of firewardens; that no wooden building shall be enlarged without a permit from the board of supervisors and mayor, granted after the filing of plans and specifications, and reference of the latter to the board of firewardens, and written report by them, and the filing of a copy of the permit within 2 days in the offices of the engineer and marshal of the fire department; and that the building shall be finished within 90 days after the permit becomes a law,—is a valid ordinance.

2. SAME—CONTROL OF BUILDINGS WITHIN FIRE LIMITS—RIGHTS OF ADJOINING OWNERS.

If, under such ordinance, a right of action is given to private persons, it is given only to one whose damage is special, and the depreciation of plaintiff's property, which is a part of a densely populated tract, and the increase of his insurance rates by reason of the proximity of defendant's wooden building, are not such special damages to plaintiff as give him a right of action.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Action by James McCloskey against John Kreling, William Kreling, and Joseph Kreling, for injunction. Judgment for defendants, and plaintiff appeals. The ordinance referred to in the opinion provides, among other things, that all buildings within said fire limits, after the approval of said order, shall be made and constructed of brick or stone; that no building already erected, or thereafter to be erected, in said city and county shall be enlarged,

raised, or built upon in such a manner that were the said building wholly built or constructed after the passage of said order it would be a violation of any of the provisions of said order; that, before any building of brick, stone, iron, or wood shall be enlarged, raised, altered, or built upon, the same shall be first examined by the board of firewardens to ascertain if the same is in good condition to be enlarged, raised, altered, or built upon, and they shall have certified to the safety of making said alterations; that no wooden building within the fire limits shall be enlarged or rebuilt upon without a permit from the said board of supervisors, approved by the mayor of said city and county, and that no such permit shall be granted unless the applicant shall file with the clerk of the said board of supervisors, when the application is made, the plans and specifications of the improvement contemplated, and such plans and specifications of the improvement shall have been referred to the board of firewardens of said city and county, and a majority of them shall have examined the premises to be enlarged or built upon, and reported their opinion thereon in writing to said board of supervisors, and that a copy of all such permits given shall be filed by the applicant within 2 days after the same are given in the office of the chief engineer of the fire department of said city and county and the fire marshal; that, in granting permits to erect, enlarge, build upon, alter, or change a frame building within the fire limits, the permit shall be void if the work is not commenced within 10 days after said permit becomes a law, and be finished within 90 days, and that all such permits shall have the time specified in them; that no permit shall be considered valid unless all the requirements of said order, applying to the granting of permits, shall have been complied with; that the board of firewardens shall consist of the chief engineer, the assistant chief engineer, the assistant engineer, and the clerk of the fire department of said city and county, and the fire marshal of said city and county; and that any act done by a majority of said board of firewardens shall be deemed to be the act of the whole board.

J. B. Hart, for appellant. *H. H. Lowenthal*, for respondents.

HAYNE, C. Action by the owner of certain houses in the city of San Francisco to enjoin the continuance of an adjacent wooden building, which was built in violation of the ordinance establishing the fire limits. The court below gave judgment in favor of the defendants, and the plaintiff appeals. We think the ordinance is a valid one. Const. art. 11, § 11; 1 Dill. Mun. Corp. (3d Ed.) § 405; *Amyx v. Taber*, 23 Cal. 370; *Ex parte Shrader*, 33 Cal. 279; *Ex parte Smith*, 38 Cal. 702; *Johnson v. Simonton*, 43 Cal. 242; *Ex parte Delaney*, Id. 479; *Ex parte Casinello*, 62 Cal. 538; *Ex parte Moyner*, 65 Cal. 33, 2 Pac. Rep. 728; *Ex parte Heilbron*, 65 Cal. 610, 4 Pac. Rep. 648; *Ex parte White*, 67 Cal. 102, 7 Pac. Rep. 186; *In re Yick Wo*, 68 Cal. 294, 9 Pac. Rep. 139; *In re Linehan*, 72 Cal. 114, 13 Pac. Rep. 170; *Barbier v. Conolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357.

In the absence of this ordinance, the maintaining of a frame building in a city would not give a right of action to the owners of adjacent property, although the value of such property was thereby decreased and the rates of insurance raised. Such circumstances are ordinary incidents to residence and ownership in a city. *Rhodes v. Dunbar*, 57 Pa. St. 274. If we assume that the ordinance gives a right of action by private persons, it can only be to those who suffer damage by reason of its violation, and this damage must be special, and not such as is common to the public. The defendant's building, being "located in a portion of said city and county compactly built upon and densely populated," would naturally cause to others more or less of the same depreciation in value and increase of insurance rates from which it would seem the plaintiff suffers. Hence there is no damage which is special to him. Depreciation in value is not a ground of special damage. *Severy*

v. *Railroad Co.*, 51 Cal. 197; *Bigley v. Nunan*, 53 Cal. 404. The injury "must be special in character, and not merely greater in degree than that of the general public." *Bigley v. Nunan*, *supra*; *Crowley v. Davis*, 63 Cal. 460. We therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

76 Cal. 508

WEITHOFF v. MURRAY *et al.* (No. 12,155.)

(Supreme Court of California. June 9, 1888.)

1. MASTER AND SERVANT—CONTRACT OF HIRING—DISCHARGE BY DEATH OF MASTER—PLEADING.

In an action by an employe to foreclose a lien for work done by him after the death of his employer, under Civil Code Cal. § 1998, providing for compensation from the employer's successor for such service, so far as it is necessary to protect the property, and for a reasonable time after notice of the facts to the successor, a complaint alleging "that it was necessary for this plaintiff to continue his services after the death of said Hugh Murray, * * * and that said services were necessary to protect," etc.; "that the continuation of said services up to the 30th day of June, 1888, was a reasonable time,"—is defective, in pleading mere conclusions of law.

2. SAME—REASONABLE TIME.

Under Civil Code Cal. § 1998, providing, in case of death of an employer, for payment of his employe, by the employer's successor, for such services as are necessary to protect the property, and for a reasonable time after notice of the facts to the successor, six months' continuation of services after the appointment of an administrator of the employer's estate, in the absence of special circumstances shown, is more than a reasonable time.

3. MECHANIC'S LIEN—PROCEEDINGS TO PERFECT—TIME OF FILING CLAIM.

In such case a claim of mechanic's lien for work done during the five months succeeding the appointment of the administrator, filed six months after such appointment, is not a compliance with Code Civil Proc. Cal. § 1187, requiring such claims to be filed within either 30 or 60 days from the termination of the employment.

Commissioners' decision. Department 2. Appeal from superior court, Calaveras county; C. V. GOTTSCHALK, Judge.

Action by William Weithoff against Mathew Murray, as administrator of Hugh Murray, deceased, and others, to foreclose a mechanic's lien. Judgment for defendants, and plaintiff appeals. Hugh Murray died December 1, 1883. The claim of lien was filed in the office of the county recorder of Calaveras county on the 25th day of July, 1884, and in the recorder's office of Amador county on the 29th day of July, 1884; the property claimed to be subject to the lien being partly in each county. Section 1996, art. 4, Civil Code, provides: "Every employment in which the power of the employe is not coupled with an interest in its subject is terminated by notice to him of (1) the death of the employer; or (2) his legal incapacity to contract." Section 1187, Code Civil Proc., provides: "Every original contractor, within 60 days after the completion of his contract, and every person, save the original contractor claiming the benefit of this chapter, must, within 30 days after the completion of any building, improvement, or structure, or after the completion of the alteration or repair thereof, or the performance of any labor in a mining claim, file for record with the county recorder of the county in which such property, or some part thereof, is situated, a claim containing a statement of his demand," etc.

Reddick & Solinsky, for appellant. *Eagon & Rust*, for respondents.

HAYNE, C. Action to foreclose a laborer's lien. The court below gave judgment for the defendants on demurrer to the amended complaint, and the

plaintiff appeals. The facts shown by said complaint are substantially as follows: The plaintiff was employed by one Hugh Murray, who was the owner of a certain "water-ditch property," as "a laborer and ditch-tender." The employment must be taken to have been from month to month. After a little more than five years the owner died. We think it must be assumed from the complaint that the plaintiff had notice of the death of his employer, and therefore that the employment was at an end, (Civil Code, § 1996,) unless the case falls within the following provision of the same Code: Sec. 1998. "An employe, unless the term of his service has expired, or unless he has a right to discontinue it without notice, must continue his service, after notice of the death or incapacity of his employer, so far as is necessary to protect from serious injury the interests of the employer's successor in interest, until a reasonable time after notice of the facts has been communicated to such successor. The successor must compensate the employe for such service according to the terms of the contract of employment." In order to bring himself within this section, the plaintiff alleges "that it was necessary for this plaintiff to continue his services as laborer and ditch-tender, on said ditch property, after the death of said Hugh Murray, in the same manner as prior to said Hugh Murray's death; and that plaintiff did work and labor on said ditch as laborer and ditch-tender continuously from the time of the death of said Hugh Murray up to and including June 30, 1884, and that said services, so performed by plaintiff after the death of said Hugh Murray, as aforesaid, were necessary to protect from serious injury the said ditch premises, and the interests therein of the successors of the said Hugh Murray; that the continuation of said services up to the 30th day of June, 1884, was a reasonable time after notice of the facts had been communicated to the said successors in interest of said Hugh Murray."

The objection to the foregoing is that it does not state facts, but mere conclusions of law. We cannot accept the mere assertion of the plaintiff that the continuance of his employment was necessary. He should have stated facts showing it to be so. Nor, if it were otherwise as to the necessity, can we accept his mere assertion that the period of such continuance was reasonable. The administrator was appointed January 15, 1884; and, when he was appointed, it was the duty of the plaintiff to inform him of the state of the case. If good excuse for not doing so existed, it should have been shown. For all that appears in the complaint to the contrary, he was notified as soon as appointed. And on this assumption we think that, in the absence of special circumstances, the delay from January to June was wholly unreasonable. This being the case, it appears from the complaint that the notice of lien was not filed within either 30 or 60 days from the termination of the employment. Code Civil Proc. § 1187. The only question is as to the existence of the lien; for no claim was presented to the administrator, and the plaintiff expressly waives all recourse against any property of the estate other than the ditch property, and all claim for compensation for services since the death of his employer. We therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

76 Cal. 524

SCHUYLER v. BROUGHTON, Sheriff. (No. 12,333.)

(*Supreme Court of California.* June 9, 1888.)

1. HOMESTEAD—DECLARATION—STATEMENT OF VALUE.

A clause in a declaration of homestead, as follows: "And we do place the value of said land at a sum not to exceed \$1,600,"—is not so positively bad as to render the declaration void under Civil Code Cal. § 1263, requiring the declaration of homestead to contain an estimate of the actual cash value of the premises.

2. SAME—DESCRIPTION OF PREMISES.

Under Civil Code Cal. § 1263, requiring, in declarations of homestead, a description of the premises, the following description is sufficient: "The lot of land and premises situated in the Lompoc valley, county of Santa Barbara, state of California, bounded and described as follows: Being the N. W. $\frac{1}{4}$ of subdivision No. 11, as laid down on the official map of Lompoc Valley Land Company's lands, and contains forty acres of land, more or less."

In bank. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

Action by Annie Schuyler to restrain the execution of a deed by R. J. Broughton, sheriff, of land in which plaintiff claims a homestead. Judgment for plaintiff, from which defendant appeals. A former appeal of this case is reported in 11 Pac. Rep. 719.

B. F. Thomas, for appellant. *W. C. Stratton*, for respondent.

SEARLS, C. J. This action was brought by the plaintiff to obtain a judgment restraining the defendant, sheriff of Santa Barbara county, from executing a deed to the premises described in the amended complaint. The premises were sold by the sheriff by virtue of an execution issued on a judgment against W. H. Schuyler, the husband of the plaintiff, who claims said premises as a homestead, the homestead declaration having been filed before the said judgment was rendered. The plaintiff recovered judgment in the superior court, from which the defendant has appealed to this court. It is contended by the appellant that the homestead declaration is not sufficient—*First*, because it does not state an estimate of the actual cash value; *second*, because the description is not sufficient. The clause in the declaration of homestead as to value is as follows: "And we do place the value of said land at a sum not to exceed sixteen hundred dollars." The fourth subdivision of section 1263 of the Civil Code requires the declaration of homestead to contain "an estimate of their actual cash value." In *Ashley v. Olmstead*, 54 Cal. 616, this court held that a declaration of homestead which failed to contain any estimate of the value of the premises was void. In *Ames v. Eldred*, 55 Cal. 136, it was held that a declaration which stated "that the actual cash value is \$5,000 and over" did not contain an estimate of the actual cash value, and was therefore defective. In *Read v. Rahm*, 65 Cal. 343, 4 Pac. Rep. 111, where the statement was "that the cash value of the said above-described premises is three thousand dollars," it was held sufficient. In *Graves v. Baker*, 68 Cal. 134, 8 Pac. Rep. 693, a statement in the declaration of homestead that "the cash value of the homestead is about four thousand dollars" was held sufficient as a statement of value. The statute in reference to homesteads is a remedial measure, and as such is to be liberally construed. We are not at liberty to disregard the statute; its provisions are binding upon us, and in the absence of a compliance with them we can only declare the result flowing therefrom. The concurrence of several things are necessary, under our statute, before exemption can be allowed. Where these several acts have been substantially performed, and where the declaration contains the essence of the statutory requirements, the construction should be so liberal as to advance the object of the constitution and statute. By use of the language adopted by the declarants in this case we think it may be fairly inferred they estimated the value of the premises to be about \$1,600. The phrase used, "And we do place the value of said land at a sum not to exceed sixteen hundred dollars," though not precise, is such as is frequently used to convey the impression that the figures mentioned approximate the judgment of the speaker. A homestead, to the extent of \$5,000, may be secured by the owner and occupant being the head of a family. One object of the statute, requiring the declaration of the applicant to contain an estimate of the value of the premises, was no doubt to give notice to the world whether or not the value was within the statutory limit of \$5,000; and, if not, the ex-

cess of value above such limit. If within the \$5,000 limit, that fact is all that creditors, present or future, can be interested in knowing. It is in such a case beyond their reach.

If the valuation, however, is in excess of \$5,000, they are interested in knowing the extent of the excess of value, and, so far as the public is concerned, we can see good reasons for holding homestead claimants to greater strictness in the one case than the other. Not that the plain provisions of the statute can be dispensed with in either, but what is a substantial compliance with the terms of a statute is a question which is often to be determined by the nature, object, and effect of the act or acts set up as constituting compliance. We are far from commending the statement as to value, used in the case, as a precedent to be followed, and wish to be distinctly understood as only holding that it is not so positively bad as to render the declaration void.

The description of the property to which objection is made is as follows: "The lot of land and premises situated in the Lompoc valley, county of Santa Barbara, state of California, bounded and described as follows: Being the N. W. $\frac{1}{4}$ of subdivision No. 11, as laid down on the official map of Lompoc Valley Land Company's lands, and contains forty acres of land, more or less." In *Thompson v. Thompson*, 52 Cal. 154, it was said the following description in a deed was not as matter of law void for uncertainty: "Lot No. 62, containing 50.52 acres, situate in the town and county of Santa Barbara, state of California, and numbered and marked on the official map or plan of outside lands of the town of Santa Barbara, made by William H. Norway, surveyor." A "deed" excepting therefrom all the land comprehended in the *encinal* or *temescal* sold on the 13th of March, 1852, to John Caperton and others, was held a sufficient description to except the land so described. *Truett v. Adams*, 66 Cal. 218, 5 Pac. Rep. 96. It is not necessary that a description of land in a homestead declaration should be more particular than in a conveyance. *Ornbaum v. Creditors*, 61 Cal. 455. The description is not void for uncertainty. The judgment of the court below is affirmed.

We concur: PATERSON, J.; MCKINSTRY, J.; THORNTON, J.; SHARFSTEIN, J.; MCFARLAND, J.

76 Cal. 499

McNEE v. DONAHUE. (No. 11,107.)

(Supreme Court of California. June 9, 1888.)

1. PUBLIC LANDS—GRANT TO STATE—BY ACT OF CONGRESS.

Act Cong. July 13, 1866, (14 St. U. S. 218,) provides, in section 1, that where the state of California had theretofore selected lands in part satisfaction of grants from the United States, and had disposed thereof to purchasers in good faith under her laws, the lands so selected should be and were thereby confirmed to said state; and in section 2 that, where the selections were made on lands already surveyed by the United States, it should be the duty of the state authorities to notify the proper register of the land-office thereof, where that had not already been done, which notice should be regarded as the date of selection, and making it the duty of the commissioner of the land-office to investigate such selections, and, if found correct, to certify them to the state. The effect of this legislation is to grant *in presenti* the lands therein mentioned, in spite of the provisions concerning notice, and the duty imposed on said commissioner; and no patent is necessary to convey the legal title.

2. SAME—TITLES DERIVED FROM STATES—PURCHASERS IN GOOD FAITH.

Defendant being in possession of lands mentioned in said sections, as purchaser from the state, without patent therefor, an act of congress donated lands to the state to found an agricultural college, and the state selected the land so held by defendant under said act, and sold it to plaintiff. A patent issued from the United States to the state, and from the state to plaintiff. *Held*, in ejectment, that, the land having been already conveyed by the act of 1866, the state was vested with the legal title for the benefit of and in trust for defendant, and could not dispose of it to plaintiff, who should be treated as holding the title, under his patent, as trustee for defendant, and required to convey to him.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; D. BELDEN, Judge.

Ejectment by John H. McNee against Peter J. Donahue. Judgment for defendant, declaring plaintiff a trustee of the legal title, and requiring him to convey to defendant. Plaintiff appealed.

S. F. Leib, for appellant. *Doyle, Galpin & Scripture*, for respondent.

HAYNE, C. The plaintiff sues in ejectment for 106.24 acres of land in Santa Clara county. The defendant denied the material allegations of the complaint, and put in a cross-complaint, praying for a conveyance from the plaintiff. The court below gave judgment for the defendant, as prayed for, and the plaintiff appeals. The facts are substantially as follows: In September, 1853, one Stephen Franklin was the owner of two land-warrants issued under the act to provide for the disposition of 500,000 acres of land granted to the state by act of congress, for which warrants full value was paid; and in said month he located the same upon the tract in controversy, which was then vacant and unappropriated public land of the United States. At the time of such location said Franklin was in the actual possession of said tract, with certain adjoining land, making 578 acres in all. The dwelling-house and barns were on the adjoining land. On the tract in controversy was an artesian well, with ditches for carrying water from the same. The whole was under one general inclosure, and was cultivated as a single farm. Franklin remained in possession until 1862, when his interest was acquired by James Donahue, the father of the defendant. In 1862 the tract in controversy was selected by the state as lieu lands. In that year Donahue, who was then in possession, purchased from the state "in good faith," and paid the full purchase price therefor, and on January 22, 1864, the state issued and delivered to him a certificate of purchase of said lands. He continued in possession until his death, "in the year 1864 or 1865." The defendant then succeeded to the interest of his father, and ever since remained, and was at the commencement of the action, in the actual possession of said tract. The land was not surveyed by the authority of the United States until May, 1866, when it was surveyed, and located in township 6 S., range 1 W., Mount Diablo meridian. It will be observed that this was before the passage of the act of July 23, 1866, "to quiet land titles in the state of California." 14 St. U. S. 218. That act contained, among other things, the following provisions. Section 1. "That in all cases where the state of California has heretofore made selections of any portion of the public domain in part satisfaction of any grant made to said state by any act of congress, and has disposed of the same to purchasers in good faith under her laws, the land so selected shall be, and are hereby, confirmed to said state." Then follows certain exceptions which we do not think apply to the present case. *Whitney v. Morrow*, 112 U. S. 693, 5 Sup. Ct. Rep. 333. Sec. 2. "And be it further enacted that, where the selections named in section 1 of this act have been made upon lands which have been surveyed by authority of the United States, it shall be the duty of the proper authorities of the state, when the same has not already been done, to notify the register of the United States land-office for the district in which the land is located of such selection, which notice shall be regarded as the date of the state selection; and the commissioner of the general land-office shall, immediately after the passage of this act, instruct the several local registers to forward to the general land-office, after investigation and decision, all such selections, which, if found to be in accordance with section 1 of this act, the commissioner shall certify to the state in the usual manner." Section 3 relates to selections upon unsurveyed lands, and gives directions concerning the making of the surveys, section 4 relates to swamp and overflowed lands, and the remaining sections relate to matters which are not material to be considered. The court finds that the proper authorities of the state had notified the register of the United States land-office, etc., on May 30, 1866, which was before the passage of the act, and therefore within the clause, "when the same has not already

been done," above quoted. Apparently, to make matters sure, the state authorities gave another notice after the passage of the act, "which notice was received by the register of the said United States land-office, and filed by him on the 10th day of April, 1867." But it does not appear that the commissioner of the land-office ever certified the land over to the state, as directed by section 2, above quoted. So much for the basis of the defendant's claim. The plaintiff claims the land under a selection by the state in September, 1873, as part of the Agricultural College grant. The purchase price was fully paid by plaintiff and his assignors. On June 1, 1882, the United States issued and delivered a patent for the land to the state, and on the 17th day of June the state issued and delivered her patent to the plaintiff.

We think the act of 1866 operated as a grant *in presenti*. A confirmatory act operates as a grant. "That a grant may be made by a law, as well as a patent pursuant to a law, is undoubted, (*Fletcher v. Peck*, 6 Cranch, 128;) and a confirmation by a law is as fully, to all intents and purposes, a grant as if it contained in terms a grant *de novo*," (*Strother v. Lucas*, 12 Pet. 454; *Chouteau v. Eckhart*, 2 How. 372, 373; *Grignon's Lessee v. Astor*, Id. 319; *Langdeau v. Hanes*, 21 Wall. 521, *Maxwell Land-Grant Case*, 122 U. S. 365, 7 Sup. Ct. Rep. 1271, 121 U. S. 325, 7 Sup. Ct. Rep. 1015.) And, in construing grants, the words "is hereby granted" operate as a grant *in presenti*. In *Railroad Co. v. U. S.*, 92 U. S. 741, the court (per DAVIS, J.) said of the grant there in question: "It creates a present interest, and does not indicate a purpose to give in future. 'There be, and is hereby, granted,' are words of absolute donation, and import a grant *in presenti*. This court has held that they can have no other meaning; and the land department, on this interpretation of them, has uniformly administered every previous similar grant." And to the same effect: *Railway Co. v. Railway Co.*, 97 U. S. 496; *Railroad Co. v. Baldwin*, 103 U. S. 429; *Van Wyck v. Knevals*, 106 U. S. 365, 1 Sup. Ct. Rep. 336; *Wright v. Roseberry*, 121 U. S. 500, 7 Sup. Ct. Rep. 985. Now, the words "is hereby confirmed," used in the act under consideration, are words of present confirmation; and if "confirmed" means "granted," as is above shown, they must be words of present grant. And they were so construed in *Ryan v. Carter*, 93 U. S. 78. Such a construction goes much further towards carrying out the purpose of the act, which was to "quiet" land titles, than one which would vest no right in the state, or in the purchaser from her in good faith, but which simply offers a privilege of purchase. The latter construction, as it seems to us, would tend to open the door to those who go prowling around for flaws in their neighbor's titles. It makes no difference that the state authorities were required to notify the register of the selections, "when the same has not already been done." Such notice had already been given at the date of the passage of the act. In the language of the statute, "the same had already been done." And the second notice, which was probably given out of abundance of caution, did not affect the validity of the first notice. The provision of the act is that the time of said notice "shall be regarded as the date of the state selection;" and, in view of the fact that the notice had already been given, it follows that it must be held that there was a valid selection as of a date prior to the passage of the act. But if this were not the case,—that is to say, if the second notice (given after the passage of the act) is to be taken as the notice in the case,—it would not, in our opinion, affect the question as to the operation of the act as a grant *in presenti*. The case, we think, would be like that of railroad grants, which, although the lands cannot be identified until the road is located and the map filed, yet, nevertheless, operate as grants *in presenti*, and, upon the location of the road and filing of the map, relate back to the passage of the act. "In that sense we say that the grant is one *in presenti*. It cuts off all claims * * * to any portion of the lands from the date of the act, and passes the title as fully as though the sections had then been capable of identification." *Van Wyck*

v. *Knevals*, 106 U. S. 365, 1 Sup. Ct. Rep. 336; *Railroad Co. v. Baldwin*, 103 U. S. 429; *Railway Co. v. Railway Co.*, 97 U. S. 496, 497; *Railroad Co. v. U. S.*, 92 U. S. 741; *Schulenberg v. Harriman*, 21 Wall. 60. See, also, *Wright v. Roseberry*, 121 U. S. 500, 7 Sup. Ct. Rep. 985, and *Lessieur v. Price*, 12 How. 76.

Nor does it make any difference that the commissioner of the general land-office, on receiving the notices above mentioned from the various registers, "if he finds them to be in accordance with section 1 of this act, is directed to certify them over to the state in the usual manner." This merely furnishes record evidence of the selection and identification, and this purpose is not at all affected by the fact that the land-officers are to first investigate whether the selections came within the purview of the act. Even if a patent had been required to be issued, it would not have operated to transfer the title which had already passed. As was said by the court (per FIELD, J.) in *Whitney v. Morrow*, 112 U. S. 695, 5 Sup. Ct. Rep. 335: "If, by a legislative declaration, a specific tract is confirmed to any one, his title is not strengthened by a subsequent patent from the government. That instrument may be of great service to him in proving his title if contested, and the extent of his land, especially when proof of its boundaries would otherwise rest in the uncertain recollection of witnesses. It would thus be an instrument of quiet and security to him, but it could not add to the validity and completeness of the title confirmed by the act of congress." See, also, *Langdeau v. Hanes*, 21 Wall. 529. This construction is not inconsistent with the cases of *Toland v. Mandell*, 38 Cal. 30, and *Collins v. Bartlett*, 44 Cal. 371. Those decisions related to unsurveyed lands, and consequently were under the third section of the act under consideration. The second section of the act relates to surveyed lands, (by which we understand lands surveyed, under the authority of the United States, at the date of the act,) and is somewhat different from the third section, relating to unsurveyed lands. The correctness or incorrectness of those decisions, therefore, is not involved here. The case of *Hodapp v. Sharp*, 40 Cal. 69, so far as we can ascertain from the report, seems to have been under the second section; and the court reached a different conclusion from that at which we have arrived. It held that the provision that the selections "shall be, and are hereby, confirmed to said state," as used in the act, mean that the selection "is not confirmed, and title does not pass to the state, until the land is certified over to the state." Id. 73. This seems to us to be contrary to the federal decisions above cited, which, of course, in a matter of this kind, are of paramount authority.

If our construction of the act of 1866 is the true one, the legal title passed to the state. And it seems clear that, if it did, she held it in trust for the purchasers mentioned in the act, and could not dispose of it to others. The whole purpose of the act was to quiet the titles of those who had purchased from the state in good faith. The predecessors of the defendant had done all that was required of them, and consequently had the beneficial interest. They could be in no worse position than that of settlers upon public lands who have complied with all the conditions required of them. And, as was said by BRADLEY, J., delivering the opinion in *Wirth v. Branson*, 98 U. S. 121: "The rule is well settled by a long course of decisions that when public lands have been surveyed and placed in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract is to be regarded as the equitable owner thereof, and the land is no longer open to location. The public faith has become pledged to him, and any subsequent grant of the same land to another party is void, unless the first location or entry be vacated and set aside. This was laid down in the case of *Lytle v. State of Arkansas*, 9 How. 314, and has ever since been adhered to. See *Stark v. Starrs*, 6 Wall. 402. Subsequent cases which have seemed to be in conflict with these have been

distinguished from them by the fact that something remained to be done by the claimant to entitle him to a patent; such as the payment of the price, the payment of the fees of surveying, or the like. See, also, *Simmons v. Wagner*, 101 U. S. 261.

If the state held the land in trust for the predecessor of the defendant, she could not dispose of it to the plaintiff. *Van Wyck v. Knevals*, 106 U. S. 365, 1 Sup. Ct. Rep. 336. The cases of *Wirth v. Branson* and *Simmons v. Wagner*, above cited, seem to hold that a subsequent patent from the state, in violation of the rights of "the equitable owner," is absolutely void. But for the purposes of the present case it is immaterial whether the legal title passed to the plaintiff by the state patent or not. If it did pass to him, he took it with a trust in favor of the defendant. If what we have endeavored to show above be correct, the defendant was the equitable owner; and it is found that the plaintiff had notice of the defendant's rights. The plaintiff's counsel asks, "On what theory has a trust been declared and fastened on us?" The theory is plain: "When the legal right has passed from the United States to one party, where in equity and in good conscience, and by the laws of congress, it ought to go to another, a court of equity will convert the holder into a trustee of the true owner, and compel him to convey the legal title." *Rector v. Gibbon*, 111 U. S. 291, 4 Sup. Ct. Rep. 605. If, on the other hand, the legal title did not pass to the plaintiff, his patent constitutes a cloud upon the defendant's right, which he is entitled to have removed. In this regard the case of *Van Wyck v. Knevals*, 106 U. S. 370, 1 Sup. Ct. Rep. 336, is precisely in point. And we may say of the defendant here, who is a cross-complainant, as was said in that case: "The existence of the patent embarrasses the assertion of the complainant's rights; that is, it prevents him from obtaining a strictly legal title, which would enable him to recover possession of the premises by an action at law. The existence of the patent also creates a cloud upon the title of the land. * * * The existence of the patent, therefore, under these circumstances, furnishes ground for equitable relief. That relief, however, should properly be limited to a decree declaring the equity of the complainant, the invalidity of the title of the defendant, and enjoining him from the assertion of any claim to the property under the patent; but inasmuch as no objection is taken to the form of the decree as entered, which requires the defendant to execute a conveyance of the premises to the complainant, and as the execution of such a conveyance, amounting in fact to a release of his claim to the property, will accomplish all that could legally be effected, it is not considered necessary to order a modification of it."

It is unnecessary to give any extended notice to the argument that the patent from the United States to the state conveyed the land in trust for the purposes of an agricultural college, and could not be diverted from such purposes. In the first place, it is doubtful whether a trust is fastened upon the state by reason of the agricultural land grant. *Emigrant Co. v. County of Adams*, 100 U. S. 61. In the second place, the title did not pass to the state under the patent from the United States, but under the previous act of 1866.

Several other points are made in the somewhat discursive brief of the learned counsel for the appellant. We have examined them all, but do not think they require special notice. We therefore advise that the judgment and order denying a new trial be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

2 Cal. Unrep. 871

RYAN v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO.
(No. 12,568.)

(Supreme Court of California. June 1, 1888.)

WRIT OF REVIEW—WHEN LIES.

Where a judgment has been entered for defendant, and, on plaintiff's motion, the court vacates the judgment, and restores the case to the calendar for a new trial, a writ of review by the supreme court will not lie to a subsequent order, made on defendant's motion, setting aside the former order, and refusing a new trial.

In bank. Upon a petition for a writ of review.

The facts, as shown by plaintiff's petition, are as follows: Mary Ryan, the petitioner, says that she is the party beneficially interested herein, and plaintiff in the cause of *Mary Ryan v. C. P. Kennedy and Mary A. Kennedy, Executor and Executrix of Philip Kennedy, Deceased*; that said cause was commenced in the justice's court of the city and county of San Francisco on September 17, 1887, and was brought for the recovery of \$102, money loaned to Philip Kennedy, defendants' testator; that on October 21, 1887, defendants having answered, the cause was tried before J. D. PAGE, presiding justice of said court, and judgment entered in favor of plaintiff for \$102 principal, \$5.10 per centage, and \$10 costs; that defendant appealed to the superior court of the city and county of San Francisco, from the said judgment, on questions of law and fact, and the cause was assigned to F. W. LAWLOR, presiding judge of department No. 8 of said court; that, on motion of plaintiff, the cause was set for trial on January 9, 1888, and was tried on that day by said LAWLOR, and an oral decision given in favor of defendants, plaintiff demanding findings; that on or before January 17, 1888, judgment without findings was entered in favor of defendants, at the written request of their attorney; that on January 20, 1888, notice was given and filed that on January 27th following plaintiff would move the court to set aside the judgment entered against her, (on the ground that the same was ineffectual and void because there were no findings to sustain it,) and to restore the cause to the calendar, and set a day for trial thereof, at which time the motion was heard, and an order entered vacating said judgment, and restoring the cause to the calendar for trial on March 6, 1888; that on February 3, 1888, on motion of defendants, an order was entered by the court, setting aside that portion of its order of January 4, 1888, which restored the cause for trial; that plaintiff excepted to said last order, which, as she is informed and believes, is in excess of the jurisdiction of the court granting it; that affiant is informed that she has no right of appeal, nor any remedy other than by her present proceeding. Wherefore she prays the supreme court that respondent, the said LAWLOR, J., be directed to certify and send up, for review by said supreme court, a transcript of the record and proceedings in said cause, and that meanwhile execution for defendants' costs be stayed.

James Gartlan, for petitioner. *Charles F. Hanlon*, for respondent.

PER CURIAM. We have examined the petition on this application for a writ of review, and can find no reason why the writ should issue. The application is therefore denied. Ordered accordingly.

76 Cal. 394

BERNIAUD v. BEECHER. (No. 12,378.)

(Supreme Court of California. June 5, 1888.)

EVIDENCE—PAROL—TITLE TO LAND.

It is error to permit counsel to ask a witness if he knows, by general reputation, who owned the land in controversy, since title cannot be proven by reputation.

Department 2. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

J. A. Loutitt, (*S. D. Woods* and *A. L. Levinsky*, of counsel,) for appellant.
L. W. Elliott and *John C. Byers*, for respondent.

THORNTON, J. The court erred in allowing the following question to be put to one Daniel Meader, who was called as a witness for plaintiff: "Do you know, by general reputation, who owned the west one-half of block 229?" The question was answered by witness that it was, by general reputation, said to be the property of Mrs. Rosina Berniaud. Mrs. Berniaud is the person for whom this action is prosecuted by J. M. Hogan, her guardian *ad litem*. We find no other error in the record. Judgment reversed, and cause remanded.

We concur: McFARLAND, J.; SHARPSTEIN, J.

76 Cal. 404

CALIFORNIA CENT. RY. CO. v. HOOPER *et al.* (No. 12,574.)

(*Supreme Court of California.* June 6, 1888.)

1. EMINENT DOMAIN—PROCEDURE—SUBSTITUTION OF NEW CORPORATION AS PLAINTIFF.

Where a railroad corporation brings action to condemn certain real estate, and, having consolidated all its franchises and privileges with several other corporations, the consolidation has incorporated, the court is authorized to substitute the consolidated corporation as plaintiff under Code Civil Proc. Cal. § 385, providing: "An action or proceeding does not abate by the death or any disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding."

2. SAME—INSTRUCTIONS.

In condemnation proceedings, after the court has submitted to the jury the question, "Were the lands described in plaintiff's complaint, and sought to be condemned for the right of way, * * * necessary for such right of way?" it is not an abuse of discretion to refuse to recall the jury, and submit an interrogatory requested by defendants as to whether it was necessary for the plaintiff to take any of their tract for the purpose of its right of way.

3. SAME.

In condemnation proceedings, where the evidence tended to prove that two locations of the proposed railroad were equally good and convenient, an instruction to the jury that "the fact, if proven, that another equally desirable and convenient line could be had by passing over other grounds, did not show that the land sought to be taken was not necessary for the use of plaintiff," is a proper instruction.

4. SAME.

A charge in condemnation proceedings, as follows: "The fact that some other company had ample terminal and depot grounds was no reason why the plaintiff should not condemn such lands described in the complaint as the jury should find to be necessary for the construction and operation of its roads,"—is not erroneous.

5. SAME—PLEADING—DESCRIPTION OF LAND.

In a complaint in condemnation proceedings, a description of a strip of land sought to be condemned in a block known as "Block 302," as follows: "Thence, crossing Spring street or avenue upon and across block 302, in Middletown, as delineated on the map filed herewith, and marked Exhibit A, in the office of the clerk of this court, and more particularly known as the 'Gardner and Bleeker tract,'" no part of the map being designated as Middletown, no scale of measurement appearing on the map, nor the width of streets, nor size of lots, nor certainty as to the area, limits, or quantity of the land sought to be condemned,—is a defective description.

In bank. Appeal from superior court, San Diego county; HENRY M. WILLIS, Judge.

Condemnation proceedings by California Central Railway Company against George F. Hooper, David L. Gardner, John R. Bleeker, and others. Defendants Gardner and Bleeker appeal from the judgment.

A. B. Hotchkiss, for appellants. *A. Brunson*, for respondent.

MCKINSTRY, J. The action was originally brought by the San Diego Central Railroad Company, a corporation, to condemn for a public use certain real property. After the commencement of the action it was made to appear to the satisfaction of the superior court that the San Diego Central Railroad Company had consolidated all its franchises, properties, rights, and privileges with several other railroad corporations, and that the consolidation had, by articles of agreement, incorporated under the name and style of the "California Central Railway Company;" and thereupon the court ordered that the California Central Railway be substituted as plaintiff in the action, in the place of the San Diego Central Railroad Company. Civil Code, § 473. Of course, an order *ex parte*, substituting one person for another as plaintiff, is not conclusive upon the defendant. But here the regularity of the consolidation, as a consolidation, is not denied. It is, however, disputed that, as a matter of law, the new plaintiff acquired any right to prosecute the action by virtue of the consolidation and order of the court. The articles of consolidation constituted the new articles of incorporation to be filed. *Railroad Co. v. Railroad Co.*, 67 Cal. 59, 7 Pac. Rep. 123.

It is contended by appellant that, when the San Diego Central Railroad Company was amalgamated with other companies, the San Diego Central "died," and the proceedings died with it; that the cause of action did not survive the existence of the corporation which began it. The constitution of Ohio of 1851 prohibited special acts of incorporation, and provided "corporations may be formed under general laws, which [general laws] are subject to alteration or repeal by the legislature." In *Shields v. Ohio*, 95 U. S. 319, it was held where a railroad corporation created by special act, prior to the taking of effect of the constitution of 1851, voluntarily consolidated with another company, under a general law, after the adoption of that constitution, the new corporation, created by the consolidation, was subject to the provisions of the constitution above referred to, and derived its powers and franchises from the general laws; and, accordingly, that the new corporation could not charge more than a limited freightage, fixed by an amendment of the general laws, although the consolidated company, created prior to the constitution of 1851, was originally authorized by its charter to charge "reasonable" rates. In that case it was said it was a condition precedent to the existence of the new corporation that the old ones should first surrender their vitality, and submit to dissolution: *Shields v. Ohio*, is cited by counsel for appellants as bearing upon the present controversy. Since the organization of the state government of California corporations have been formed, and legally can only have been formed, under general laws. None of the corporations merged in the California Central had any other powers or franchises than are enjoyed by it. No such question arises here as was presented in the Ohio case. Whether the consolidating companies ceased to exist, for every purpose, immediately on consolidation,—whether they did not continue separate as to their creditors, (Civil Code, § 473),—is, perhaps, unimportant here. It is certain that, after the amalgamation, the San Diego Central, as a distinct entity, had no interest in nor right to continue the prosecution of the action by it commenced for the condemnation of private property. But, in authorizing corporations to commence and prosecute proceedings like the present, the state does not transfer to such corporations the exercise of the power of eminent domain. The legislature determines that property taken to be used for certain railroad purposes is taken for a public use. Since the state must act through agents, and as the necessity for taking particular property, and the fixing of just compen-

sation to be paid for it, are *quasi* judicial questions, the legislature authorizes a corporation to bring and prosecute an action to secure a judgment determinative of the necessity, and of the valuation, and formally transferring the use. While a corporation which brings such an action is the proper party to bring it, because the statute makes it the proper party, its interest in the action is but incidental and subordinate to the main purpose, (which alone justifies the proceeding under the constitution;) the main purpose being to secure private property, upon just compensation, for a public benefit. In initiating the proceedings, the corporation acts as agent of the state; the legislature having provided the mode for the employment of the power of eminent domain. *Houghton v. Austin*, 47 Cal. 655; *Mahoney v. Water-Works Co.*, 52 Cal. 162. The legislature, which has power to name the agent, has power to provide for the transmission of the agency during the pendency of an action by a change of the plaintiff, at least where, as here, the substituted plaintiff has acquired all the rights, powers, and franchises of the original plaintiff, continues the prosecution of the same action upon the same cause of action,—for the condemnation of the same property for the same public use.

Nor is anything to the contrary of the foregoing decided in *Mahoney v. Water-Works Co.*, *supra*. In that case it appeared that on the day of the commencement of an action by a water corporation for the condemnation of certain land and water, the corporation assigned to certain individuals its right and privilege to acquire and condemn the land and water; the assignees agreeing to pay the amount of damages which should be awarded to the owner of the property in the action, and the corporation covenanting to convey to the assignees (or their beneficiary) the land and water after it should be acquired. The assignees took the assignment for "the use and benefit" of the Spring Valley Company. After the assignment, the corporation last named conducted the proceedings in the name of the original plaintiff. In that case, even treating the assignment of the right to acquire etc., as an attempted purchase by the Spring Valley Company, there was no "consolidation" of the two companies,—no acquisition by that company of the rights and franchises of the corporation plaintiff. The issue made and tried was the necessity of the taking of the private property for the public use represented by the plaintiff, not for the public use represented by the Spring Valley Company. The court said that the attempt by the plaintiff to transfer the right of acquiring the land and water through the condemnation proceedings was *ultra vires*. *Mahoney v. Water-Works Co.*, was an action brought by the owner of the property sought to be condemned, he claiming that he was entitled to recover of the defendant the assessed value of the land and water as appraised in the condemnation proceedings brought and prosecuted to an alleged judgment by and in the name of the Clear Lake Company; this, by reason of an assignment by that company of its right to bring and prosecute the condemnation proceedings to certain individuals, for the use and benefit of the Spring Valley Company. It was held the last-named company could not take an assignment of a right to condemn property not necessary, as must be presumed, to the public use, by it represented. Moreover, what was said on the subject was not strictly necessary to the judgment. The assignment was to individuals, and the statutory proceedings to condemn were commenced by, and could, under the particular statute, only be prosecuted by, a corporation. In the case now here the present plaintiff had acquired, in the manner provided by statute, the right to represent the public use represented by the original plaintiff, as incidental to its acquisition of the right and franchise of building and operating the same railroad, along the same line, and between the same termini.

Section 385 of the Code of Civil Procedure reads: "An action or proceeding does not abate by the death or any disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of

the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding." As to natural persons, the statute speaks of those who may become disabled as different from those who may die. The last sentence relates to voluntary transfers, or to transfers not brought about by the death or disability of the original party. A corporation "in charge of the public use for which the property is sought," (Code Civil Proc. § 1244,) and which must be styled plaintiff, has an interest in the action,—an interest in securing the easement, and in the control of the property which may be taken for the public use represented by the plaintiff in the action. The action does not abate by reason of the plaintiff's disability or attempted transfer, in case the transfer is provided for by statute, and the transferee is in all respects the successor to the interest, both so far as the same is direct, and to the extent that the original party had charge of the public use. Certainly, the right of the successor, if the laws intend him to be successor, to prosecute the action, is not affected by the mere circumstance that the original plaintiff becomes disabled or goes out of existence by the process (amalgamation) which operates a transfer of the previous interest of the original plaintiff, and brings the successor into life. Aside from the direct benefit it will receive in case the property is appropriated to the public use of which it has charge, the very statute which requires the action to be prosecuted in the name of a corporation confers upon it an interest. The agency is in its nature an office. The corporation is a trustee prosecuting the proceeding primarily for the state, which, by its legislature, has declared the use to be public. By permitting a consolidation of the corporation with others, and the creation of a new corporation thereby, the new creature is made a corporation, like each of the others. Aside from the franchise to be a corporation, which is the same as that of each of the consolidating companies, it acquires the rights and franchises to build and operate the roads which all the others had the right to build and operate, and, with this last, the right to commence or prosecute an action for condemnation of property necessary to the building and operation of each of such roads. Had the consolidation occurred before the commencement of this proceeding, the present plaintiff could have begun it. By reason of the subsequent consolidation it took the place, in all respects, so far as this proceeding is concerned, of the original plaintiff. We are of opinion the court below was authorized to make the order of substitution, and so far the judgment is regular and valid.

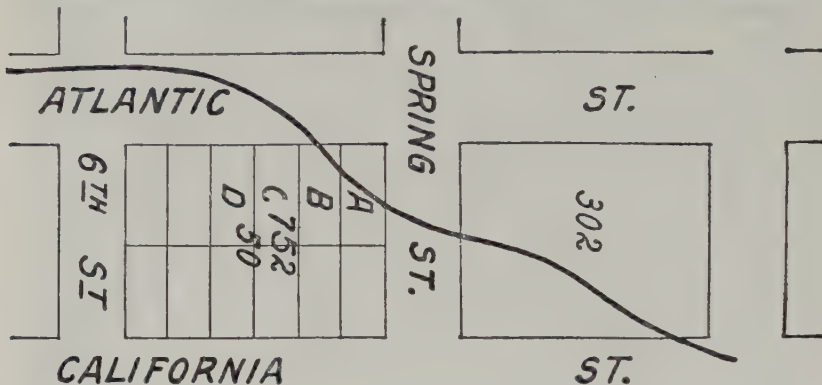
A bill of exceptions recites that, before the jury returned the defendants requested the court to submit the interrogatory to the jury: "Was it necessary for the plaintiff to take any of the Bleeker and Gardner tract for the purpose of its right of way?" The court did not abuse its discretion in refusing to recall the jury. Besides, the complaint alleged that a portion of block 302, in Middletown, was necessary for the right of way. The court found that block 302, in Middletown, belonged to these appellants. The court submitted to the jury the question: "Were the lands described in plaintiff's complaint, and sought to be condemned for the right of way, * * * necessary for such right of way," etc.?

In the absence of the evidence given before the jury, we cannot pass upon the relevancy and propriety of instruction No. 5, asked by defendants. The instruction immediately following in the transcript was substantially given by the court. It is urged the court erred in refusing an instruction that if the land described in the complaint "is being condemned for the use and benefit of the Atchison, Topeka & Santa Fé Railroad Company," etc., the jury should find for defendants. The evidence is not here, and in another instruc-

tion the court said: "There is no evidence in the case connecting the Atchison, Topeka & Santa Fé Railroad Company with this suit, nor any question as to the necessities of that company for these grounds in any way presented by the pleadings." We have examined the charges claimed by appellants to be violative of section 19 of article 6 of the constitution, and find that they are not charges with respect to matters of fact. After saying that there was some evidence in the case tending to show that another railroad company had terminal grounds and other facilities for transacting business in the city and on the bay of San Diego, and that the defendants had offered evidence tending to show that a part of the proposed line of plaintiff's railroad might be so shifted as to pass over other lands, and make an equally good and convenient line of road, the learned judge below said: "The fact that some other company had ample terminal and depot grounds was no reason why the plaintiff should not condemn such lands, described in the complaint, as the jury should find to be necessary for the construction and operation of its roads; and the fact, if proved, that another equally desirable and convenient line could be had by changing it to another place, and passing over other grounds, did not show that the land sought to be taken was not necessary for the use of plaintiff," etc. The instruction as to the non-effect of evidence of the possessions or property of another company was not erroneous. In the absence of a recital of the evidence, we must presume the evidence offered by the defendant with regard to another line tended to prove just what the judge said it intended to prove,—that another line would be "equally good and convenient." The Code provides that, where the land is required for public use, it must be located in a manner compatible with the greatest public good and the least private injury, and subject to the provisions of section 1247. Code Civil Proc. § 1242. One of the two lines equally good and convenient for the railroad company may be of greater injury to the land-owner, or may not permit of a proper regulation of the place and manner of making connections and crossings. Code Civil Proc. § 1247. If there be two lines equally good and convenient both for the property owner and railroad company, the fact of the existence of two such lines does not constitute a reason why neither should be adopted. Even if it should be conceded that in such case the owner of the land over which both lines pass has a right to determine which of the two shall be adopted, there is no pleading or evidence in the transcript before us indicating the defendant's selection of one route rather than another.

It is, however, contended by appellants that there is no certain or sufficient description of the land sought to be taken from them for a way, in the complaint, findings, or judgment. The Code of Civil Procedure (§ 1242) provides that the agent of the state may survey and locate the land sought to be condemned, and that the complaint shall contain a description of each piece of land sought to be taken, and whether the same includes the whole or only a part of an entire parcel, (§ 1244.) The value of each piece taken is to be fixed by the court, as well as the amount of injury done to the remainder of a tract when a part is taken. The judgment must be so far certain as that the parties, and any ministerial officer who may be called on to enforce the judgment, may know what land is to be taken and paid for. The complaint herein avers that there is needed land, for the right of way, "upon and over Atlantic street from the end of said wharf to Spring avenue, curving easterly, and passing upon and across lots A, B, C, and D of block fifty (50) of said Gray & John's map; thence crossing Spring street or avenue upon and across block 302, in Middletown, as delineated on the map filed herewith and marked 'Exhibit A,' in the office of the clerk of this court, and more particularly known as the 'Gardner and Bleeker tract,' taking a strip of 100 feet wide, fifty feet on each side of the center line of said railroad track, as shown on said Exhibit A," etc. The findings and judgment refer to the complaint, and contain no further description. The map brought here is certified by the

clerk of the superior court to be a copy of the original on file in his office. The following is a portion of the map accurately transferred:



NOTE. The figures "752" appear on the map in red.

No part of the map in the transcript is designated as "Middletown;" no scale of measurements appears upon it; the points of the compass are not indicated; neither the width of the streets, nor the size of the lots or blocks, can be ascertained from it; and, with respect to land sought to be taken from appellants, no certainty can be arrived at, by an examination of the map, as to its area, limits, or quantity. The complaint, independent of the map, contains no description of the land to be taken from appellants out of block 302: and by reference to the map it is impossible to determine at what point on Spring or California street the line of the railroad enters or leaves the block 302, as laid down thereon. Judgment and order reversed, and cause remanded for further proceedings.

We concur: SEARLS, C. J.; THORNTON, J.; MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.

76 Cal. 476

HELM v. WILSON. (No. 11,187.)

(Supreme Court of California. June 9, 1888.)

1. EJECTMENT—NONSUIT—DEED—FALSA DEMONSTRATIO.

It is not error on suit for the recovery of land for the court to refuse to grant a motion for a nonsuit against the plaintiff, because his deed, by mistake recites that the land is in the S. E. $\frac{1}{4}$, instead of reciting that it is in the S. W. $\frac{1}{4}$ of the quarter section named, where the land really intended to be conveyed can be identified by monuments fixed upon the ground.

2. SAME—EVIDENCE—CONTRACT OF PURCHASE.

A written contract, under which the defendant went into possession of a piece of land, and built a house and made valuable improvements thereon, and under which the land was afterwards conveyed to him, may be offered in evidence in an action involving the question of the boundaries of the land conveyed to him, to show that he was the equitable owner of the land, and had authority to make an agreement settling a doubtful line between it and an adjoining lot.

3. BOUNDARIES—RECOGNITION—INSTRUCTIONS—STATUTE OF FRAUDS.

An instruction that no parol agreement in regard to land is good except when there is a dispute between owners of adjoining tracts of land about a doubtful line, and an agreement upon a division line between them, is erroneous, it not being necessary to the validity of such an agreement that there should be a previous dispute about the line.

Commissioners' decision. Department 1. Appeal from superior court, Mendocino county; R. MCGARVEY, Judge.

H. W. Helm brought an action against J. G. Wilson to recover a piece of land. Judgment for plaintiff, and defendant appeals.

J. T. Rogers, for appellant. *J. A. Cooper* and *T. J. Carothers*, for respondent.

BELCHER, C. C. The plaintiff owns two acres of land and the defendant one acre. The parcels are adjacent, the plaintiff's land lying east of defendant's. The question in the case is as to the location of the line dividing the parcels. The plaintiff claims that the line is about 22 feet west of the line claimed by defendant, and he brought this action to recover from defendant possession of the disputed strip. The case was tried before a jury, and the verdict and judgment were for the plaintiff. The defendant moved for a new trial, and has appealed from the judgment and order denying his motion.

Both parties derive title through mesne conveyances from Mrs. William Henry, who prior to September, 1877, owned the south half of the quarter section in which the "strip" is situated. The plaintiff proved that on the 4th day of September, 1877, Mrs. Henry conveyed to E. Barnett four acres of land described as "lying on the south side of and within the S. E. $\frac{1}{4}$ " of the quarter section referred to, "commencing at an iron stake in the center of the road on the south line of said described land, near a creek running in a westerly direction, on or near said south line," and extending north 12.65 rods, and west 50.60 rods; that on the same day, and within a few minutes after he received his deed, Barnett conveyed to F. B. Layton the E. $\frac{1}{2}$ of the four acres so conveyed to him, and thereafter, on the 28th of June, 1883, Layton conveyed the same to the plaintiff; that on the 12th of April, 1883, Barnett conveyed to the defendant one acre, being part of the original four-acre tract described as commencing at a point 25.30 rods west from the iron stake mentioned in the deed from Mrs. Henry, and extending north and west 12.65 rods. The plaintiff also proved that the four-acre tract was situated in and was a part of the S. W. $\frac{1}{4}$ of the quarter section referred to, and not in the S. E. $\frac{1}{4}$ thereof; that at the time of the conveyance by Mrs. Henry the tract was surveyed and its corners staked, an iron pin or stake being placed at the south-east corner thereof, and that the iron pin was then where it was placed at the time of the survey; that measuring from the iron pin, according to the calls of his deed, the strip in dispute was a part of the two acres conveyed to him. When the plaintiff rested his case, the defendant moved for a nonsuit, on the ground that plaintiff had failed to show that the strip of land in controversy was within the S. E. $\frac{1}{4}$ of the quarter section described in the complaint, and had shown that the said S. E. $\frac{1}{4}$ was still owned by Mrs. Henry. The court denied the motion, and the defendant excepted to the ruling. The defendant then offered in evidence a written contract, by which Barnett agreed to convey to him the one acre subsequently conveyed, and he agreed to erect upon the premises a framed house of two stories in height, to be covered on the outside with rustic, and the lower story to be finished and painted, for the purposes and uses of a store, the contract reciting that "it is understood that the said party of the second part is to have the sole use, possession, and enjoyment of said property, to rent the same and to use it as his own property, in a lawful manner." The contract was dated August 17, 1878, was signed by both parties, and duly acknowledged, and on the 5th of November, 1878, was recorded in the county records. The plaintiff objected to the contract being received in evidence, on the ground that it was immaterial and incompetent, and that he was not in privity with it. The court sustained the objection, and the defendant reserved an exception. The defendant proved that he went into possession of the land contracted to be sold to him, and in 1878 built a house thereon 24 by 40 feet, and 2 stories high. He also erected a fence along what he supposed to be his east line, which line is the east line of the now disputed strip. About 100 feet of this fence was

burned down in 1881, and was rebuilt by defendant in 1884. Defendant also, in 1884, erected on the south end of the disputed ground a two-story building, the lower story being intended for a saloon. One McClasky built a part of the original fence. He was called as a witness, and, having stated that he knew the parties to the action and Layton and the land in controversy, was asked: "*Question.* Do you know where the fence was built across it, near the middle of the four-acre tract of land? *Answer.* Yes, sir. *Q.* Who built that fence? *A.* I built a portion of it. *Q.* Under whose direction? *A.* Under Mr. Wilson's. *Q.* What directions did Mr. Wilson give you at the time? *A.* He told me to go and see Mr. Layton. *Q.* Did you have any conversation with Layton? *A.* Yes, sir. *Q.* Now, what was said by Mr. Layton at that time? *A.* He pointed out the marks he had on the fence; he said there was as far as his land went. *Q.* On what fence? *A.* On the picket fence that was on the north side of Layton's lot. *Q.* A picket fence that ran east and west along the north boundary of the four acres? *A.* Yes, sir; on the north boundary. * * * *Q.* What was done by you and Layton at that time? *A.* Well, I told him that Mr. Wilson wanted me to put up a chicken-house and chicken-yard there, and wanted me to put it on the line. I told him I would set the post there, and he would tell me where to put it. I walked out and held up a stake, and he told me when it was right, and I built the fence accordingly. *Q.* Where did Mr. Layton stand at that time? *A.* He stood at the north. *Q.* Which way did Mr. Layton look at that time? *A.* Looking south. *Q.* What object did he sight by? *A.* The post on the rail fence,—sighted to the road. *Q.* Did he tell you that he looked at that? *A.* Yes, sir. *Q.* Where was it? *A.* It stood on the south side. *Q.* Did you see the post? *A.* I saw the post. *Q.* Where did you put the fence with reference to the marked line? *A.* I placed it right on the line. * * * *Q.* How far across the lot did you build? *A.* I suppose about thirty yards. * * * *Q.* Do you know whether there was a fence afterwards built from the corner of the chicken-yard, where you left it, clear across to the front? *A.* Yes, sir. *Q.* What was it Mr. Layton said when he pointed out this notch on the fence about his land? *A.* He said that was as far as his land came. *Q.* Was this fence afterwards built on the line, as you got it from him, from the chicken-yard across? *A.* It was built on the same line as the fence I built." The defendant was a witness in his own behalf, and testified: "I have known this 4-acre tract for twenty-six years, and I have been in possession of this 'strip' since 1878. On the 1-acre tract which I got from Barnett I built, in 1878, a house twenty-four by forty feet, and two stories high. I fenced the lot. A part of the fence was the one to which McClasky testified. I have used it in various ways up to the line pointed out by Layton in 1878. No one has ever claimed any of it except me. * * * A portion of the fence was burned down when Layton's house was burned. It was again built, in the spring of 1884, under these circumstances: They wanted a division fence there, and I sent some of my boys over there to set up some posts and rebuild it. They went over there, and set some posts, first commencing at my store, and running up to the corner, and then commenced setting posts to run north, and the plaintiff said they were setting the posts wrong,—not setting them to conform to old line,—and they quit. I afterwards went there, and the plaintiff and I pulled up some of the posts and strung them along to suit his notions of the line. Afterwards I had the fence built on the line on the east side of the 'strip' indicated then by the plaintiff. This was before I commenced to build the saloon. The plaintiff did not object to my building the fence, nor claim any of the land west of the fence. We pulled up and reset four or five posts. The old stubs were there to go by. It had been burned for about one hundred feet." Layton was called as a witness for plaintiff, and testified: "I know the plaintiff and defendant and the 'strip' in dispute. I am the grantor of the plaintiff, and was present in 1877, when Taylor surveyed the

four acres. I set the corner stakes or pins. * * * When I sold to plaintiff I showed him my boundaries, though I did not point out the iron pin to him. I don't know that I showed him the western boundary. He could see my fence. I did not show him any land now included in the 'strip.' I did not show him any land as mine west of the fence McClasky built. I never told anybody that I claimed any part of the 'strip.' I used it before it was fenced, but I did not use or claim it as mine. After it was fenced I never claimed it. It was fenced about 1878 or 1879. Up to this time there had been no controversy about the boundaries." The plaintiff was called as a witness for himself, and testified: "I know the defendant. He is in possession of the 22-foot 'strip.' * * * In the spring of 1884 the defendant built a fence and house and horse-shed on this land. The house is 2-story, about 20 by 40 feet, and stands on the south end of the land facing the street. It is about forty feet from defendant's store, and about fourteen feet from my dwelling-house. I was at home, and saw the house being built. The defendant told me he was building it. I objected to its being built there, because it was so near my own house. I did not object because I owned the land. I never thought I owned it. I never heard any one say the 'strip' belonged to my lot until we measured it, about a month before the suit was commenced. Never claimed to own it till it was measured. I do not know that Layton ever claimed to own it. In 1881 there was a fence along the east side of this 'strip.' * * * There was in 1881, and is now, a chicken-lot extending from the north boundary south, on and along the east side of this 'strip' for about one-third along the 'strip' in length. It had been there probably a year. From the south-east corner of the chicken-lot there was a fence, above spoken of, on and along the east side of the 'strip,' on through to the street. Mr. Layton's house, on the 2-acre tract, was burned in July, 1881, and at that time the said fence was also partly burned for about one hundred feet back from the street. The old stubs of the burned posts still stood in the ground. On this line, marked out by these old stubs, the defendant, in the spring of 1884, built another fence. His boys came and put down some posts. They did not set them on the old line, but east of it. I told them about it. They then quit. It was afterwards built on the old line, marked by the stubs, by the defendant. About one month before the fence was built I had a conversation with the defendant. It was something like this: He said that he would furnish the lumber to build the fence on the old line if I would nail on the boards, and that I might nail them on my side so as to have the smooth side to my house. The defendant and I reset some of the posts set by his boys. We put them on the old stub line. The defendant built the fence." There was also testimony offered by defendant for the purpose of showing the original location of the north-west and south-west corners of the four-acre tract, and that, measuring from such south-west corner, the iron pin at the south-east corner must have been originally placed further east than it then was; but, upon objection by the plaintiff, the testimony was excluded.

The court, at the request of the plaintiff, gave to the jury, among others, the following instruction: "I charge you that no parol agreement is good between parties in regard to real estate, except that when owners of adjoining tracts of land are uncertain about the true division line between them, and there is a dispute about the same, they may then agree upon a division line as the true line, and if they do so agree, and erect a division fence upon what they agree upon as the true line, in such case the agreement of the parties would govern; but you must find, by a preponderance of testimony, that there was a dispute between the adjoining owners as to the true line, and that such line was agreed upon, or you cannot find for the defendant upon the theory of an agreed line."

1. We do not think the court erred in refusing to grant the defendant's motion for a nonsuit. The fact that each of the deeds described the land con-

veyed as being a part of the south-east quarter, instead of the south-west quarter, of a quarter section named, is not controlling. If the land really intended to be conveyed can be identified by monuments actually fixed upon the ground, then the mistake as to the 40-acre subdivision in which it is situated may be rejected as *falsa demonstratio*. In this case both parties were in possession, and claiming a part of the four-acre tract conveyed by Mrs. Henry, and the only question as to its location was as to where were its exact eastern and western boundaries.

2. We think the court erred in refusing to admit in evidence the written contract made between Barnett and the defendant. Under that contract defendant went into possession of the one-acre tract described, and erected improvements thereon. He became the equitable owner of the land, and as such dealt and agreed with Layton as to its eastern line. He was entitled to show by his contract his relations to the land and to the adjacent owner.

3. We also think the court erred in giving the instruction above quoted. It in effect told the jury that no agreement between coterminous owners, as to their boundary line, is binding, unless there has been a dispute as to the true line. If this be sound law, then it must follow that in every case where a line is uncertain, though both parties agree as to where the line is, and erect thereon a division fence and acquiesce in that line for a long time, still, when the true line is discovered, the agreement and acquiescence will count for nothing, and the true line may be insisted upon. We think the dispute a false quantity, and that the instruction was misleading. In *Truett v. Adams*, 66 Cal. 223, 5 Pac. Rep. 96, the rule is said to be that "where it is proved that a line has been agreed upon, either expressly or by long acquiescence, as the dividing line between two tracts of land, courts will not disturb the line." In *White v. Spreckels*, 17 Pac. Rep. 717, it is said: "Where coterminous proprietors of land in good faith agree upon, fix, and establish a boundary line between their respective tracts of land, in which they acquiesce, and under which they occupy, for a period equal to that fixed by the statute of limitations, the line as thus established is binding upon them, and those holding under them, or either of them." Here the division line was agreed upon, and the fence built, according to the testimony of Layton and the plaintiff, in 1878 or 1879, and this line was acquiesced in, according to the testimony of all the witnesses, until about a month before the action was commenced, which was on the 25th of November, 1884. If the time of building the fence was rightly given by Layton and the plaintiff, then it would seem that there was an acquiescence and occupancy for a period longer than that fixed by the statute of limitations to bar an action. Besides, it appears that in 1884 the defendant, with the knowledge and acquiescence of the plaintiff, erected valuable improvements upon the disputed "strip." It has been held that, even without any agreement more than is implied from their acts, if two persons trace their dividing line, and both recognizing it as such, one goes forward with the knowledge and acquiescence of the other, and makes valuable improvements, so valuable as to work great injury to the party making them if the line be disturbed, the other will be estopped from afterwards alleging such mistake as shall deprive the builder of his improvements; and especially if the party seeking to disturb the line knew at the time the improvements were made all that he subsequently learned, or if he had the means of knowledge. *Dolde v. Vodicke*, 49 Mo. 98; 1 Wait, Act. & Def. 719, and cases cited. Many other points are made, but they do not require special notice. In our opinion the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

76 Cal. 465

WRIGHT v. MIX. (No. 9,932.)

(Supreme Court of California. June 9, 1888.)

ASSIGNMENT—OF CLAIM FOR SERVICES RENDERED—PURCHASE BY EMPLOYER.

M. employed defendant to do certain work, no price being fixed. Subsequently, H. was, with M.'s consent, associated with defendant in the work, and to receive one-third of the proceeds. Upon the completion of the work, a dispute as to the value thereof arose, and H., without the knowledge of defendant, accepted a sum in satisfaction of his claim, and executed an assignment of his interest to plaintiff, who had no interest in the matter, but was acting for M., who furnished the money to pay H. Defendant recovered a judgment against M. for his services, and plaintiff, as assignee of H., sued to have a trust declared in one-third of the judgment by virtue of said assignment. *Held*, that M. was legally liable to both defendant and H., and that under Civil Code Cal. § 1473, providing that full performance of an obligation by the party whose duty it is to perform it, or by another person with his assent, if accepted by the creditor, extinguishes it, the payment to H. extinguished his claim, and plaintiff was entitled to no part of said judgment.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

John Reynolds, for appellant. *S. W. Holladay*, for respondent.

HAYNE, C. Suit to declare a trust as to one-third of a judgment recovered by the defendant, Mix, against one Henry Miller. It appears that Miller employed Mix, who was a searcher of records, to prepare an abstract of title to the Las Animas *rancho*, to be used in a partition suit. A few days after the agreement the defendant, Mix, with the consent of Miller, associated with himself another searcher, (one Howes,) and agreed that he should have one-third of what should be obtained for their services. When the abstract was prepared a dispute arose as to what was to be paid for it, no sum having been fixed. Miller offered the searchers \$1,800, in addition to certain sums which he had paid on account, in satisfaction of what was due to them. They declined this proposition; but a short time afterwards Howes, without the knowledge of Mix, agreed with the attorneys of Miller to accept \$600 as his share of what was due to himself and Mix. There was also an understanding that,

in case anything over and above the fee was ordered paid by the other cotenants as costs in the partition suit, Howes was to get one-third of it; but he was to have no further personal claim against Miller. In pursuance of this arrangement, Miller furnished the money to pay Howes. Howes did not give any satisfaction or receipt, but executed an assignment to the plaintiff, Wright. Wright was an attorney, who had an office adjoining the offices of the attorneys for Miller. He paid no money to Howes, and had no interest in the claim, but acted simply as the "trustee" of Miller. Mix afterwards brought suit upon the claim, and recovered a judgment against Miller for the sum of \$10,000, which judgment was affirmed on appeal. It does not clearly appear whether that suit is to be taken as for the whole demand against Miller, or only for Mix's two-thirds of it; and, in the view we take, it is not necessary to determine that question. Wright now sues to declare Mix a trustee for him as to one-third of the \$10,000 judgment. The court below gave judgment for the defendant, and the plaintiff appeals.

1. We think that upon the record the obligation of Miller was directly to Howes and Mix, and not to Mix only. In the first instance, it was to Mix only. But it is alleged in the complaint that a few days thereafter Mix "obtained the consent of said Miller to associate with him in said employment one S. P. Howes. * * * And it was on said last-named day agreed, by and between said defendant and said Howes, that they should together revise, correct, and complete said abstract, and that the fee or price which should be obtained for their services in the matter should be divided between them." This allegation is not denied. And we think the construction that must be given to it is that a new arrangement was made between Miller, Mix, and Howes, by which the latter two were to do the work jointly, and be interested in the fee in the proportions mentioned, in which view Miller was responsible directly to Howes as well as to Mix. There is some evidence to the effect that Mix proceeded on the theory that Miller was responsible to him alone, and that Howes "was his assistant, having no relation with Miller." But that does not seem to have been Howes' view of the matter. And the court finds that "Mix, by consent of Miller, associated with him in said work one S. P. Howes, and they (Mix and Howes) agreed together in writing to do said abstract work, and Miller agreed to pay therefor." The court, therefore, took Howes' view of the matter. But, however this may be, the allegation of the complaint, being admitted, must control. Miller, therefore, was liable directly to Howes for one-third of the fee.

2. Miller having paid the \$600 directly to Howes, and the latter having accepted it in full satisfaction, his claim was extinguished. In this regard the court finds that "Howes had been fully paid and settled with by Miller for all his (Howes') claims and demands for his services in the matter of said abstract, at or about the time of his pretended assignment to plaintiff above set forth, * * * of all of which plaintiff had due notice at the time of said payment and settlement." And this finding is justified by the evidence. It is undisputed that the money came from Miller. The plaintiff had no interest in it whatever, and admits that he acted only as "trustee" for Miller. Howes says that he "had settled with Miller;" that his understanding of the transaction was that it was simply to protect Miller; and that after the settlement he had no further personal claim against Miller. Taking these to be the facts, it is evident that the claim was extinguished by payment, and could not be kept alive in the way attempted. "Full performance of an obligation, by the party whose duty it is to perform it, or by any other person on his behalf, and with his assent, if accepted by the creditor, extinguishes it." Civil Code, § 1473. An obligation which has been extinguished by payment cannot be subsequently transferred. *Moran v. Abbey*, 58 Cal. 167; *Gordon v. Wansey*, 21 Cal. 78; *Bank v. Lay*, 80 Va. 436; *McClure v. Andrews*, 68 Ind. 98; *Rolfe v. Wooster*, 58 N. H. 526. And we think that it makes no difference

that the attempted transfer is made at the same time as the payment and as part of the same transaction. It was a mere disguise gotten up as a weapon for use in the controversy with Mix. This being the case, if the suit by Mix is to be regarded as for the whole amount due to himself and Howes, the payment to Howes would have been a defense *pro tanto*, and ought to have been pleaded in that action. If, on the other hand, the suit by Mix was only for his two-thirds, the other third was not involved, and the plaintiff has no color of right to the judgment. We therefore advise that the judgment and order denying a new trial be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

77 Cal. 263

GRANT v. HEVERIN *et al.* (No. 11,160.)

(*Supreme Court of California.* June 1, 1888.)

TRUSTS—ASSIGNMENT BY TRUSTEE—EXECUTORS AND ADMINISTRATORS.

An assignee of a bond who holds the legal title for another, upon the death of the latter holds in trust for his legal representatives; and if assignment is made by the assignee to the widow with notice by her of the character of his title, and without any consideration, she acquires no title upon which she can recover.

Department 2. Appeal from superior court, city and county of San Francisco; M. A. EDMONDS, Judge.

Action by Elizabeth A. Grant against M. Heverin, P. Mallon, and Charles McVicker, upon a bond. Judgment was for plaintiff, and defendants appeal. The trial court found that on March 11, 1876, action was begun by John Hughes against M. Heverin, and property of the defendant was attached and taken possession of by levy. That, to obtain the release of the same, the bond in question was entered into, in terms as follows: "*John Hughes, Plaintiff, vs. Michael Heverin, Defendant.* Whereas, the above-named plaintiff commenced an action in the district court of the Fourth judicial district of the state of California, in and for the city and county of San Francisco, against the above-named defendant, claiming that there was due to said plaintiff from said defendant the sum of seven hundred and fifty dollars, or thereabouts, and thereupon an attachment was issued against the property of said defendant as security for the satisfaction of any judgment that might be recovered therein, and certain property and effects of the said defendant have been attached and seized by the sheriff of said city and county under and by virtue of said writ; and whereas, the said defendant is desirous of having said property released from said attachment: now, therefore, we, the undersigned, residents and householders in the state of California, in consideration of the release from said attachment of the property attached, as above mentioned, do hereby jointly and severally undertake, in the sum of fifteen hundred dollars, and promise, that, in case the plaintiff recover judgment in the action, defendant will, on demand, pay to plaintiff the amount of whatever judgment may be recovered in said action, together with the percentage, interest, and costs; the same to be paid in United States gold coin if so required by the terms of the judgment. *Dated at San Francisco the 16th day of June, A. D. 1876. M. HEVERIN. P. MALLON. CHARLES McVICKER.*" That March 11, 1878, the plaintiff, Hughes, sold all his interest in the bond and judgment to one John Grant, and at his request assigned the same to Michael Mullany. That September 5, 1882, judgment was recovered, and August 6, 1883, execution was issued thereon, and returned unsatisfied. That afterwards, on August 13, 1883, the said John Grant died, and Mullany assigned the bond and judgment to his wife, this plaintiff; and that payment of the judgment has

been refused. Judgment was entered against defendants, and motion for new trial was denied.

M. C. Hassett, for appellants. *Mich. Mullany*, for respondent.

THORNTON, J. The evidence in this case shows that Mullany, the assignor of the plaintiff, held the undertaking assigned to him for John Grant; that John Grant was the owner of the undertaking; and that Mullany held the legal title to it for him. The evidence further shows that, after John Grant's death, Mullany assigned it to his widow, the plaintiff herein. We are satisfied from the evidence that the plaintiff was not the purchaser for value of the instrument assigned; and, further, that she was a purchaser with notice of John Grant's title. In fact, we cannot see how she could have been, under the evidence, a purchaser without notice of the character of the title of her assignor, Mullany. On John Grant's death the undertaking in suit here passed to his administrator or executor. Mullany then held the legal title to the undertaking in trust for the personal representative of John Grant, and had no right to assign to Grant's widow. The plaintiff has no title on which she can recover. Judgment and order reversed, and cause remanded.

We concur: **SHARFSTEIN, J.; McFARLAND, J.**

76 Cal. 489

BANK OF HEALDSBURG v. HITCHCOCK. (No. 11,351.)

(*Supreme Court of California.* June 9, 1888.)

1. APPEAL—REVIEW—PRESUMPTIONS—MOTION FOR NEW TRIAL.

Where the order of the court denying a motion for a new trial is stated to be based on the ground that "a motion for a new trial is not the proper remedy," it will be presumed that the notice of intention to move for a new trial was in all respects regular, and that said motion was not denied on the ground that such notice of intention to move for a new trial was not given in time or not at all.

2. COURTS—JURISDICTION BY CONSENT—PARTITION.

Where the parties to an action of partition file a stipulation in regard to the partition of the lands in controversy, and other lands not involved in the suit, and one of the parties fails to comply with the stipulation, the court cannot render any decree in such action upon the stipulation; the contract contained in the stipulation being entire.

Appeal from superior court, Sonoma county; **JOHN G. PRESSLEY**, Judge.

This is an action for partition of certain lands situated in Sonoma and Mendocino counties, Cal., and described in the complaint and answer and cross-complaint. The action came on regularly for trial on May 21, 1885, before **J. G. PRESSLEY**, judge of the superior court of Sonoma county, Cal., to which court the action had been regularly transferred from the superior court of Mendocino county. On said day plaintiff asked leave of court to file the following stipulation, which, not being objected to by defendant, was accordingly filed; whereupon the case was continued indefinitely, and ordered stricken from the calendar, to be restored on motion: "In the Superior Court, Sonoma County, State of California. *Bank of Healdsburg vs. Hollis Hitchcock*. The parties to said action hereby stipulate for partition of the lands for which said action was brought, and, to settle any question in relation to other lands adjoining said lands, stipulate" for the partition of such other lands also. On June 8, 1885, on motion of plaintiff, the said cause was restored to the calendar, and continued to June 15, 1885. The plaintiff then moved for judgment upon the stipulation, and read the same in evidence, and also the affidavit of **James H. McGee**, showing that defendant had failed and refused to perform the stipulation on his part, and the court found that said defendant had so refused to perform. No further evidence being offered, after argument the court ordered judgment for plaintiff; and on June 25, 1885, the following decree was duly signed and entered in said cause, viz.: "This

cause having by stipulation been transferred from the superior court of Mendocino county, and coming on to be heard on the 21st day of May, A. D. 1885, upon the complaint of the plaintiff and the answer of the defendant, and the said cause being called for trial, on motion of defendant's attorneys in open court, duly consented to and signed by plaintiff's and defendant's attorneys, a stipulation was duly filed in said cause, on motion of the attorneys for the respective parties, stipulating for a partition of the lands set out and described in plaintiff's complaint, and for a judgment against the said defendant for an accounting of three hundred dollars in United States gold coin for moneys laid out and expended on the common property, and for one-half of the costs of suit; now, on this 15th day of June, A. D. 1885, on motion of the attorneys for plaintiff for judgment upon said stipulation in pursuance of the terms thereof, which motion was argued by the attorneys for plaintiff and defendant, and taken under advisement by the court until the 19th day of June, A. D. 1885, when the court rendered its decision on said motion in writing, sustaining and granting said motion, and ordering judgment as per said stipulation regarding all the matters and things forming the subject of this action: now, therefore, on motion of plaintiff's attorneys, this 25th day of June, A. D. 1885, it is ordered that partition of the lands mentioned, set out, and described in plaintiff's complaint herein be had between plaintiff and defendant, as follows: It is hereby ordered, adjudged, and decreed that said plaintiff, the Bank of Healdsburg, have set off to it, and the same is hereby set off to it, in severalty, all that portion of the lands set out and described in plaintiff's complaint herein, situate, lying, and being on the south or southerly side of what is known as and commonly called the 'Rock Pile Creek,' * * * in township eleven (11) north, range 13 west of Mount Diablo meridian, in the county of Mendocino, state of California. It is further ordered, adjudged, and decreed that the said defendant, Hollis Hitchcock, have set off to him, and the same is hereby set off to him, in severalty, all that portion of the lands set out and described in plaintiff's complaint herein, situate, lying, and being on the north or northerly side of said Rock Pile creek, * * * in the county of Mendocino, state of California. The said parties, plaintiff and defendant, are hereby decreed and adjudged the owners in fee-simple and in severalty of the lands above described and set off to the Bank of Healdsburg and Hollis Hitchcock, respectively. It is further ordered, adjudged, and decreed that the plaintiff, the Bank of Healdsburg, do have and recover, of and from the defendant, Hollis Hitchcock, the sum of three hundred dollars in United States gold coin, and that plaintiff have execution therefor; that the plaintiff and the defendant each pay one-half of the costs of this action." The order denying motion for new trial was as follows: "There was no trial of this case. The decree was signed, and judgment ordered, on a written stipulation of the parties, signed by their attorneys and filed. I am of opinion that there was no error in entering the decree and judgment, and that, even if there was, a motion for a new trial is not a proper remedy. The motion 'to vacate and set aside the decision of the court,' * * * and to grant a new trial of said cause,' is denied." Defendant appeals.

Thos. J. Geary, for appellant. *J. H. McGee* and *W. F. Russell*, for respondent.

THORNTON, J. We think that the record here shows that the notice of intention to move for a new trial was properly and duly given. We find in the order denying the motion that the court below denies it on the ground that "a motion for a new trial is not the proper remedy." If the notice of intention to move was not given at all, or was not given in time, the court might and would have denied the motion for a new trial on one or the other of such grounds. The ground on which the court rested its denial of the motion satisfies us that the notice for a new trial was in all respects regular, and that

there is no ground to indulge the presumption that the notice of intention was not given at all, or not given in time, and, on one or the other of such grounds, that the motion was denied. The court decided the cause on a stipulation or contract made between the parties to the action in regard to the partition of the lands involved in this case, and other lands not involved herein. The contract was entire, its terms being dependent, and in our judgment the court erred in selecting a portion of the contract and ruling on it, and disregarding other portions of it. No one can say on reading the contract (which seems to have been filed as a stipulation in the cause) that the defendant consented or would have consented to the partition of the land involved in this action, unless the provisions of the contract in regard to the other lands were also carried out. We are of opinion, therefore, that there was no evidence to justify the decision of the court. If the defendant refused to carry out his contract with the plaintiff, the plaintiff has its remedy by an action for specific performance. The judgment and order must be reversed, and the cause remanded. So ordered.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

76 Cal. 527

BECK *et al.* v. SOWARD. (No. 12,476.)

(Supreme Court of California. June 9, 1888.)

1. HOMESTEAD—DECLARATION BY WIFE—ACKNOWLEDGMENT.

Civil Code Cal. § 1239, provides that a homestead cannot be selected from the separate property of a wife without her consent, shown by joining in a declaration of homestead; section 1262 provides that such declaration must be acknowledged in the same manner as grants of real property; section 1186, that the acknowledgment of a married woman must not be taken unless she is made acquainted by the officer with the contents of the instrument, on an examination without the hearing of her husband. Under these provisions a certificate that "she was by me first made acquainted with the contents thereof, and thereupon acknowledged to me, on examination separate and apart from, and without the hearing of, her husband, that she executed," etc., it is defective, in not showing that she was made acquainted with the contents of the declaration on an examination without the hearing of her husband, and such declaration is invalid. MCFARLAND, J., dissenting.

2. HOMESTEAD—RIGHT OF SURVIVING HUSBAND.

Under Civil Code Cal. § 1265, which provides that, upon the death of a person whose property was set apart as a homestead, (except in case of community property of a married person,) such property shall descend to the heirs or devisees; and section 1386, which provides that, where deceased leaves a wife or husband and more than one child, such wife or husband shall inherit one-third of the real estate, and the children the remainder jointly,—the husband of a deceased wife, who left more than one child, inherits only one-third of her separate real estate set apart in her life-time as a homestead.

In bank. Appeal from superior court, Los Angeles county; A. W. HUTTON, Judge.

Action to quiet title, brought by M. A. Beck, M. J. Bryant, Serena Thurman, E. T. Smith, Joseph Hart, Meredith Hart, Mitchell Burks, and Catherine Burks, against Richard Soward. The superior court rendered judgment for plaintiffs, declaring them to be the owners of an undivided two-thirds interest in the land in controversy. Defendant appeals.

Williams & McKinley, for appellant. *Shaw & Damron*, for respondents.

SEARLS, C. J. This is an action to quiet title, brought by plaintiffs, the heirs of Millie C. Soward, deceased, against Richard Soward, her husband. The land in dispute was the separate property of Millie Soward, deceased. Defendant claims under the declaration of homestead set forth in the findings. It is claimed by plaintiffs and respondents that the declaration of homestead upon the separate property of the wife was invalid, upon the grounds—*First*, that it was not properly acknowledged by the wife; *second*, that it did not

show declarant was the head of a family; *third*, that it did not show the estimated value of the property.

The homestead declaration was executed in November, 1880, and recorded December 10, 1880. Section 1239 of the Civil Code provides that "the homestead cannot be selected from the separate property of the wife without her consent, shown by her making, or joining in making, the declaration of homestead." It follows that the wife was a necessary party to the declaration of homestead upon this, her separate property. The declaration must be executed and acknowledged in the same manner as a grant of real property is acknowledged. Civil Code, § 1262. "The acknowledgment of a married woman to an instrument purporting to be executed by her must not be taken unless she is made acquainted by the officer with the contents of the instrument on an examination without the hearing of her husband; nor certified unless she thereupon acknowledges to the officer that she executed the instrument, and that she does not wish to retract such execution." Id. § 1186. In the present case the acknowledgment of decedent is certified to as follows: "And I do hereby further certify that the said Millie C., wife of Richard Soward, is personally known to me to be the person whose name is subscribed to said instrument as a party thereto, and that she was by me first made acquainted with the contents thereof, and thereupon acknowledged to me, on examination separate and apart from, and without the hearing of her husband, that she executed the same freely and voluntarily, for the uses and purposes therein mentioned, without fear or compulsion or undue influence of her said husband, and that she did not wish to retract the execution of the same." As will be seen, the certificate fails to show that the party was made acquainted with the contents of the instrument by the officer on an examination without the hearing of her husband, as required by section 1186 of the Civil Code. The form used was such as was provided by the statute prior to the Code; but, since the adoption of that instrument, a married woman, in acknowledging an instrument, must be made acquainted with and acknowledge the instrument without the hearing of her husband. If she acknowledges the homestead declaration in the same manner as she is required to acknowledge a grant of real property, she must be made acquainted with its contents on an examination without the hearing of her husband, as provided in section 1186 of the Civil Code; and, as that section provides that the acknowledgment of married women to an instrument must not be taken without this formula, we are of opinion there was no sufficient evidence of such an execution of the instrument by deceased as was requisite to its validity. The reasons for requiring a homestead declaration, made by a wife upon her separate property jointly with her husband, to be explained to and acknowledged by her without the hearing of her husband, are as all-prevailing as those which apply to the conveyance by her of her separate property. The strongest reason, however, is to be found in the fact that the provision is statutory, and the statute not only requires it, but inhibits the taking of an acknowledgment by a married woman in any other way. The case of *Clements v. Stanton*, 47 Cal. 60, in which it was held that the wife might acknowledge, in the mode prescribed by law for the acknowledgment of conveyances of real property by persons other than married women, a declaration of homestead selected by her alone, was one which originated prior to the adoption of the Code, and when the inhibition contained in section 1186 did not exist. We think the rule enunciated in *Hutchinson v. Ainsworth*, 63 Cal. 286, in case of an acknowledgment similar to the one here, is the true one, and applicable alike to all acknowledgments of instruments by married women.

We have discussed this question as though it were important to a determination of the case. The judgment of the court below must be affirmed for another reason. The homestead was carved out of the separate property of the wife in December, 1880. The wife died intestate February 16, 1887,

leaving a husband and more than one child. By section 1265 of the Civil Code, the homestead not being community property, but having been selected from the property of the wife, upon her death descended to her heirs; that is to say, there being more than one child and a surviving husband, one-third of it was succeeded to by the husband, and the remaining two-thirds, in equal shares, to the children, etc., as provided in section 1386 of the Civil Code. This is precisely the result reached by the court below; and, had the homestead been held valid, it would not have changed the order of succession. The judgment is affirmed.

We concur: PATERSON, J.; MCKINSTRY, J.; THORNTON, J.; SHARPSTEIN, J.

McFARLAND, J., (*concurring*.) I concur in the judgment on the point last named in the opinion of the chief justice, but I dissent from the view that the certificate of acknowledgment of Mrs. Soward to the homestead declaration is so defective as to render it void. I have always been loath to see titles to real property broken up on account of irregular acknowledgments of deeds and conveyances, and I think that such result should not be declared except when the failure to substantially comply with statutory requisites is clear and marked. Such, in my opinion, is not the case in this instance. Scarcely any one would notice the alleged defect upon a first reading of the certificate, and I think a fair construction to be that the word "thereupon" connects what precedes and follows it, and shows, substantially, that making her acquainted with the contents of the instrument, and her acknowledgment of it, were parts of the same transaction, and that both occurred "without the hearing of her husband."

76 Cal. 494

ORDER OF MUTUAL COMPANIONS v. GRIEST *et al.* (No. 11,068.)

(*Supreme Court of California. June 9, 1888.*)

INSURANCE—MUTUAL BENEFIT CERTIFICATE—DESIGNATION OF BENEFICIARY.

Testator became a member of a mutual insurance association whose constitution provided that the association would pay a stated sum, upon the death of the member, to the person designated in writing as beneficiary, allowing a change of beneficiary on application in writing to the secretary; and his deceased wife, without his designation, was made beneficiary. Subsequently he remarried, and by his will bequeathed the insurance to his surviving wife, directing the officers of the order to substitute her name in the certificate, and pay her the money. *Held*, that a judgment awarding the fund to the executor of testator's estate, to be distributed as the probate court might direct, was proper as against the heirs of the first wife; she never having been designated as beneficiary.

Department 2. Appeal from superior court, Sonoma county; JACKSON TEMPLE, Judge.

Action by the Order of Mutual Companions against Eliza Griest, widow of Peter Griest, deceased, Israel Cook, executor of his estate, and Rebecca Young and others, children and grandchildren of Leah A. Griest, a former wife of said Peter Griest, to determine the conflicting claims of defendants to the proceeds of a policy of insurance issued by plaintiff on the life of deceased. From a judgment awarding the fund to the executor, the said children and grandchildren bring this appeal.

J. H. McGee, J. T. Campbell, and W. F. Russell, for appellants. *Wm. B. Haskell, A. B. Ware, and L. A. Norton*, for respondents.

McFARLAND, J. Peter Griest, deceased, was, at the time of his death, a member in good standing of the corporation plaintiff, known as the "Order of Mutual Companions." Before its incorporation there had been in existence another corporation of a somewhat similar character, called the "Sonoma & Marin Mutual Beneficial Association." The constitution of each of these corporations provided that each member should designate in writing some

person as nominee for the benefits, and that upon the death of a member the nominee so designated by him should receive a certain amount of money according to class, etc., which, in the case of said Peter Griest, if there had been a nominee, would have been \$2,000. The nominee might also be changed by the member forwarding to the secretary an application upon a blank used for that purpose. Peter Griest had been a member of the Sonoma & Marin Association, and had designated as his nominee therein his then wife, Leah A. Griest. But that association was disincorporated by decree of court in December, 1882. During said year (1882) the plaintiff herein, the Order of Mutual Companions, was incorporated, and said Peter Griest became a member of it on December 28, 1882. A benefit certificate was issued to him at the last-named date, in which said Leah A. Griest was mentioned as nominee; but Mrs. Leah A. Griest had died in July, 1882, several months before he became a member of the corporation plaintiff, and he had not designated her, nor did he ever designate any other person, as his nominee in said corporation, or make any application for a change of nominee. In November, 1883, Peter Griest and the defendant Eliza Griest intermarried, and continued to be husband and wife until February 15, 1884, when said Peter Griest died. He left a will in which he bequeathed his "life insurance, amounting to \$2,000, in the Order of Mutual Companions," to his surviving wife, the said Eliza Griest, and directed the officers of said order to substitute her name in the certificate, and to pay her the money. The defendant Israel Cook is the executor of the estate. After the death of Peter Griest, his said executor demanded that plaintiff pay to him, as executor, the said \$2,000. The surviving widow, Eliza Griest, also demanded that said money be paid to her. The other defendants are children and grandchildren of the deceased wife, Leah A. Griest, and they demanded that the money be paid to them. Under these circumstances, the plaintiff brought this action; and in its complaint, after stating the foregoing facts, admits its moral obligation and willingness to pay the money to whomsoever the court may direct it to be paid, and asks the court to determine by its judgment to whom the money shall be paid, and to relieve plaintiff from further liability or embarrassment in the premises. The court below rendered judgment that the executor of the estate of said Peter Griest take said money, to be distributed as the probate court may direct. From this judgment the defendants, children and grandchildren of said Leah A. Griest, deceased, appeal to this court.

It is somewhat difficult to see how either of the parties could have been legally "aggrieved" by any judgment that the court might have rendered. It seems to be admitted that the plaintiff was not legally liable to pay the money to anybody. It was liable only to the nominee of a deceased member, and in this instance there was no nominee. Peter Griest did not designate Leah A. Griest as his nominee; and, if he had, such designation would have been a nullity, because there was no such person in existence. The appellants, therefore, as her heirs or representatives, had no interest in or ownership of the money; and how can they be aggrieved even if the court gave property not theirs to the wrong party? And, in good conscience, they are not entitled to it, because Peter Griest intended it to go to another person. If he had designated his living wife as nominee in the proper way, instead of relying upon an expression of his desire in his last will and testament, there would have been no difficulty in legally consummating his intention. But, under any view, we do not see how a better conclusion could be arrived at than the one reached by the court below, namely, that the money should go, in the first instance at least, as part of the estate, to the executor. And this is so, certainly, as against the appellants; for the surviving wife, Eliza Griest, does not appeal. Judgment is affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J

76 Cal. 497

In re GRIEST'S ESTATE. (No. 11,069.)

(Supreme Court of California. June 9, 1888.)

WILL—BEQUEST OF INSURANCE MONEY.

Testator became a member of a mutual insurance association whose constitution provided that the association would pay a stated sum, upon the death of the member, to the person designated in writing as beneficiary, allowing a change of beneficiary on application in writing to the secretary; and his deceased wife, without his designation, was made beneficiary. Subsequently, he remarried, and by his will bequeathed the insurance to his surviving wife, directing the officers of the order to substitute her name in the certificate, and pay her the money. *Held*, that such surviving wife was entitled to the fund as against testator's children.

Department 2. Appeal from superior court, Sonoma county.

Peter Griest, deceased, was, at the time of his death, a member in good standing of the Order of Mutual Companions. Before the incorporation of the order there had been in existence another corporation of a similar character, called the "Sonoma & Marin Mutual Beneficial Association." The constitution of each of these corporations provided that each member should designate in writing some person as nominee for the benefits, and that upon the death of a member the nominee so designated by him should receive a certain amount of money, according to class, etc., which, in the case of said Peter Griest, if there had been a nominee, would have been \$2,000. The nominee might also be changed by the member forwarding to the secretary an application on a blank used for that purpose. Peter Griest had been a member of the Sonoma & Marin Association, and had designated as his nominee therein his then wife, Leah A. Griest. That association had been disincorporated in 1882, and the Order of Mutual Companions incorporated; Peter Griest becoming a member. A benefit certificate was issued to him, in which said Leah A. Griest was mentioned as nominee. Leah A. Griest had died several months before he became a member of the order, and he had not designated her, nor did he ever designate any person, as his nominee in said corporation, or make any application for a change of nominee. Thereafter Peter Griest and Eliza Griest intermarried, and continued to be husband and wife until the death of said Peter Griest. He left a will in which he bequeathed his "life insurance, amounting to \$2,000, in the Order of Mutual Companions," to his wife, Eliza Griest, and directed the officers of said order to substitute her name in the certificate, and to pay her the money. In *Order of Mutual Companions v. Griest, ante*, 652, it was decided that the heirs of Leah A. Griest, the former wife, had no claim to the fund, and that it was to be treated as part of the estate of said Peter Griest.

J. H. McGee, J. T. Campbell, and W. F. Russell, for appellants. *A. B. Ware and L. A. Norton*, for respondent.

McFARLAND, J. This is an appeal by the children and grandchildren of Peter Griest, deceased, from an order of the superior court, sitting in probate, distributing to Eliza Griest, surviving widow of said Peter, certain money paid to the executor of his estate by a certain mutual benefit corporation called the "Order of Mutual Companions." The debts of the estate were all paid, and no question is made by creditors, or any person other than the appellants herein. The facts of the case are fully stated in *Order of Mutual Companions v. Griest, ante*, 652, (No. 11,068, this day decided by this court.) After the decision of the latter case in the court below, the said Order of Mutual Companions paid the money to the executor of said estate, and the court distributed it, as aforesaid, to the respondent herein, Eliza Griest. There is no doubt that Peter Griest, by his last will and testament, bequeathed this money, so far as he possibly could do so, to his surviving wife, Eliza; and, as we held in the other case above referred to that the money must be treated as part of

the estate, we think that the court below was right in distributing it according to the will. Order appealed from affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

76 Cal. 514

Ex parte KIRBY. (No. 20,434.)

(Supreme Court of California. June 9, 1888.)

CRIMINAL LAW—TWO TERMS OF IMPRISONMENT—WHEN SECOND TERM BEGINS.

K. being convicted of two distinct crimes, and sentenced to two terms of five years in the penitentiary, on the same day, on the expiration of one sentence brought *habeas corpus*. *Held*, that under Pen. Code Cal. § 669, providing that, where one is convicted of two or more crimes before sentence has been pronounced on him for either, the imprisonment for the second term begins on the termination of the first, the sentences were not concurrent and closing at the same time; but it is for the warden of the prison to examine the records, and determine which is the first sentence, and the second sentence will begin on the termination of the first. MCFARLAND, J., dissenting.

In bank. Application for *habeas corpus*.

J. K. Kirby applied to the supreme court for a writ of *habeas corpus*, being at the time confined in prison under sentence.

Edmund Tauszky, for petitioner. George A. Johnson, Atty. Gen., for the State.

THORNTON, J. The warden of the state prison at Folsom, Charles Aull, made the following return to the writ herein:

"In the Supreme Court of the State of California. In the Matter of the Application for a Writ of *Habeas Corpus* on Behalf of James Kenan Kirby. To the Honorable, the Supreme Court of the state of California: State of California, County of Sacramento—ss.: I, Charles Aull, warden of the California state prison at Folsom, do hereby certify that I received the annexed writ of *habeas corpus* on the 24th day of May, A. D. 1888; and, in obedience to commands of same, I make return as follows: I have James K. Kirby, the party named in said writ, as a prisoner at the California state prison at Folsom, and I hold the said James K. Kirby a prisoner at the California state prison at Folsom by virtue of two certified copies of judgments duly made and entered in the honorable superior court of the county of Solano, state of California, each of said judgments bearing date October 8, 1884; true copies of which said judgments are hereunto annexed, and made part of this return. I also hereto annex, and make part of this return, certified copies of the minutes of the superior court of Solano county showing the arraignment and pleas of James K. Kirby on the 7th day of October, 1884, in the cases numbered, respectively, Nos. 201 and 202 of the docket of said court. I further certify that the said James K. Kirby was received at the prison as a convict under and by virtue of said judgments, as shown by the records of the prison, on the 9th day of October, A. D. 1884, and he has now been imprisoned under said judgments three years, seven months and fifteen days. And I further certify that, during the said imprisonment of the said Kirby, his conduct has been such as to entitle him, under the provisions of section 1590 of the Penal Code, and under the rules adopted by the state board of prison directors, to have deducted from his full term, as credits for good behavior, a period of seventeen months. All of which is respectfully submitted for the consideration of the honorable court.

"In witness whereof I have hereunto set my hand, and affixed the seal of the prison, this 24th day of May, A. D. 1884. CHARLES AULL, Warden.

"*California State Prison at Folsom.*"

"In the Superior Court of the County of Solano, State of California. Present: Hon. J. M. GREGORY, Judge; W. J. Costigan, Clerk. Tuesday, October

7. 1884. People, Plaintiff, vs. James Kirby and John C. Burk, Defendants. (No. 202.) Grand larceny. Now comes the district attorney with the defendants to the bar of this court for arraignment. The defendants, in reply to the court, stated that they had no counsel, and did not desire any. The original information was read by the clerk, and a copy thereof presented each defendant. Defendant Kirby replied that his true name is James K. Kirby. Defendant John C. Burk said that his true name is John C. Burk. It was then ordered that all proceedings had against said defendants thereafter be had in their true names, referring also to the names in the information. Defendants, waiving time, announced that they were prepared to plead. The defendants, and each of them, pleads that he is guilty of the offense charged in this information. Defendants were ordered to appear for sentence to-morrow morning."

"In the Superior Court of the County of Solano, State of California. Present: Hon. J. M. GREGORY, Judge; W. J. Costigan, Clerk. Tuesday, October 7, 1884. People, Plaintiff, vs. James Kirby, Defendant. (No. 201.) Now comes the district attorney with the said defendant to the bar of this court for arraignment. Defendant, appearing without counsel, in reply to the court stated that he did not desire counsel. The original information was read by the clerk, and a copy thereof furnished this defendant. Defendant stated that his true name is James K. Kirby. It is ordered that all proceedings hereafter had against said defendant be had in his true name, referring therein to the name by which he was informed against. Defendant, waiving time, announced himself ready to plead. Thereupon the defendant pleads that he is guilty of the offense charged in the information. The court fixed to-morrow morning as a time for pronouncing sentence."

"In the Superior Court of the County of Solano, State of California. Wednesday, October 8, A. D. 1884. Present: Hon. JOHN M. GREGORY, Judge. The People of the State of California vs. James K. Kirby, Named in the Information James Kirby, Defendant. (No. 201.) Convicted of grand larceny. The district attorney, with the defendant, James K. Kirby, came into court. The defendant was duly informed by the court of the nature of the information filed on the 7th day of October, A. D. 1884, charging him with the crime of grand larceny committed on the 13th day of August, A. D. 1884; of his arraignment and plea, to-wit, guilty of the offense charged in this information. The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replies that he has none. And, no sufficient cause being shown or appearing to the court, thereupon the court rendered its judgment: that whereas the said James K. Kirby having been duly convicted in this court of the crime of grand larceny, it is therefore ordered, adjudged, and decreed that the said James K. Kirby be punished by imprisonment in the state prison of the state of California at Folsom for the term of five (5) years. The defendant was then remanded to the custody of the sheriff of Solano county, to be by him delivered into the custody of the proper officers of said state prison."

"In the Superior Court of the County of Solano, State of California. Wednesday, October 8, 1884. Present: Hon. JOHN M. GREGORY, Judge. The People of the State of California vs. James K. Kirby, Named in the Information, with John C. Burk, as James Kirby, Defendant. (No. 202.) Convicted of grand larceny. The district attorney, with the defendant, James K. Kirby, came into court. The defendant was duly informed by the court of the nature of the information filed on the 7th day of October, 1884, charging him with the crime of grand larceny committed on the 14th day of September, 1884; of his arraignment and plea, to-wit, guilty of the offense charged in the information. The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replies that he has none. And no sufficient cause being shown or appearing to

the court, therefore the court rendered its judgment: that whereas, the said James K. Kirby having been duly convicted in this court of the crime of grand larceny, it is therefore ordered, adjudged, and decreed that the said James K. Kirby be punished by imprisonment in the state prison of the state of California at Folsom for the term of five (5) years. The defendant was then remanded to the custody of the sheriff of Solano county, to be by him delivered into the custody of the proper officers of said state prison."

It appears from the foregoing return there were two convictions and two sentences of the applicant, Kirby; and it is argued that it was the duty of the court, in pronouncing the sentences, to designate that, at the close of the imprisonment under the first sentence, the imprisonment under the second sentence should commence; inasmuch as this has not been done by the court on the trial of Kirby, that the sentences ran concurrently, and the periods mentioned in both close at the same time. Whatever might be the correct rule in such a case at common law, or in some of the other states where such a statute as exists here is not in force, we hold that the question herein must be and is determined by the provisions of section 669 of the Penal Code. Section 669 of the Penal Code is in these words: "When any person is convicted of two or more crimes before sentence has been pronounced upon him for either, the imprisonment to which he is sentenced upon the second or other subsequent conviction must commence at the termination of the first term of imprisonment to which he shall be adjudged, or at the termination of the second or other subsequent term of imprisonment, as the case may be." We are of opinion that this section is a mandate to the warden who holds the prisoner in custody, and by it he is informed that the imprisonment on the second conviction must commence at the termination of the first term of imprisonment. As the law is a mandate to the warden, that officer is empowered to examine the records of the court in which the prisoner was convicted, to ascertain which is the first and which is the second sentence. The records of the trial court will give him all the information required to enable him to act understandingly in the matter, whether in regard to attributing the credits to which the prisoner is entitled, or in determining the length of time during which the convict must be imprisoned; and, should any application be made to the governor for pardon, we see no difficulty in the way of his ascertaining in which case he is called on to act. The records of the trial court are open and accessible to him, that he may obtain information in regard to the subject on which he is called to act. We say that the records of the court will furnish all requisite information, for the reason that they will show which was the sentence pronounced on the first and which on the second conviction. We cannot concur in the argument of counsel for the applicant, and are of opinion that in this case the imprisonment of the applicant must continue for the period of five years under each sentence; one period of five years following the other of the same length, shortened by such credits as he may be by law entitled to. While we are convinced of the correctness of the foregoing, we think it proper to say that, in the case of two convictions of the same person, it would be right and proper that the court, in pronouncing its sentence upon the second conviction, should order and have inserted in its judgment a direction that the period of imprisonment on the second sentence should commence at the close of the period of imprisonment under the first. Not having suffered such imprisonment, the prisoner is not entitled to his discharge, and he must therefore be remanded to the custody of the warden aforesaid of the state prison at Folsom. So ordered.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; MCKINSTRY, J.; PATERSON, J.

I dissent: MCFARLAND, J.
v.18p.no.8—42

76 Cal. 537

TREGEAR v. ETIWANDA WATER CO. (No. 12,556.)

(Supreme Court of California. June 11, 1888.)

1. CHATTEL MORTGAGE—CORPORATE STOCK—DELIVERY OF CERTIFICATE.

A mortgage of shares of corporate stock, although land is also included in the mortgage, is valid and binding between the parties, without delivery of possession of the certificate of stock.

2. CORPORATIONS—STOCK—ACTION TO COMPEL ISSUE OF CERTIFICATE—PARTIES.

In an action against a corporation to compel the execution and delivery of a certificate of certain shares of stock which stand on the books of the company in the name of another, from whom plaintiff claims title under a mortgage and sheriff's deed in foreclosure proceedings, the mortgagor is not a necessary party.

3. SAME—PLEADING.

The complaint, in such an action, is not demurrable on the ground of unintelligibility for the reason that the writ issued in the foreclosure proceedings, under Code Civil Proc. § 684, which requires that such writ shall recite the judgment or the material parts thereof, and direct the officer to make the sale for its enforcement, is termed "an order of sale."

In bank. Appeal from superior court, San Bernardino county; JAMES A. GIBSON, Judge.

Action by James Tregear against the Etiwanda Water Company to compel said company to execute and deliver to plaintiff a certificate of certain shares of stock standing on the books of the company in the name of another. Judgment for plaintiff, and defendant appealed. Code Civil Proc. Cal. § 684, provides that, "when a judgment requires the sale of property, the same may be enforced by a writ reciting such judgment, or the material parts thereof, and directing the proper officer to execute the judgment, by making the sale and applying the proceeds in conformity therewith."

H. C. Rolfe, for appellant. *Charles R. Gray*, for respondent.

SEARLS, C. J. Plaintiff brought this action against the Etiwanda Water Company, a corporation, to compel said corporation, through its officers, to execute and deliver to him, in his name, a certificate for 20 shares of its capital stock now standing in the name of R. B. Warren on the books of the company. The complaint shows that W. B. Warren was the owner of 20 shares of the capital stock of defendant, and was registered as the owner thereof on the books of defendant, and held and still holds a certificate therefor in his name, issued by defendant to him. That on the 18th of October he executed a mortgage to one George Chaffey upon certain real estate, together with the stock in question, and certain other stock not in controversy, to secure the payment of a promissory note for \$2,000. The note and mortgage were indorsed and delivered to plaintiff, who, at the maturity of the note, foreclosed the mortgage, and obtained a decree of sale under which the stock in question and real estate were sold by the sheriff and purchased by plaintiff, who received a certificate of sale, and at the end of six months, in default of redemption, a deed. Plaintiff presented his sheriff's deed to defendant, and demanded a transfer of the stock to his name on the books of the company, and that a certificate issue to him, which, as to the 20 shares in dispute, was refused. That Warren has no interest in the stock, but still stands upon the books of the company as a stockholder therein. It does not appear that the certificate representing the 20 shares was ever indorsed to, held or possessed by, plaintiff or his assignor, but it still stands in the name of, and is possessed by, Warren. Defendant demurred to the complaint upon the grounds—*First*, that the complaint does not state facts sufficient, etc.; *second*, defect of parties defendant in not joining Warren and the president and secretary of defendant; *third*, that it is unintelligible as to what is meant by the order of sale issued upon the judgment and in pursuance of which the sale was made by the sheriff. The contention of appellant is (1) that shares of

capital stock of a corporation are personal property; (2) that they are not the kind of personal property that can be mortgaged.

Shares of stock in a corporation are certainly personal property. At common law, personal property could not only be mortgaged, but the mortgages were in many cases held valid, without change of possession, in the absence of fraud, even against subsequent *bona fide* purchasers and creditors. *Hilbrook v. Baker*, 5 Me. 309; *Bissell v. Hopkins*, 3 Cow. 166; *Bucklin v. Thompson*, 1 J. J. Marsh. 223; *Letcher v. Norton*, 4 Scam. 575; *Homes v. Crane*, 2 Pick. 610. We are not aware of any case in which, independent of some statute, it has been held that a sale of personal property, and retention of possession thereof by the vendor or mortgagor, is void as between the parties thereto. The great contest which has been urged upon questions growing out of the retention of possession of personal property by the vendor or mortgagor after a sale or mortgage has been, not between the parties, but between the creditors of the mortgagor or vendor on the one hand and the parties on the other. This contest, from the days of the celebrated *Twyne Case*, 3 Coke, 80, was continued in England for several generations, and resulted in an adjudication of the question in all its phases. We inherited it from our English ancestors, and the courts of the several states have been called upon to go over much of the same ground. In most of the states of our Union statutes have been passed setting at rest the more important questions involved in the problem. Section 3440 of our Civil Code declares every transfer of personal property, and every lien thereon, with few exceptions, where made by a person in possession, and not accompanied by an immediate delivery, and followed by a continued change of possession, of the things transferred, to be fraudulent, and therefore void, as against creditors, etc. The statute does not attempt to determine the effect of the transfer as between the parties, but only as to creditors, their successors in interest, trustees, etc.; leaving the rule as it before existed between the parties. The property involved here is not of the class upon which a chattel mortgage, as defined by statute, may be given. It may, however, as between the parties, be mortgaged. The fact that the mortgage included both real and personal property is of no significance. We are of opinion that, as between the parties thereto, the mortgage of the 20 shares of the capital stock was valid and binding without the delivery of possession. It would, of course, under our statute, have been void as to creditors and subsequent purchasers in good faith for a valuable consideration, but there are no such persons here complaining.

We fail to see wherein R. B. Warren, the mortgagor, is a necessary party defendant. In equitable actions there is a marked distinction between proper parties and necessary parties defending. Necessary parties are those without whom no decree can be made determining the principal issues in the case. Proper parties are those without whom a substantial decree may be made, but not one which shall completely settle all the questions which may be involved in the controversy, and conclude the rights of all the persons who have any interest in the subject-matter of the litigation. A decree cannot bind one who is not a party to the action, and by making him a party he may frequently be bound, and questions as to him determined which would otherwise remain open and subject to future adjudication. Parties to the main issue or issues to be determined, and which are essential to any valid decree, are necessary parties; those who are only interested in subordinate or collateral questions are proper parties,—that is to say, persons who may or may not be made parties. The failure to make the latter parties defendant is not cause for demurrer. Pom. Rem. § 329, *et seq.* Warren is to be treated as the vendor of the plaintiff, who, through his agent, the sheriff, sold his stock in the corporation to plaintiff. Upon the facts, as stated in the complaint, his interest in the subject-matter ceased upon the consummation of the sale as effectually as though he had in person assigned his shares to the plaintiff. If there were

any reasons why such assignment, apparently valid, was not so in fact, it was a matter of defense to be set up by way of answer; and then, and on such showing, if it appeared to the court that Warren was a proper party defendant, it would have been the duty of the court, under section 389 of the Code of Civil Procedure, to order him brought in.

We are of opinion the complaint states facts sufficient to constitute a cause of action against the defendant, that there is no apparent defect of the necessary parties defendant, and that the complaint is not amenable to the charge of being unintelligible. The practice of the courts in this state, in directing the sale of incumbered property under foreclosure proceedings, has not been uniform. A copy of the decree, duly certified, and which gave full directions as to the time, place, manner of sale, etc., was said to be sufficient in *Heyman v. Babcock*, 30 Cal. 367. Under section 684, Code Civil Proc., a writ reciting the judgment, or the material part thereof, and directing the officer to execute the judgment, by making the sale, etc., is the proper course. By analogy to the former equity practice, this writ is usually termed an "order of sale." Plaintiff so calls it in his complaint, and, as we think, properly. The judgment appealed from is affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.; PATERSON, J.; MCKINSTRY, J.

2 Cal. Unrep. 878

PEOPLE v. BOWERS. (No. 20,345.)*

(Supreme Court of California. June 14, 1888.)

1. COURTS—APPELLATE JURISDICTION OF SUPREME COURT IN CRIMINAL CASES.

The supreme court, under Const. Cal. art. 6, § 4, has appellate jurisdiction, in criminal cases prosecuted by indictment in a court of record, in questions of law only, and cannot set a verdict aside where the evidence is conflicting.

2. HOMICIDE—EVIDENCE.

Where a druggist testifies that he had sold defendant, a physician, who is on trial for murdering his wife by poisoning with phosphorus, medicine during the illness of his wife, and says he would not put up phosphorus in overdoses for any one but a physician, and is asked if he would then, and answers, not until he had spoken to the physician, the answer cannot prejudice defendant, as it is not proof of a general custom, nor is it claimed that he had sold phosphorus to defendant.

3. SAME—TRIAL—ORDER OF TESTIMONY.

It is not error to allow a witness for the prosecution to testify after defendant has opened his case, when the reasons given by the court for so doing show there has been no abuse of the discretion given by Pen. Code Cal. § 1094.

4. SAME—EXAMINATION OF EXPERTS.

In a trial for murder, where the state claims the death was caused by poisoning, it is admissible to ask expert witnesses the cause of the death when there is some evidence to support the facts hypothetically stated in the questions.

5. SAME.

It is proper to propound an hypothetical question to an expert, based on any facts of which there is evidence, though the weight of evidence may be strongly against the truth of the facts assumed, and it is for the jury to disregard the opinion if the evidence fails to establish the facts thus assumed.

6. SAME—QUESTIONS BY THE COURT.

It being in the discretion of the court to permit leading questions, it may, of its own motion, ask questions of witnesses in that form.

7. SAME—OBJECTION TO EVIDENCE.

Where the stomach and intestines of deceased are set aside for analysis, but not sealed, and the physician who had them in charge is certain they have not been tampered with, it is for the jury to decide whether there is a doubt as to that fact; and an objection to the sufficiency of the identification, not made until after the testimony for the people is all in, comes too late.

8. SAME—EXAMINATION OF DEFENDANT.

To ask defendant, on cross-examination, the name of his father and mother, cannot prejudice him.

9. SAME—CONDUCT OF PROSECUTING ATTORNEY.

Where the prosecuting attorney proposes to read to the jury in his argument a paper not in evidence, and stated that it purported to be the record of defendant as

*Reversed in banc. See 24 Pac. 752, 79 Cal. 415.

furnished by a chief of police, while his course is reprehensible, it does not prejudice defendant when it is promptly rebuked by the court, who charges the jury that statements of counsel not in proof are not evidence, and to be disregarded.

10. SAME—INSTRUCTIONS.

Where the court, after charging in strong language as to the presumptions surrounding defendant, and the certainty of proof required, calls the jury's attention to the fact that the law should be fearlessly administered, and that, if they were satisfied beyond a reasonable doubt of defendant's guilt, they should be derelict in duty if they failed to find so, it is not prejudicial, though not in good taste.

11. SAME—APPEAL—MATTER NOT SHOWN BY THE RECORD.

Where, after defendant appeals from a conviction for murder, a third person confesses that he committed the crime, and that defendant is innocent, these matters not being in the record, and there being no law by which they can be for the first time presented to the supreme court, cannot be considered by it.

12. WITNESS—CREDIBILITY—CROSS-EXAMINATION.

A witness cannot be asked, on cross-examination, whether she is not in the habit of playing cards for money, and asking for money from her daughter for that purpose, under Code Civil Proc. Cal. § 2051, providing that evidence of a particular wrongful act is not admissible to impeach a witness.

In bank. Appeal from superior court, city and county of San Francisco; D. J. MURPHY, Judge.

J. Milton Bowers was indicted for the murder of his wife. The court, after the case for the prosecution had closed, and the defendant's case had begun, permitted a witness for the prosecution to be called under Pen. Code Cal. § 1094, which provides that, for good reason, the court, in its discretion, may change the order of trial as provided by the statute. Defendant was convicted, and sentenced to be hanged, and appeals.

Charles N. Fox and *Colin Campbell*, for appellant. *George A. Johnson*, Atty. Gen., for the State.

PATERSON, J. On August 24, 1885, Mrs. Cecelia Bowers, wife of defendant, Dr. Bowers, became very ill with what appeared to be a bilious colic. On the following day, and later, physicians were called in and, after making a diagnosis of the case, all pronounced it to be "abscess of the liver." She was treated accordingly by the attendant physicians, but continued to suffer great pain in the right side, and to vomit and discharge large quantities of pus and bile until her death, which occurred November 1st following. On November 3d the coroner of the city and county of San Francisco received an anonymous communication which stated that there was reason to believe there had been foul play in the treatment of Mrs. Bowers during her last illness, and requesting an official investigation. The coroner proceeded to the house of defendant, where preparations were being made for the funeral, summoned a jury, and held an inquest. He then postponed the investigation until after the funeral, upon a promise made by those in charge of the funeral that the remains would not be interred, but would be placed in a vault, and returned to the morgue for the autopsy. Owing to a misunderstanding, the remains were interred at the conclusion of the funeral services on that day, November 3d. On the morning of November 5th the coroner discovered the mistake which had been made, disinterred the remains, and held the autopsy. On December 30, 1885, an information was filed, charging the defendant with having willfully, unlawfully, and of his malice aforethought killed said Cecelia Bowers; and on April 23, 1886, he was convicted of murder in the first degree, and thereafter, June 2, 1886, his motion for a new trial having been denied, he was sentenced to be hanged. The case is made remarkable, in one respect, by recently discovered evidence which purports to be the written confession of one Henry Benhayon, brother of the deceased, in which he declares that he poisoned his sister, and that Dr. Bowers is innocent. If the events occurred as stated in the brief of appellant's counsel,—and they are matters of notoriety,—the facts would entitle the defendant to a new trial on the ground of newly-

discovered evidence, if presented in time to the court below; but they were not presented to the court below, and unfortunately could not be presented, because they occurred pending appeal. The appeal herein was taken on June 2, 1886. On October 23, 1887, the coroner received through the mail a letter which had been deposited in a postal box late the night before, which reads as follows: "CTRY, October 22, 1887. Dr. J. I. Stanton, Coroner—SIR: That I may not change my resolution, I send you this in advance. I am the cause of my sister's (Cecelia Bowers') death on November 1, 1885. I could not keep the horrible secret any longer; I had to write it in a memorandum book, and I lost it. This is one of my reasons for making my exit from the world's stage. Dr. Bowers knew nothing of my ———, and had no hand in her death. No one is to blame but myself, and I take this step to relieve myself from further misery, and all concerned. I do not wish to see my mother. H. BENHAYON." On receipt of this letter a search was made for the author thereof, and his body was found on the floor in the room of a lodging-house, with a bottle nearly empty, but containing poison, lying beside it. The written confession and letters which were found on a table in the room stated, in substance, that Dr. Bowers and his wife had always quarreled; that Mrs. Bowers said she would poison the doctor before he should leave her; that he (Benhayon) secured the poison with which to kill the doctor, but his sister would not listen to the proposition, and threatened to expose him; that, after his sister became sick, he felt an irresistible impulse to "use the stuff on her, and finish Bowers later;" that he took a pill and capsule out of her box, and filled the capsule with two kinds of poison, put it back, and took others, until four capsules had been poisoned and exchanged; that he did not think Bowers could get in any trouble, for the person who furnished him with the poisons said a chemist told him no doctor could find it in the stomach, for it was blood-poisoning; that he forced his sister to give him an order for her insurance policy in the F. of P., but he dare not present it. In the letter to Dr. Bowers he stated to him that Mrs. Bowers had been unfaithful, and cautioned him against certain friends, whom he charged with criminal intimacy with her. While it is admitted by counsel for appellant that ordinarily no argument could be made here upon facts occurring after appeal taken, it is urged that the evidence which has been discovered in this case "is of so grave a character, and points so strongly to the innocence of this defendant, that, however informally it may have come to the attention of the court, this or any other court of competent jurisdiction should say that he shall not be executed until it shall have been submitted, in common with other evidence in the case, to a jury of his country." But, manifestly, the court has no authority to consider these matters as thus presented. They are no part of the record sent to us from the court below, and there is no provision of law by which newly-discovered evidence may be presented to this court in the first instance. The remedy in such cases rests with the executive. He alone can afford relief.

It is claimed by counsel for appellant—and this is their leading contention—that the evidence is insufficient to justify the verdict of the jury. A determination of this question has imposed upon us an examination of all the evidence offered, the statement of which covers about 1,200 pages of the record. It would be impractical to discuss within the limits of a judicial opinion the character, bearing, and weight of all the testimony offered by the respective parties in this case. It might be sufficient to say that the evidence is conflicting, and that it would be an invasion of the province of the jury to go into an examination of the weight of the evidence. It is claimed, however, that inasmuch as the evidence of death by poisoning is all circumstantial, and especially as it is all expert-opinion testimony, the ordinary rule should be relaxed, because the untrained mind of the jury cannot be expected to comprehend or appreciate the full effect of such evidence. But this might be said

in every case where the verdict is based upon expert testimony, and the judgment of this court as to the facts be substituted for that of the jury. Whatever may be the right or duty of this court to interfere with the verdict of a jury in civil cases when it deems it to be against the evidence, the constitution provides that it "shall have appellate jurisdiction, * * * in all criminal cases prosecuted by an indictment or an information in a court of record on questions of law alone," (article 6, § 4;) and in cases of this kind, where it appears that there is a conflict in the evidence, we are not justified in setting aside the verdict. The question is not whether the witnesses for the prosecution are less intelligent and more prejudiced than those of the defense; not whether what they said was true or false. Those are matters for the jury. The credibility of the witness and the weight of his testimony is always for the jury. Counsel for the defendant do not claim that there were no expert witnesses whose testimony was deserving of respect and weight, but it is claimed that all the expert testimony given in this case which is entitled to consideration came from witnesses for the defendant. Their position is clearly set forth in the following frank statement by one of the defendant's attorneys: "If it shall be said that these strictures upon expert medical testimony apply to the testimony of the experts who testified in behalf of defendant as well as to that of those on behalf of the prosecution, I answer that the value of the opinion of a medical expert depends upon his intelligence, his knowledge of the subject upon which he gives his testimony, and his honesty and impartiality; and I ask the court to carefully examine the testimony of the expert witnesses for both the prosecution and defense, and determine whether these *desiderata*,—some or all of them,—are not generally absent in the testimony of the expert witnesses for the prosecution,—and present, in an unusual degree, in the testimony of defendant's experts. There are expert witnesses—the exceptions, it is true—whose testimony the courts receive with favor and respect, and to whose opinion they accord the utmost deference; and some such witnesses, at least, the defendant has, I think, been fortunate in securing." The theory of the prosecution is that defendant caused the death of his wife by administering to her toxic doses of free phosphorus. This theory stands or falls upon the evidence offered as to—*First*, the clinical symptoms; *second*, the pathological conditions disclosed by the autopsy; and *third*, the presence of free phosphorus in the organs of the deceased, as revealed by chemical analysis.

1. *The Clinical Symptoms.* The clinical symptoms in phosphorus poisoning are violent cramps in the stomach, vomiting of dark-green matter, a burning sensation in the stomach, and silvery white condition of the tongue and mouth, rawness of the throat, disagreeable taste in the mouth, purging, convulsions, collapse, and *coma* preceding death. Counsel for appellant has greatly aided us in our examination of the testimony by a synopsis thereof, in which the substance of the evidence is very fairly stated, and there is some evidence as to every clinical symptom mentioned. It is claimed, however, that the testimony of the principal witnesses for the people, as to these symptoms, is conflicting, and that the testimony of one witness nullifies that of another; but, as before stated, it is for the jury to determine from all the evidence which witness is to be accredited.

2. *Pathological Conditions.* There were present at the autopsy 11 physicians, all of whom testified at the trial. The pathological conditions are stated in the official report of Dr. Blach, the city physician of the city and county of San Francisco, who superintended the autopsy on the body of the deceased in pursuance of an official investigation as to the cause of her death. The report of the autopsy is as follows: "External inspection: Body of a well-nourished woman four feet eight inches in height, about one hundred and twenty-five pounds weight; *rigor mortis* absent; no external marks of violence. The mouth: The mucous membrane of the mouth very white and

thickened. The esophagus: The mucous membrane presents a similar appearance to that of the mouth, but not so general. Body emits no odor of decomposition. The thoracic cavity: The lungs apparently normal; pericardial fluid about half an ounce, and somewhat reddened; heart weighs seven ounces, valves healthy, but walls thin; atheromatous patches on the aorta; clot of blood in the heart. Abdominal cavity: Liver weighs one pound and twelve ounces, not adherent to walls of the abdomen; capsules slightly adherent to the convex surface; the consistency of the liver soft; the stomach nearly empty; ulcer one and one-half inches from the cardiac orifice, near the greater curvature, about the size of a quarter of a dollar; the edges of the ulcer raised; the tissues of the mucous membrane of the stomach about the ulcer infiltrated with pus; extravasations of blood in the neighborhood of the ulcer; capillary hemorrhages in the fundus; pyloric extremity highly congested; mucous membrane of the stomach thickened, and of an opaque, yellowish color; intestines slightly congested. Kidneys: The right one normal; small extravasation of blood in the center of the kidney; left kidney apparently normal. Pelvic cavity: Contains three quarts of blood, partially organized; also extensive extravasation of blood in the pelvic cellular tissue; the left ovary contains a large mass of blood; the right ovary normal; left fallopian tube dilated, and contains remains of fluid exudations; right fallopian tube dilated, and filled with blood; the uterus healthy in every respect. Cranial cavity: Slight *oedema* on surface of brain; brain otherwise healthy." Dr. Blach testified that he was satisfied at the autopsy there was fatty degeneration of the kidney, but did not care to say so in his report, because it was a matter that could not be determined with certainty without a microscopic examination. Dr. Abrams, who made the examination with the microscope, testified that he found the liver in a high state of fatty degeneration. Dr. Stallard corroborates the statement. It was shown that the liver was greatly atrophied, and bore no evidence of ulceration or abscess. When the stomach was opened, some of the physicians present noticed a strong garlicky odor, which is one of the evidences of phosphorus poisoning. There was evidence showing that the ulcer in the stomach was undergoing a healing process; that the blood clots were harmless, because encysted by nature, and that these reparative processes had gone on to such an extent that the continued nausea and vomiting, which increased as the patient grew worse, could not be attributed to either the ulcer or *hamatocles*. The physicians having found no cause of death, the stomach was removed, and given to Dr. Johnson for chemical analysis; and the heart and liver were given to Dr. Abrams for microscopic examination. Dr. Johnson testified, in substance, that he first tested the contents of the stomach for arsenic, and then for mercury, and finding no trace of either of these poisons, but having detected an alliaceous odor in the nature of garlic, he made a test for phosphorus by the Mitscherlich apparatus and process; that by this test he obtained luminosities, which were proof positive of the presence of unoxidized phosphorus; that sulphur has the property of condensing upon its surface free phosphorus; that he took the distillate (from the contents of the stomach and the intestines) in the flask, placed it in a small piece of sulphur, and then sealed it; that after heating it, the sulphur was removed, dried, and placed in the palm of his hand, and the result was a light luminosity or phosphorescence; that there was a strong alliaceous or garlicky odor from the distillate. He testified that free phosphorus is an irritant poison, and in its free form, as he found it, produces vomiting, pain in the stomach, convulsions, *coma*, and death; fatty degeneration of the liver being one of its accompaniments. He expressed himself as perfectly satisfied, after finding free phosphorus in the stomach, that death was caused by free phosphorus. Dr. Abrams testified that from what he observed at the autopsy, from the examination he made with the microscope, and what he saw in assisting Dr. Johnson in his chemical analysis, that "the introduction of phosphorus or caustic poi-

son was the cause of the death of Mrs. Bowers." Many of the expert witnesses testified that they knew of no disease that could produce all the pathological conditions described; that, while each and every one of the conditions might be the result of some natural disease, when taken separately, they could not, taken all together, be the combined results of any disease. Dr. Johnson and Prof. Price both experimented with and made tests of "Fellows' Sirup of Hypophosphites," which had been given to Mrs. Bowers by her physicians, and which the defense claimed might account for the luminosity and garlicky odor, and both testified that no traces of luminosity or garlicky odor could be discovered. In short, the testimony introduced by the prosecution tended to show that it was a case of slow poisoning by the administration of free phosphorus, which produced the ulcer of the stomach by its irritant action, affected the whole mucous membrane from the mouth to the stomach, causing excessive vomiting, and fatty degeneration of the liver. The most that can be said against the verdict, so far as the evidence goes, is that it depends entirely upon circumstantial evidence, and that the evidence as to the circumstances is conflicting. But the experts were shown to be competent to speak. The jury heard their evidence, passed upon their credibility, and are the sole judges of the weight to be given to the testimony of each witness. In all cases of poisoning, except where there are eye-witnesses, the evidence is necessarily expert opinion in character; and, if the rules which are here urged were to be applied, it would be impossible to secure a conviction in any such case.

Conceding that the deceased was poisoned, as claimed by the prosecution, it is still contended that the evidence is insufficient to show that the defendant administered the poison to her; and that, if she was killed with phosphorus, there is stronger evidence to prove that some person other than defendant administered it to her than there is to prove that the defendant administered it. But here, again, follows an argument by counsel for the appellant, which is robbed of its force by the fact that there is evidence, although conflicting, as to the defendant's treatment of his wife during her life-time, and by the fact that he expected to receive a large sum of money upon her death. That he treated her cruelly there is abundant evidence, and as to means and opportunity to commit the crime, there is no question. So far as the intent and motive are necessary in making out the offense charged, it is sufficient to say that, in addition to evidence of cruel treatment, and declarations indicating regret on the part of the defendant that his wife was not killed in an accident which occurred while driving, and a wish that she might die, there is evidence that he secured insurance upon her life, in various societies, to the amount of \$17,000. The fact that he had his own life insured in her favor for a like amount is a circumstance which naturally weakens the force of the argument made by the prosecution so far as the insurance upon her life bears upon the question of motive, but it was for the jury to say, from all the circumstances of the case, after they became satisfied that the deceased was killed by phosphorus, who administered it, and for what purpose. Our attention is directed to the authorities, which say that in cases of this kind the proof ought to be not only consistent with the prisoner's guilt, but inconsistent with every other rational conclusion. This is, of course, true; and the jury were told repeatedly that the circumstances proved must exclude to a moral certainty every other hypothesis except the single one of guilt. But it does not follow that, because there is evidence tending to show that defendant did not commit the crime, the proof is consistent with the prisoner's innocence. Evidence is simply the means of proving a fact; that which tends to establish a fact. Proof is the establishment of a fact by evidence; and it is only upon the theory that the witnesses whose evidence was favorable to the defendant, and no others, are to be accredited in their opinions, that it can be said, as matter of law, the proof is consistent with innocence. The jury may not have believed

any one of the witnesses for the defense in anything he said, and were not bound to say there was a reasonable doubt because the witnesses of the prosecution did not agree as to the cause of the conditions found, or the cause of the death of deceased.

At the trial a motion was made to strike out the testimony of Dr. Johnson bearing upon the chemical analysis, on the ground that there was not sufficient proof of identity of the material submitted to the witness for analysis, and upon the further ground that proper precautions had not been taken to prevent said material from being tampered with. It appeared that the anatomical jars which held the stomach and contents, and the contents of the intestines, were covered like preserve jars, and wrapped in paper, but were not sealed at any time; were exposed during the autopsy; and were afterwards locked in a case for two days in the laboratory of Cooper Medical College, to which Dr. Johnson and the janitor (who died prior to the trial) had access. Dr. Johnson was quite certain that the jars had not been touched from the time he placed them in the laboratory until he took them out again. No objection was made to the sufficiency of the evidence to identify the material at the time the doctor was examined as a witness, nor until the evidence for the prosecution in chief was all in, when the motion to strike out was made. The evidence being relevant and material, the objection came too late. But, in any event, it was for the jury to say whether it had been tampered with, or whether there was a doubt as to that fact. There were no suspicious circumstances tending to show that the jars had been tampered with; and, while those in charge did not employ the safeguards which might reasonably be expected from men who knew that the materials in their possession were to be used as evidence against a person suspected of murder by poison, yet, in the absence of some evidence tending to show that the jars were tampered with, we cannot presume that anything was added to their contents.

During the progress of the trial the court propounded to some of the expert witnesses several questions which counsel for appellant claimed were improper. We see no valid objection to the questions thus asked, except that in form they are leading and suggestive. If they assumed facts not proved, the attention of the court ought to have been directed to this objection. While it was probably not the duty of the defendant to urge his objections to questions asked by the court with the formality and persistence required when counsel for the prosecution were examining the witness, yet the attention of the court ought to have been called in some manner to the objectionable matters. It is in the discretion of the court to allow counsel to ask leading questions, and there is no reason why the court may not, of its own motion, ask questions in that form.

The conduct of the assistant district attorney in proposing to read to the jury, during his argument, a paper which had not been introduced in evidence, and in asserting that it contained the record of defendant from the chief of police of Chicago, was inexcusable and reprehensible. We think, however, that, so far as the defendant's interests were concerned, no prejudice resulted from this violation of professional duty, for it was promptly rebuked by the court at the time, and the following instruction was thereafter given: "In weighing the evidence in this case, it is important that you should bear constantly in mind that statements of fact made by counsel, whether in examination of witnesses or in argument of the facts so stated, are not in proof, are not in evidence, and are to be discarded from your consideration."

The court did not err in overruling objections to questions put to Drs. Johnson, Lane, and others, calling for their opinions as to the cause of death. It is sufficient if there be some evidence in the case to support the facts stated in the hypothetical question. *Reg. v. Frances*, 4 Cox, Crim. Cas. 57; *Hurst v. Railroad Co.*, 49 Iowa, 76; *Filer v. Railroad Co.*, 49 N. Y. 42; *Webb v.*

State, 9 Tex. App. 490. Some of the questions called for an opinion as to the cause of death. In cases of this kind this is permissible when the facts are stated to or by the witness. By answering this question the witness does not assume the province of the jury, and determine the precise question they are to pass upon. The question was, what caused the death? not, who caused the death? *Conner v. Stanley*, 67 Cal. 316, 7 Pac. Rep. 723, cited by appellant, is clearly not in point. *State v. Smith*, 32 Me. 370; *Shelton v. State*, 34 Tex. 664; *Ebos v. State*, 34 Ark. 520; *Lawson*, Exp. Ev. 221.

Mrs. Benhayon, a witness for the prosecution, was asked, on cross-examination, whether she was not in the habit of playing cards for money, and demanding money from her daughter for that purpose. "Evidence of particular wrongful acts is not admissible to impeach a witness," (section 2051, Code Civil Proc. ;) and we cannot see the pertinency of the evidence if offered for any other purpose.

In one of the hypothetical questions asked by him, counsel for the people used the word "luminosity." The question was objected to on the ground that this word introduced a conclusion of fact drawn from actual facts found during the chemical analysis. The witness, Dr. Dennis, seems to have understood the meaning of the word, and no attempt was made, on cross-examination, to show that he meant any other kind of luminosity than that described by Dr. Johnson. It is a word which evidently has a definite meaning, and is well understood by medical experts when used in explaining the result of a chemical analysis.

The court did not err in allowing Dr. Lane to testify on behalf of the prosecution after the defendant had opened his case. The reasons given by the court show that there was no abuse of discretion. The same may be said of the ruling of the court in allowing the witness Price and others to testify in rebuttal. Section 1094, Pen. Code; *People v. Strong*, 46 Cal. 302.

There was some evidence tending to show the existence of every fact stated by counsel for the people in the hypothetical questions propounded to Dr. Lane. It may be apparent, as claimed by counsel for defendant, that some of these facts were not proved, the weight of the evidence being strongly against them; but this does not determine whether the proper foundation has been laid for the question. It is proper to assume, within the limits of the evidence, any state of facts which the evidence justifies, and obtain the opinion of the expert. The facts are assumed for the purpose of the question only, and, of course, if the evidence fails to establish the material facts thus assumed, the jury must disregard the opinion. *Reg. v. Frances*, *supra*; *Lawson*, Exp. Ev. 153.

The testimony of Brooks and Hogan was properly admitted. The defendant's declarations as to the conduct of his wife were evidently made to show that her death was caused by her own acts. This is clearly shown by his declaration made to the witness Hogan in the city prison. But, without a declaration by the defendant that such was his purpose, the jury might readily believe from the statement itself that it was made for the purpose of explaining the cause of her death.

A. Hogg was called as a witness, and having testified that he was a druggist, and had sold Dr. Bowers medicine several times during the last illness of Mrs. Bowers, without prescriptions therefor, said that he would not put up phosphorus in overdoses for any one not a physician. He was asked this question: "But if a physician called upon you for it in that way, you would put it up, wouldn't you?" Counsel for the defendant objected to the question on the ground that it was incompetent. The objection was overruled, and an exception reserved. The witness answered: "I would make some remark to the physician first, if it were an overdose, because otherwise I would be liable to get into trouble." We cannot perceive how this answer could have prejudiced the defendant's case. It was not an attempt to prove a gen-

eral custom, and what Mr. Hogg would do was entirely immaterial. It was not claimed that he had sold phosphorus to Dr. Bowers.

On cross-examination the defendant was asked to name his parents. Objection was made that it was not cross-examination. The objection was overruled, and an exception taken. The defendant answered that his father's name was Matthew Minslow Bowers, and his mother's maiden name was Stump. This answer certainly did not prejudice the defendant. The same may be said of the answers given to other questions put to defendant and those asked in the cross-examination of Jenkins.

Several exceptions were taken by counsel for defendant to the rulings of the court in excluding and admitting evidence which we do not deem of sufficient importance to review in detail. It is sufficient to say that we have carefully examined them all, and found no prejudicial error in any of them.

The charge of the court as to the credibility of defendant and the weight of his testimony has been approved here several times. *People v. O'Neal*, 67 Cal. 378, 7 Pac. Rep. 790. That portion of the charge which counsel referred to as "an elaborate speech to the jury" might have been omitted without injury to the rights of either the prosecution or the defense, but we cannot see any prejudicial error in it. The court had given many instructions couched in very strong language, cautioning the jury against forgetting the presumptions with which the law clothed the defendant, and the certainty of proof of every element which the law required before conviction; and, in closing the charge, called the attention of the jury to the fact that the law should be fearlessly and impartially administered; that verdicts should not be dictated by any other considerations than the law and the evidence; and that, if they were satisfied beyond a reasonable doubt and to a moral certainty of the guilt of the defendant, they would be derelict in their duty to the people of the state if they failed to say so. It would be better taste and more dignified judicial style to give the law to the jury in its simplest forms, applying such principles thereof as are applicable to the facts of the case, without lecturing the jury upon the consequences of a failure to obey the mandates of their oaths. Anything else is liable to lead the court into error, cause suspicion of prejudice against one side or the other, and give this court unnecessary labor and annoyance.

We have carefully examined the record upon every question presented by the defendant's counsel on this appeal, and we see nothing in the record which would warrant us in reversing the judgment. The judgment and order denying a new trial are affirmed.

We concur: SEARLS, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; MCKINSTRY, J.; THORNTON, J.

76 Cal. 532

BUNDY *et al.* v. MAGINESS. (No. 12,232.)

(Supreme Court of California. June 11, 1888.)

1. ASSAULT AND BATTERY—CIVIL ACTION—EXEMPLARY DAMAGES.

Under Civil Code Cal. § 3294, providing for the giving of exemplary damages in actions for the breach of an obligation not arising from contract, where defendant is guilty of malice, such damages were properly assessed in an action for assault and battery, where the evidence satisfied the jury that the assault was maliciously made.

2. SAME.

In an action for assault and battery, the fact that defendant had previously been punished, criminally, for the assault is not a bar to the recovery of exemplary damages for the same offense.

3. SAME—EVIDENCE—PLEADING AND PROOF.

Where defendant, in an action for assault and battery, after alleging, in his answer, acts of provocation, both at the moment of the assault and at other times prior to it

finally alleges that the acts of provocation that caused the assault were those occurring at the moment thereof, he cannot introduce evidence of other provocative acts done before the assault.

4. JUDGMENT—ENTRY—TIME.

Under Code Civil Proc. Cal. § 664, providing that, when a trial by jury has been had, judgment must be entered by the clerk, in conformity to the verdict, within 24 hours after the rendition of the verdict, a judgment upon a verdict rendered Saturday night will not be invalid though not entered until Monday morning, the statute being purely directory, and not mandatory.

Commissioners' decision. Department 1. Appeal from superior court, Sacramento county; GEORGE E. WILLIAMS, Judge.

Action by Lizzie Bundy and W. L. Bundy, her husband, against Samuel Maginess, to recover damages for an assault and battery on the wife. Judgment for plaintiffs for \$600 damages, and defendant appealed. Defendant set up in his answer acts of provocation, both at the time of the assault and at other prior times, in mitigation of damages. It appeared that defendant had, previous to this action, been fined in a criminal action for the same offense. Code Civil Proc. Cal. § 664, provides that "when trial by jury has been had, judgment must be entered * * * within twenty-four hours after the rendition of the verdict," unless reserved for argument, or a stay of proceedings is granted. Civil Code Cal. § 3294, provides that "in any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant."

Blanchard & Swisler, for appellant. *Grove L. Johnson and Irwin & Irwin*, for respondents.

FOOTE, C. The defendant, Samuel Maginess, was sued by the plaintiff Lizzie Bundy, joined with her husband, to recover damages for an assault and battery inflicted upon her. In his answer the defendant did not deny the assault and battery, but claimed that he only slapped the plaintiff, and that the slap he gave her "was wholly provoked" by the insulting and taunting speech of the plaintiff *eo instanti*. Upon the trial he endeavored to introduce evidence showing other provocative acts of the plaintiff done before the time of the alleged slapping. Inasmuch as, according to his answer, the provocation, which caused the assault and battery, was that occurring at the moment of the attack on the plaintiff, it is difficult to see how any other acts of provocation, which he says in that pleading had nothing to do with his unlawful act, could be availed of as a defense. He cannot be permitted to disprove the allegations of his answer. The fact that upon a verdict rendered Saturday night, a judgment was not entered until the following Monday, cannot be held to invalidate it under a statute purely directory, and not mandatory, as is section 664, Code Civil Proc. It is also claimed that in an action of this kind exemplary damages cannot be given, and that the court erred in giving instructions to the jury that they could allow them. But in this state the law does allow such damages for an oppressive or malicious assault upon the person. Section 3294, Civil Code; *Wade v. Thayer*, 40 Cal. 585. It is further alleged that no such rule of law should have been given to the jury to guide their action as that which ignored the punishment of the defendant criminally for the assault, as a defense against an action for exemplary damages, if the evidence warranted it. It was held, in *Wilson v. Middleton*, 2 Cal. 54, that such punishment was no bar to the recovery of exemplary damages for such an unlawful act as the defendant committed. The evidence before the jury, as we think, justified them in determining that the defendant had inflicted severe injury upon the plaintiff, and had done so maliciously. Such being the case, their verdict should not be disturbed. Section 3294, Civil Code. We perceive no error in the granting or refusing instructions by the

court. No prejudicial error appearing in the record, we advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

76 Cal. 555

HAYS *et al.* v. STEIGER. (No. 11,295.)

(*Supreme Court of California. June 13, 1883.*)

1. PUBLIC LANDS—MEXICAN GRANT.

Act Cong. July 23, 1866, § 7, entitled "An act to quiet land titles in California," giving to one who for valuable consideration, in good faith, has purchased lands of Mexican grantees, "where the lands so purchased have been excluded from the final survey of any Mexican grant," and who has used, improved, and possessed the same, the right to purchase such lands at the minimum price, applies to lands included within the exterior boundaries of a Mexican grant for a specific quantity within a larger tract described by outside boundaries, commonly known as a "float;" the land so purchased having fallen outside the tract, as the specific quantity was afterwards officially located and surveyed.

2. SAME—LAND-OFFICE—JURISDICTION OF SECRETARY OF INTERIOR—MEXICAN GRANTS.

The secretary of the interior has jurisdiction to entertain an appeal from the decision of the commissioner of the land-office in a contest between two claimants of public lands, involving the construction of said act.

3. SAME—REVIEW OF SECRETARY'S DECISION BY COURTS—PLEADING.

A complaint by the heirs of a pre-emptor against a homestead patentee, seeking to charge defendant as trustee of the land in question, as to which, after a contest between such defendant and the pre-emptor, the land had been granted to defendant, alleged that defendant had, in violation of Rev. St. U. S. § 2291, aliened a part of the land, and thereby forfeited his entry, and that the secretary of the interior erred in said contest in holding that such alienation did not work a forfeiture; but did not allege that such alienation was proved before said secretary, and found by him to be true, and that he had made such decision as a matter of law. *Held*, that the forfeiture was insufficiently alleged, as the decisions of the officers of the land-office are final on matters of fact, and reviewable in matters of law only.

4. SAME—HOMESTEAD ENTRIES—ALIENATIONS.

Rev. St. U. S. § 2291, providing that no patent shall issue for a homestead until the applicant makes affidavit that he has not alienated any part of the land except for church, cemetery, or school purposes, or for right of way for a railroad, applies only to alienations made after the filing of the homestead claim.

5. SAME.

A complaint attacking a homestead patent for such alienation, not averring that the alienation was not for one of the purposes excepted by said statute, was therefore bad.

Commissioners' decision. Appeal from superior court, Sonoma county; JOHN G. PRESSLEY, Judge.

Action by Mary T. Hays, Isabella G. Krager, Thomas D. Mann, and Edward H. Mann, an infant, by his guardian, against Edward Steiger, to declare a trust in defendant in a tract of land in Sonoma county to which defendant had obtained a patent. Judgment on demurrer was rendered for defendant, and plaintiffs appealed. Act Cong. July 23, 1866, § 7, (14 St. 220, § 7,) entitled "An act to quiet title to land in California," provided that where persons, in good faith and for valuable consideration, have purchased of Mexican grantees lands excluded from the final survey of any Mexican grant, and have used, improved, and possessed the same, such persons shall have the right to purchase the same at the minimum price.

James A. Waymire and Frederic Hall, for appellants. *Henley & Oates*, for respondent.

BELCHER, C. C. The plaintiffs are the heirs at law of one John Mann, who died intestate on the 25th day of July, 1872. Mann was a qualified pre-emptor, and in 1863 settled upon a tract of unsurveyed land in the county of So-

noma. He erected improvements on the land, and continued to reside thereon with his family until the time of his death. The township in which the land was situated was afterwards surveyed, and on the 16th of August, 1880, an approved plat thereof was filed in the United States land-office at San Francisco. On the 27th of October, 1880, one of the plaintiffs, for and on behalf of the heirs of Mann, filed with the register and receiver of the land-office a declaratory statement, claiming the right to pre-empt, for the use and benefit of the said heirs, 160 acres of land, which was described as lots 4 and 5 of section 22, and lots 7, 9, 10, 11, 12, 13, and 22 of section 23, in township 6 N., etc. In 1870 the defendant entered upon a part of the land claimed by Mann, and thereafter resided thereon. On the 8th of November, 1880, he filed in the land-office an application for a homestead on land described as lots 1, 3, 6, 7, 10, 11, 12, and 14 of section 23, in township 6 N., etc. The land applied for by both parties, to the extent of 110.81 acres, was the same. The defendant claimed that, under the provisions of section 7 of the act of congress of July 23, 1866, entitled "An act to quiet land titles in California," he had a right to purchase all the land applied for by him, for the reason that the same was within the exterior boundaries of a Mexican grant, known as "Agua Caliente," but was excluded therefrom upon final survey by the United States, and he was a *bona fide* purchaser thereof, for a valuable consideration, from parties who purchased from the original grantee of the grant. The contest between the parties as to which had the right to enter the land was tried before the register and receiver of the land-office, and the decision was in favor of the defendant. From that decision an appeal was taken to the commissioner of the general land-office, and he reversed the decision of the register and receiver, and entered one in favor of the plaintiffs. An appeal was then taken to the secretary of the interior, and that officer reversed the decision of the commissioner, and affirmed that of the register and receiver. Subsequently a United States patent was regularly issued to the defendant. The plaintiffs claim that they have an equitable right to the 110.81 acres of land in dispute, and they brought this action to charge the defendant as trustee of the title, and to compel its transfer to them. The defendant demurred to the complaint, and the demurrer was sustained. The plaintiffs declined to amend, and thereupon judgment was entered against them. The appeal is from the judgment.

It is not claimed for the appellants that the respondent holds the title in trust for them if the land was in fact within the exterior boundaries of the Agua Caliente grant. Nor is it claimed that the courts can review the action of the officers of the land department in so far as their decisions are based upon questions of fact, the rule to the contrary being well settled. *Shepley v. Cowan*, 91 U. S. 330, 340; *Quinby v. Conlan*, 104 U. S. 420, 426. But it is insisted that the land was not within the exterior boundaries of the grant, and that the register and receiver and secretary of the interior erred, as a matter of law, in holding that it was, and awarding it to the respondent; and this presents the principal question for consideration. The complaint alleges that the grant, known as "Agua Caliente," was made to Lazaro Pina by Alvarado, as governor of California, on the 13th day of October, 1840, and approved by the departmental assembly on the 8th of October, 1845, and that it was confirmed, by the United States district and supreme courts, to the claimant thereof, as follows: "The land of which confirmation is made, is situated in the present county of Sonoma, and is of the extent of two leagues in length, by a quarter of a league in width, and known by the name of 'Agua Caliente,' and is bounded on the south-west by the arroyo of the rancho of Petaluma; on the south-east by the town of Sonoma; on the north by the hills and mountains which intervene and separate the rancho of George Yount; and on the north-west by the rancho of Mr. John Wilson,—being the same land which was granted to Lazaro Pina by Governor Alvarado." It is then alleged that the official survey of the grant was made by one Lewis, in the month of De-

ember, 1870, and was afterwards fully approved; "that by said survey the said *arroyo* mentioned in said grant was made a fixed boundary on the westerly side thereof; that said survey embraced two and one-half leagues in length along and nearly parallel to the general course of said *arroyo*, and a width of one-quarter of a league on the easterly side of said *arroyo*; that said eastern line of said survey was situate and run west of the so-called 'Napa Hills;' that, upon the publication of said survey of Lewis, objections were filed thereto by said defendant and others, claiming that the said eastern boundary did not extend far enough to the east to protect them." It is further alleged that on the 21st of February, 1878, the commissioner of the general land-office made a decision "holding that the grant of Agua Caliente was a grant limited for quantity, by the calls of the title papers and decree of the United States courts, to two and one-half leagues in length by one-quarter of a league in width; that said *arroyo* mentioned in said grant was the westerly boundary thereof; that said survey of Lewis contained said quantity; that said eastern line was an exterior boundary of said grant according to the calls thereof; that said survey should be approved, and the same was by said commissioner approved;" that the commissioner further decided "that the boundary described in the said decree as the northern must be regarded as the eastern boundary; and that it is a well-settled rule that, when hills or mountains are described as the locative calls of a grant, the boundary must follow along the foot or base of such hills or mountains,"—all which decisions were confirmed by the secretary of the interior on the 9th of January, 1879.

The above are all of the averments found in the complaint in reference to the confirmation and location of the grant. Now, conceding that the hills or mountains mentioned in the decree of confirmation as the northern boundary are really upon the east, and form the eastern boundary, and that, where a grant is described as bounded by hills and mountains, the line runs along the base, and not the summit, of the hills, still we are unable to see anything showing that the land in controversy was not within the boundaries of the grant as originally made and confirmed. So far as we can see, it may lie between the eastern line of the survey and the base of the hills. There is nothing shown to the contrary; and, as pleadings are construed most strongly against the pleader, this seems to us to constitute a sufficient answer to the appellants' contention. The grant was evidently what is called a "float;" that is, a grant of quantity only, within a larger tract, to be located by consent of the government before it can attach to any specific land. *U. S. v. McLaughlin*, 8 Sup. Ct. Rep. 1177, (lately decided by United States supreme court.) If we are right in what has been said, the case is within the rules of law as declared in *Hosmer v. Wallace*, 97 U. S. 575, and *Rutledge v. Murphy*, 51 Cal. 388.

It is contended that the secretary of the interior had no jurisdiction to hear the contest between the plaintiffs and defendant upon appeal from the decision of the commissioner. In *Hosmer v. Wallace*, *supra*, there was an appeal from the decision of the commissioner to the secretary of the interior. That case was like this, and no question was made as to the right of appeal. As we understand it, the secretary is at the head of the land department, and is clothed with supervisory power over all the rulings and acts of the commissioner.

It is alleged in the complaint that said defendant and his wife conveyed a part of said land included in his homestead claim to George W. Whitman on the 9th day of July, 1874, which deed of conveyance is now of record in said county, and that no reconveyance has been made to said defendant by said Whitman, nor by any other person. It is contended that by this conveyance defendant forfeited his right to a homestead, and in support of this position sections 2290 and 2291 of the United States Revised Statutes are cited. The first section provides that the person applying for the benefit of the homestead

act shall make affidavit "that such application is made for his exclusive use and benefit, and that his entry is made for the purposes of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person," etc.; and the second section provides that no patent can be issued until the applicant "makes affidavit that no part of such land has been alienated, except as provided in section 2288. Section 2288 provides that a pre-emption or homestead claimant may transfer any portion of his pre-emption or homestead "for church, cemetery, or school purposes, or for the right of way of railroads across such pre-emption or homestead." There are several answers to this contention: *First*. It does not appear that the matter was ever presented for decision, or was decided, by the register and receiver, or the commissioner, or the secretary of the interior. The statement in the complaint, found among the alleged errors of the secretary, that "said secretary erred in not holding that said conveyance to G. W. Whitman by said defendant forfeited his homestead," is a mere conclusion, and not a statement of any fact. But, as the courts can only review and correct the errors of law committed by the land-officers, the facts on which those errors are supposed to be based should be fully stated. For example, it should have been alleged, not only that the conveyance was made, but that the fact that it was made was proved before the land-officers, and found to be true, and that nevertheless the secretary decided that it did not operate to forfeit the defendant's right. In the absence of such a statement of the facts, the question presented does not arise, and cannot be considered. *Second*. According to the averments of the complaint, the defendant made the conveyance complained of in 1874, and did not file his homestead claim till 1880. But the sections cited refer only to proceedings taken after the homestead claim is filed. *Third*. It does not appear how large a "part" of the land was conveyed, or for what purpose. So far as we can learn from the complaint, defendant may have conveyed to Whitman a part only large enough to make a family burying-ground, and may have transferred it for cemetery purposes.

There are no other points that require consideration. We find no error in the record, and therefore advise that the judgment be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

2 Cal. Unrep. 873

WALLACE v. HOPKINS. (No. 11,226.)

(Supreme Court of California. June 13, 1888.)

FACTORS AND BROKERS—COMMISSIONS—EVIDENCE.

The plaintiff and defendant entered into a written agreement that if plaintiff should succeed in selling certain mining stock in defendant's possession, that plaintiff should receive all defendant's stock at 20 cents per share, and the shares held for third persons at 50 cents per share. Plaintiff then went to T. one of the stockholders, and by inducing him to believe that all the stockholders had agreed to take 20 cents per share for their stock, procured an order on defendant authorizing him to sell all T.'s stock at 20 cents per share, and deposited the said order with defendant. The next day T. revoked the order, but plaintiff received no notice thereof, and sold the mine at the price agreed on between himself and defendant. Defendant received all the money paid by the persons to whom plaintiff sold, and paid T. 50 cents per share for his stock. Plaintiff sued defendant for the difference between the price of the stock at 20 cents and 50 cents per share. *Held*, that defendant was not liable, not having received any money from the sale of the stock for the use of plaintiff.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; T. H. REARDON, Judge.

The plaintiff, Thomas Wallace, alleges that on or about the 8th day of March, 1879, at San Francisco, the defendant, William S. Hopkins, received

\$1,450 from the sale of stock in the "Niagara G. & S. Mg. Co.," to be paid to and for the use of the plaintiff; that the defendant, although often requested, has not paid any part thereof to the plaintiff; and judgment is asked for that sum, with interest from that day. The answer denies these statements. The evidence establishes, without any conflict, that on the 28th day of February, 1879, the defendant had in his possession 57,595 shares of the stock of said company, of which 4,900 shares belonged to William R. Townsend. A portion belonged to the defendant, and the remainder was owned by other persons. On that day Townsend gave the plaintiff an order, directed to the defendant, reading as follows: "You are hereby authorized to sell the 5,000 shares Niagara stock, more or less, in your hands, belonging to me, for the sum of one thousand dollars, gold coin. This to hold good for fifteen days from date,"—which writing the plaintiff on that day delivered to the defendant, who wrote at the bottom of it the following, in red ink: "[Four thousand nine hundred shares belonging to W. R. Townsend, 225 shares having been delivered to his client. 2-28-79. WM. S. HOPKINS.]" On the same day the defendant delivered all the shares of stock, in an envelope, to the cashier of Donohoe, Kelly & Co.'s Bank, at San Francisco, and instructed the cashier to deliver the package containing the stock to the plaintiff, or his order, in New York, upon payment of \$15,446. The stock was accordingly forwarded to Eugene Kelly & Co., New York city. The plaintiff started for New York March 1, 1879, arrived there the 8th of that month, and on the 10th of that month the plaintiff effected a sale of all of the stock, Israel S. Blumenburg paying Eugene Kelly & Co. on that day the said \$15,446; and the money was telegraphed out to San Francisco the same day. In that sale the 4,900 shares brought \$2,450, being part of the \$15,446, all of which money was received by the defendant on that day; and it is the difference between that \$2,450 and \$1,000, which the plaintiff claims Townsend was to have for the 4,900 shares of stock, that the plaintiff seeks to recover in this action. The plaintiff testified that he agreed with Townsend to pay him \$1,000 on or before the 15th day of March, 1879, for the 4,900 shares of stock; that Townsend agreed to the sale, and gave to the plaintiff that order upon the defendant to deliver the stock to the plaintiff upon the payment of \$1,000; that the plaintiff received this order on the 28th day of February, 1879; that he took the order to the defendant on the same day, and then stated to him that he had purchased this stock from Townsend; that the understanding between the plaintiff and defendant then was that the plaintiff should pay the defendant, on account of Townsend, \$1,000 for that stock, and that the defendant should hold the balance the stock might bring to plaintiff's credit, provided the plaintiff made the payment on or before March 15, 1879, according to the order; that the defendant said he was very glad that the plaintiff had made that purchase; that he would feel more interest in making sale of the whole parcel of stock; that the defendant then agreed, if the plaintiff went east, to sell the whole stock, and succeeded in so doing, the whole money should be sent to the defendant, and that the money received for the 4,900 shares should be disposed of by the defendant by paying Townsend the \$1,000, and retaining the balance for the plaintiff; that the plaintiff agreed with Townsend to pay him the \$1,000 out of the proceeds of the sale of the stock; that the plaintiff left for New York on the next day, March 1, 1879, to effect a sale of the whole stock; that the plaintiff demanded the \$1,450 of the defendant several times before bringing this suit, and after the defendant had admitted to the plaintiff the receipt of the money; that the reason the \$1,450 was not deducted out in New York was because the defendant held the whole stock in trust for the parties interested in the pool, and the collection was made as an entirety; that the plaintiff's object in going east was to insure the sale of the stock, because he had an interest of \$1,450 in the success of the sale; that Townsend and the defendant understood that the plaintiff was going to New York to

effect the sale; that the only interest the plaintiff had in the whole stock, or making the sale, was the 4,900 shares, which he thus purchased. The defendant testified that it is likely he wrote the red-ink portion on the order, in presence of the plaintiff, to show him just how many shares Townsend had in his possession; that when the plaintiff delivered this written order to him, the plaintiff expressed a desire that when the money was paid over, the defendant should retain the difference between the \$1,000 and the \$2,450, and wished the defendant to place the difference to the plaintiff's credit, and pay it over to him; that it was a question in his mind, and so he stated to him, if it was the right or proper thing for him to do; that he had no understanding or agreement with the plaintiff with reference to the Townsend stock and money other than that whoever the money belonged to he was willing to pay it to; but that he did not recognize Mr. Townsend's order on him to accept the \$1,000. W. R. Townsend testified that the substance of the conversation between the plaintiff and himself, at the time he signed the writing above mentioned, was that the plaintiff stated he was going east to effect a sale of the Niagara stock which the defendant held in the pool for the different stockholders. That his understanding from the plaintiff was that the other stockholders would accept 20 cents a share. That plaintiff wanted to know whether he would go in with the rest. That he told him he would do whatever the rest did. He would not swear that the plaintiff told him that the other parties had authorized Hopkins to sell the stock for 20 cents a share. That was his understanding. For that reason he gave him the writing. That the next day he saw one of the stockholders, who told him he had not agreed to sell at that price. That he revoked the letter to Hopkins as soon as he could find him. That the plaintiff told him he was going east to sell the stock, and he wanted him to allow his stock to be sold for \$1,000. That he understood the plaintiff to have the option on all the stock at rate of 20 cents a share. And he says: "I wrote that note to Hopkins, authorizing him to accept \$1,000, which would be twenty cents a share on my stock." That he did not notify the plaintiff that he had revoked the authority which he had given the defendant to sell.

The court found the following facts: "(1) That on the 28th day of February, 1879, the defendant had in his possession upwards of 50,000 shares of the capital stock of a corporation called the 'Niagara Gold & Silver Mining Company.' A portion of said stock was owned by said defendant, and a portion thereof was owned by other persons. Defendant had authority from the owners of said stock to sell the same at fifty cents per share. Among the stock so held by him were 4,900 shares belonging to and the property of one Wm. R. Townsend. Said Townsend had previously authorized said defendant to sell said stock for fifty cents a share. On said 28th day of February, 1879, said plaintiff and said defendant made an agreement by which the said defendant gave the plaintiff the privilege to purchase all said stock held by said defendant on or before the 15th day of March, 1879, at the following rates, to-wit: Twenty cents a share for the stock owned by defendant, and fifty cents a share for the stock held by defendant, but owned by other parties. This agreement included the 4,900 shares of stock owned by said Townsend. After the agreement was made, and on said 28th day of February, 1879, the said plaintiff had an interview with said Townsend, in which the said Townsend understood that all the stockholders owning said stock held by said defendant, as aforesaid, had authorized the sale of the same at twenty cents a share. Thereupon, and with that understanding, Townsend wrote a note to said defendant authorizing him to sell his [Townsend's] stock at \$1,000, which note was delivered to said Wallace by Townsend, and by Wallace delivered to defendant. Afterwards, and on the same day, Townsend called on defendant, and from him learned that the other stockholders having stock in defendant's hands had not authorized the sale of their stock at twenty cents a share, or at

any price less than fifty cents per share. Thereupon Townsend revoked and countermanded his said authority to defendant to sell said stock at twenty cents a share, but left defendant with authority to sell it at fifty cents a share. Plaintiff was not advised of this action on Townsend's part, but went immediately to New York and effected a sale of all said stock at the prices before mentioned, to-wit, twenty cents a share for defendant's stock, and fifty cents a share for all the other stock held by defendant, including Townsend's said stock. And the said purchase price was paid over to said defendant within said fifteen days after said 28th day of February, 1879. On receipt of the money, defendant paid Townsend fifty cents a share for his stock. The money claimed by plaintiff is the difference between \$1,000 and the fifty cents a share of this 4,900 shares of Townsend's stock. (2) The defendant did not receive the sum of \$1,450 from the sale of the capital stock of the Niagara Gold & Silver Mining Company on the 8th day of March, 1879, to be paid to or for the use of the plaintiff, nor did defendant receive any money from the sale of said stock for the use of the plaintiff, and the allegation of the complaint in that behalf is not true. (3) The defendant has not paid the sum of \$1,450 to plaintiff, or any part of it." The court gave judgment for the defendant for costs. The plaintiff appeals from the judgment and the order denying his motion for a new trial.

Wm. H. Hart, for appellant. *Daniel Titus*, for respondent.

FOOTE, C. This action was brought to recover a sum of money alleged to be due the plaintiff from the defendant. The court below gave judgment in favor of the defendant, and from that and an order denying a new trial the plaintiff has appealed. In his statement, on motion for a new trial, he specifies particulars in which the evidence is alleged to be insufficient to support findings one and two of the decision; and his main contention here seems to be that the trial court made those findings against the evidence given on the trial. We have carefully examined all the evidence in the record, and are of the opinion that the court below was fully justified in finding as it did, and, no prejudicial error appearing, we advise that the judgment and order be affirmed.

We concur: BELCHER, C. C., HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

76 Cal. 513

ANSCHLAG v. SUPERIOR COURT OF LOS ANGELES. (No. 20,429.)

(*Supreme Court of California. June 9, 1888.*)

CRIMINAL LAW—APPEAL AND ERROR—BILL OF EXCEPTIONS—MANDAMUS.

Under Pen. Code Cal. § 1171, requiring a draught of a bill of exceptions, upon two days' notice to the district attorney, to be presented to the judge within ten days after judgment or within that period delivered to the clerk of the court, to be delivered to the judge at the earliest period practicable, a petition for a writ of mandate to have settled a bill of exceptions is insufficient, and will be dismissed, when it fails to show that the bill of exceptions was presented to the judge upon the required notice to the district attorney, and fails to state when the bill was presented to the judge or delivered to the clerk.

In bank. Original proceedings in *mandamus*.

Application by John H. F. Anschlag for a writ of mandate to the superior court for the county of Los Angeles, Hon. W. A. CHENEY, presiding, to have settled a bill of exceptions. Pen. Code Cal. § 1171, provides that a draught of a bill of exceptions shall, upon two days' notice to the district attorney, be presented to the judge within ten days after judgment, or within that period be delivered to the clerk of the court to be delivered to the judge at the earliest period practicable.

Frederick McGregor, for petitioner. *Atty. Gen. Geo. A. Johnson*, for respondent.

THORNTON, J. Application for a writ of mandate to have settled a bill of exceptions. The petition for the writ is clearly insufficient. It fails to show that a bill of exceptions was presented to the judge upon the notice required by law to be given to the district attorney. In fact, there is no statement in the petition when the bill was even presented to the judge, or delivered to the clerk of the court for him. The averments of the petition should set forth facts showing that the statute in regard to the presentment and settlement of bills of exceptions has been complied with, or facts showing a sufficient reason why it has not. See Pen. Code, § 1171. The petition is an important pleading, and should state the necessary facts which entitle the applicant to the writ. If we granted the writ on such a petition as the one here presented, we would be sanctioning a practice too loose and indefinite to meet with the approval of any court. The application is denied and the petition dismissed without prejudice.

We concur: **SEARLS, C. J.**; **SHARPSTEIN, J.**; **McFARLAND, J.**; **McKINSTRY, J.**; **PATERSON, J.**

76 Cal. 587

In re LANE. (No. 20,421.)

(*Supreme Court of California.* June 16, 1888.)

INDICTMENT AND INFORMATION—CERTAINTY.

Under Pen. Code Cal. § 1426, providing that "all actions before a police court for a public offense of which such courts have jurisdiction must be commenced by a complaint under oath, setting forth the offense charged, with such particulars of time, place, person, and property as to enable the defendant to understand distinctly the character of the offense complained of, and to answer the complaint," a complaint alleging that the prisoner "then and there did unlawfully and willfully become and was a visitor to a certain house and place for the practice of gambling, there situate in said city and county of San Francisco, to-wit, at 14 Kearney street, thereby violating the provisions of sections 1 and 33, order No. 1,587 of the board of supervisors of the said city and county, as amended by order No. 1,955 of said board, contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the people of California," etc., sufficiently charges a criminal offense, and sets out the order of the board with sufficient certainty to give the police judge's court jurisdiction of the offense and the person of defendant.

Commissioners' decision. Original proceedings on *habeas corpus*.

Charles Lane, being held by the police judge's court as a prisoner for violation of an ordinance of San Francisco against visiting gambling houses, prays for a writ of *habeas corpus* on the ground that the complaint under which he was arrested alleges no offense. Pen. Code Cal. § 1426, provides that "all actions * * * before a police court for a public offense of which such courts have jurisdiction must be commenced by a complaint under oath, setting forth the offense charged with such particulars of time, place, person, and property as to enable the defendant to understand distinctly the character of the offense complained, and to answer the complaint."

Alfred Clarke and *J. D. Sullivan*, for petitioner. *Davis Louderback, E. B. Stonehill*, and *Walker C. Graves*, for the People.

FOOTE, C. The prisoner was complained of before the police judge's court of the city and county of San Francisco as having committed a misdemeanor in violation of an ordinance of said city and county in that he "then and there did unlawfully and willfully become and was a visitor to a certain house and place for the practice of gambling, there situate in said city and county of San Francisco, to-wit, at 14 Kearney street, thereby violating the provisions of sections 1 and 33, order No. 1,587 of the board of supervisors of the said city

and county of San Francisco, as amended by order No. 1,955 of said board, contrary to the form, force, and effect of the statute in such cases made and provided, and against the peace and dignity of the people of the state of California. And this complainant, upon oath, accuses the said Charles Lane of having committed said crime, and this complainant further alleges and deposes that the said accused was then and there arrested therefor in the actual commission of the said offense," etc. The complaint was duly sworn to by one J. W. Wallace. As we think it sufficiently charges a criminal offense, and the order of the board is set out and pleaded with sufficient certainty, the police judge's court has jurisdiction of the offense, and of the person of the defendant. The ordinance, according to the return of the officer having the defendant in custody, seems to be valid, and we perceive no sound reason why the defendant should not be tried for the offense of which he is duly complained of before the proper tribunal. We therefore advise that the writ be denied, and defendant remanded.

I concur: HAYNE, C. BELCHER, C. C., took no part in this opinion.

PER CURIAM. For the reason given in the foregoing opinion the writ is denied, and defendant remanded.

76 Cal. 543

In re FOOTE. (No. 20,438.)

(Supreme Court of California. June 12, 1888.)

CONTEMPT OF COURT—PROCEDURE—JURISDICTION.

A judgment and order of commitment for a contempt committed in the presence of the court, not entered until 50 days thereafter, and without notice, or any previous action in the matter, is void.

In bank. Original proceeding on *habeas corpus* to discharge W. W. Foote, committed for contempt, by the superior court of Alameda county; W. B. GREEN, Judge.

David McClure, Eugene Deuprey, and John A. Stanley, for petitioner. S. P. Hall, Dist. Atty., and Daniel Titus, for respondent.

PER CURIAM. Admitting that petitioner was guilty of contempt, committed in the presence of the court, it appears that no proceedings were taken by the court at the time the contempt was committed to punish the petitioner; nor were there any steps taken to retain jurisdiction until 50 days thereafter, when the order, adjudging him guilty of contempt, and imposing a fine of \$300, was made without notice of any kind. Under these circumstances, we think the court lost jurisdiction to proceed against petitioner for contempt, and that the order and commitment are void. Let the petitioner be discharged.

76 Cal. 573

PEOPLE v. BROWN. (No. 20,399.)

(Supreme Court of California. June 15, 1888.)

1. HOMICIDE—EVIDENCE—PREVIOUS QUARREL.

On trial for murder, testimony as to a quarrel between defendant and deceased, which occurred several years before the homicide charged, and threats by defendant then made, though remote, is admissible to show malice; its remoteness only affecting its weight.

2. SAME—CROSS-EXAMINATION OF DEFENDANT.

Where defendant, on trial for murder, was a witness in his own behalf, and, after stating that he had no quarrel with deceased on the day of the homicide, was asked, on cross-examination, whether they did not have a quarrel in a certain hotel several years before, and answered in the negative, such examination, though improper, is not reversible error, defendant not having been prejudiced thereby.

8. CRIMINAL LAW—NEW TRIAL—ILLNESS OF JUROR.

The sickness of a juror, whereby, as alleged, he was prevented from exercising that "keen judgment or calm deliberation" required for the discharge of his duties, no objection having been made to the juror at the time, is not sufficient ground for a new trial, under Pen. Code Cal. § 1181, subd. 4, allowing a new trial when the verdict has been decided by any means "other than a fair expression of opinion on the part of all the jurors."

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Oregon Sanders and *W. A. Gray*, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

McFARLAND, J. The defendant was convicted of murder in the second degree, and appeals from the judgment and order denying a new trial. The case was here on a former appeal, (72 Cal. 390, 16 Pac. Rep. 1,) when the defendant was convicted of murder in the first degree, and the judgment was reversed on a point which did not arise upon the second trial.

1. The witness, Mrs. Clark, was allowed, against defendant's objection, to testify to a quarrel between the defendant and the deceased, and threats made by the former against the latter. The ground of the objection was, mainly, that the quarrel testified to, happened several years prior to the homicide. This testimony was to the point of malice, and, while it was somewhat remote, we cannot say that it was inadmissible. Its remoteness went to its weight.

2. It is objected that the cross-examination of the defendant, who offered himself as a witness, was allowed to take too wide a range. The defendant testified as follows: "My object in drawing my pistol was to scare my brother away so that he would not shoot me. I had no desire or intention to shoot him. I had had no quarrel with him that day." The questions asked him were, mainly, whether or not he had a quarrel with the deceased a few minutes before the shooting; what kind of a pistol he had, and why he cocked it, etc. These questions were, we think, clearly proper. The prosecuting attorney then asked him this question: "You say you never had a quarrel with your brother?" To this question defendant, without making any objection, answered, "No, sir." He was then asked if he had a quarrel with the deceased in a certain hotel some years before. Objection was made to this question. The objection was overruled, and the defendant answered, "No, sir; I did not." Conceding that the last question was improperly allowed, under the authority of *People v. O'Brien*, 66 Cal. 602, 6 Pac. Rep. 695, we do not see how defendant was prejudiced by the error. He would not have been in any more favorable position if the question had neither been asked nor answered.

3. During the trial one of the jurors became sick. His condition was apparent to all persons present. The judge of the court called attention to the juror's illness several times. He was asked if he was able to perform his duties as a juror, and was told that, if he was not, the court would take a recess, or excuse him if necessary, etc.; but he replied to each inquiry that he was better, and could go on. No objection was made to the juror by defendant, nor did any one object to proceeding with the trial. But the sickness of this juror was afterwards sought to be used as ground for a new trial, and evidence was introduced tending to show that his sickness prevented his mind from acting clearly and fairly in considering the case and arriving at a verdict. The attorney general contends that in no case can the sickness of a juror be a cause for a new trial. Section 1181 of the Penal Code provides that a new trial may be granted only in the cases enumerated in seven subdivisions of the section. The ground relied on here must be included, if at all, in subdivision 4, which is as follows: "When the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors." It would be quite a stretch of construction to hold that the

sickness or mental condition of a juror would be one of the "means" contemplated by this language; and yet we are not prepared to say that some extreme cases of this kind might not, by necessity, be brought within it,—such, for instance, as the insanity of a juror occurring after the jury had been impaneled, and not discovered until after the verdict. It is sufficient, however, for the purposes of this appeal, to say that no such extreme case was made out by the evidence received by the court, or offered by the appellant, on the hearing of the motion. There was no pretense that the juror was of "unsound mind." The most that can be said of the evidence is that in the opinion of some physicians the pain which the juror suffered from, an attack of pneumonia, must have prevented him from exercising that "keen judgment or calm deliberation" which a juror ought to possess. We think, therefore, that, under any view of the law, the court below properly held this ground for a new trial insufficient. There are no other points in the case necessary to be noticed. Judgment and order denying a new trial affirmed.

We concur: SEARLS, C. J.; PATERSON, J.; SHARPSTEIN, J.; MCKINSTRY, J.

76 Cal. 565

ZARO v. DAKAN, Sheriff. (No. 11,310.)

(*Supreme Court of California*. June 15, 1888.)

SHERIFFS AND CONSTABLES—WRONGFUL SEIZURE—INSTRUCTIONS.

In an action against a sheriff for seizing, as property of a third person, goods claimed by plaintiff, the ownership of the goods is the point in issue; and, possession being merely evidence of title, it is error to instruct the jury that the verdict must be for plaintiff if, at the time of the levy, he was owner or in possession.

Department 1. Appeal from superior court, Santa Cruz county; F. J. McCANN, Judge.

Action by Marko Zaro against Elmer Dakan, sheriff of Santa Cruz county, for levying upon apples, which plaintiff claimed, as property of another. Judgment for plaintiff, and defendant appeals.

A. S. Kittredge and Goldsby & Jeter, for appellant. Charles B. Younger and J. Edward Marks, for respondent.

PATERSON, J. The defendant, as sheriff of the county of Santa Cruz, on January 31, 1884, attached the apples in controversy under a writ issued in the case of *Hodge v. Burns et al.* Plaintiff brought this action to recover the value of the property, claiming to be the owner thereof. The answer denies that plaintiff is the owner of the property, and alleges ownership in Burns *et al.* At the trial the evidence introduced by the plaintiff tended to show that he was the owner of the property at the time it was taken by the defendant. The evidence introduced by the defendant tended to show that, prior to the levy of the attachment, plaintiff had sold the property to Burns, and that the latter had the possession and control thereof. At the request of the plaintiff, the court instructed the jury as follows: "(7) The issuance and delivery to the defendant of the writ of attachment issued in the case of *L. C. Hodge vs. William S. Burns et al.* did not justify the defendant in attaching the apples in controversy if, at the time the defendant attached them,—if he did attach them,—said plaintiff was the owner or in possession of them; and if the jury believed from the evidence that, while said plaintiff was owner or in possession of said apples, said defendant took them, and has not returned them to said plaintiff, then said plaintiff is entitled to recover, and the verdict must be in his favor."

The court erred in giving this instruction. The ownership of the apples was the question in issue. The actual possession of the property at the time was evidence of title only. The plaintiff may have been in possession of the

property, at the time of the levy, without ownership therein. The instruction quoted above was not qualified or explained by other instructions given. Judgment and order reversed, and cause remanded for a new trial.

We concur: SEARLS, C. J.; MCKINSTRY, J.

76 Cal. 569

SCHEERER v. EDGAR, Auditor. (No. 11,032.)

(*Supreme Court of California.* June 15, 1888.)

MUNICIPAL CORPORATIONS—AUDITOR—WARRANTS.

Under act Cal. April 23, 1853, (Worley's Comp. p. 42,) authorizing the auditor of San Francisco to audit any and all sums that may be allowed and ordered paid by the board of supervisors, by authority of the act, and giving the board power to order judgments against the city and county to be paid, where the board has ordered payment of a judgment to be made to the judgment creditor, the auditor has no authority to draw the warrant in favor of an assignee of the judgment, although he had notice of the assignment.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Petition by Joseph Scheerer against William Edgar, auditor of the city and county of San Francisco, to compel defendant to draw a warrant in his favor. Writ granted, and the auditor appeals.

John L. Love and *George Flournoy, Jr.*, for appellant. *E. A. & G. E. Lawrence*, for respondent.

FOOTE, C. This is an action instituted for the purpose of compelling, by a writ of mandate, the auditor of the city and county of San Francisco to draw his warrant on the treasurer in favor of the assignee of a plaintiff, who had obtained a final judgment for a sum of money against said city and county. It appears that Paul Friedhofer was the plaintiff for whom the judgment was rendered; that before the auditor drew his warrant on the treasurer, the judgment had been assigned by Friedhofer to the petitioner in this action; that the auditor had notice of the assignment, but drew the warrant in favor of Friedhofer, the person ordered paid by the board of supervisors. The court below gave judgment in accordance with the prayer of the petitioner, and from that and an order denying a new trial this appeal is taken. The authority of the auditor to draw his warrant on the treasurer for the payment of a final judgment against the city and county depends upon section 2 of an act approved April 23, 1853, to be found on page 42 of Worley's Compilation of the Consolidation and other Acts relating to the Government of the City and County of San Francisco, which is as follows: Sec. 2. "The auditor of said city and county is hereby authorized to audit * * * any and all sums that may be allowed and ordered paid by said board of supervisors, by authority of this act." Another part of this act gives the board power to "order paid any final judgment against said city and county." It is unnecessary to discuss here the question as to whether that act has been so amended as that such judgments must be paid out of the general rather than the surplus fund. The order made by the board for the auditing and payment of the judgment in controversy is in this language: "Authorization No. 3496. Resolved, that an expenditure of two thousand and forty-nine 47-100 (\$2,049.47) dollars be and the same is hereby authorized to be made out of the general fund in payment to Paul Friedhofer in satisfaction of judgment rendered for plaintiff and against the defendant in the suit of *Paul Friedhofer v. The City and County of San Francisco*, in the superior court, department three, for the sum of \$1,756.00, with costs and interest, as follows:

Judgment,	\$1,756 00
Costs,	241 05
Interest, four and one-half months, at 7 per cent. per annum,	52 42
Total,	\$2,094 47"

Admit that the auditor had notice that the judgment upon which this authorization was issued had been assigned to the plaintiff, before he drew his warrant for the payment of it to Paul Friedhofer, and then the question presents itself, did he then have, or has his successor now, any right under the law to recognize any one as entitled to have him draw a warrant in his or her favor, except the person or persons specified in the order made by the board? If the auditor, as, we think, is here shown by the complaint and the findings, drew the warrant, as he was authorized under the order of the board to do, and the person there nominated as the one entitled to it received it, is not his duty as a ministerial officer performed? It can be readily perceived that it will sometimes occur that the auditor may be entirely justified in refusing to draw warrants as ordered by the board. But while his right to disobey an illegal order may properly exist, and can be exercised, it would seem to be beyond his power to substitute his own affirmative action for that of the board as to matters within their jurisdiction. He can refuse to draw a warrant, but, as it seems to us, he cannot go further and draw his warrant in favor of some other person than the one whom the board has ordered to be paid. In this case the course of the auditor, in making his warrant payable to Friedhofer, was proper, notwithstanding the assignment, because the judgment was payable to him, and the order of the board of supervisors directed that the amount should be so paid. Having drawn a proper warrant, the duty of the auditor was ended, and he cannot be compelled to draw a second warrant, still less to draw one in favor of a party who is not entitled to it under the order of the board. The assignment of the judgment gave to the plaintiff the right to the warrant when it was drawn, and to compel Friedhofer to execute a proper transfer thereof to him, if he refused to do so; but it did not give him the right to compel the auditor to draw a warrant not authorized by law.

We therefore advise that the judgment and order be reversed, and the writ denied.

I concur: HAYNE, C.

BELCHER, C. C., did not participate in this opinion.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the writ denied.

76 Cal. 562

LOVELAND v. ALVORD C. Q. M. Co. *et al.* (No. 12,446.)

(*Supreme Court of California.* June 14, 1888.)

ATTACHMENT—APPEAL FROM JUSTICE'S JUDGMENT BY PLAINTIFF—RELEASE OF PROPERTY.

Under Code Civil Proc. Cal. § 553, providing that, "if the defendant recover judgment against the plaintiff, * * * all the property attached remaining in the sheriff's hands must be delivered to the defendant or his agent, the order of attachment shall be discharged, and the property released therefrom," an attachment of defendant's property in a justice's court is dissolved upon judgment in his favor, though plaintiff appeals.

In bank. Appeal from superior court, San Bernardino county; J. M. WILIS, Judge.

Action by J. S. Loveland against the Alvord Consolidated Quartz Mining Company and J. B. Osborne to compel the defendant corporation to transfer

on its book, and issue to plaintiff, a certificate of stock attached by plaintiff in a former action, and, after the date of the attachment, sold to the defendant Osborne. Judgment was for plaintiff, from which defendants appeal.

Paris, Goodcell & Fox, for appellants. *Hargrave & Gray*, for respondent.

SHARPSTEIN, J. The respondent commenced an action in the justice's court against J. T. Kenworthy and H. S. Loveland, and in that action caused an attachment to issue and be levied upon 8,706 shares of the capital stock of the Alvord Consolidated Quartz Mining Company as the property of said Kenworthy. In due time said action was tried in said justice's court, and judgment was rendered in favor of defendants therein. From that judgment the plaintiff in said action (respondent here) appealed to the superior court, where he recovered judgment against said defendants. Pending said appeal in the superior court, and before any judgment was rendered therein, said Kenworthy transferred said stock to appellant Osborne, and said transfer was duly entered on the books of said company. An execution was issued upon the judgment recovered by respondent in the superior court, and levied upon said stock, and, pursuant to said execution, said stock was sold. Respondent, being the purchaser at said sale, and receiving a certificate thereof, demanded of the company and of Osborne a transfer of said stock to him, (respondent,) which was refused, and thereupon he brought this action to compel a transfer of said stock. The court below rendered a judgment in his favor, from which this appeal is taken.

We shall assume that the stock was duly attached under and by virtue of the writ of attachment, issued in the action commenced in the justice's court, and confine ourselves to the question whether, upon the rendition of the judgment in favor of the defendants in that action, the attachment became *ipso facto* dissolved. Section 553, Code Civil Proc., provides that, "if the defendant recover judgment against the plaintiff, any undertaking received in the action, all the proceeds of sales and money collected by the sheriff, and all the property attached remaining in the sheriff's hands, must be delivered to the defendant or his agent, the order of attachment shall be discharged, and the property released therefrom." As attachment is merely a creature of statute, its existence and operation, in any case, can continue no longer than the statute provides it may. And there is no express authority given to a sheriff to retain in his custody property seized by him under and by virtue of a writ of attachment issued out of a justice's court after a judgment in the action in which the attachment issued is rendered in favor of the defendant. No provision is made for his detention of it pending an appeal from such a judgment. In the absence of any such provision, it seems quite clear that under section 553, Code Civil Proc., *supra*, the defendant Kenworthy, after judgment in his favor, could make any disposition of the property which he could have made before it was attached, with like force and effect. If that be so, it follows that his transfer of it to defendant Osborne was valid. Judgment and order reversed.

We concur: SEARLS, C. J.; MCFARLAND, J.; MCKINSTRY, J.; PATERSON, J.

76 Cal. 567

BERNHEIM v. CHRISTAL *et al.* (No. 11,097.)

(*Supreme Court of California.* June 15, 1888.)

INSOLVENCY—PREFERENCE—EVIDENCE.

On appeal by plaintiff from an order granting a new trial in an action to set aside as fraudulent, under the California insolvent act of 1880, § 55, the lien of a confessed judgment and execution thereon, the evidence being conflicting as to whether the

creditor had reasonable cause to believe that the debtor was insolvent, or that he owed any one else, or whether the seizure was made with a view to obtain a preference, within the meaning of the act, the order will not be disturbed.

Department 1. Appeal from superior court, Santa Cruz county; J. H. LOGAN, Judge.

Action by Carl H. Bernheim, assignee in insolvency of Henry O'Donnell, against J. F. Christal and E. Dakan, sheriff, to set aside the lien of an execution and judgment alleged to have been fraudulently confessed by O'Donnell to Christal, contrary to the provisions of the insolvent act of 1880. On the trial, verdict was had for plaintiff. From an order setting aside the verdict, and granting a new trial, plaintiff appeals.

J. M. Lesser and Napthaly, Freidenrich & Ackerman, for appellant.
Charles B. Younger, for respondents.

PATERSON, J. This is an action brought by the plaintiff, as assignee of one O'Donnell, to set aside a lien by judgment and execution claimed to have been obtained contrary to the provisions of the insolvent act of 1880. In 1882, O'Donnell borrowed \$1,000 from Christal, and gave a note therefor, payable in 90 days. On the 3d of March, 1883, Christal commenced an action on the note, and on the same day O'Donnell filed a verified answer admitting each and every allegation of the complaint, and consenting to a judgment against himself, as prayed for. On the same day judgment was entered, execution issued, and placed in the hands of the sheriff, and a levy made on the merchandise of O'Donnell. Immediately thereafter, involuntary proceedings in insolvency were instituted by the San Francisco creditors of O'Donnell, and thereafter an order was made declaring said O'Donnell to be an insolvent debtor. Section 55 of the insolvent act reads as follows: "If any person, being insolvent, or in contemplation of insolvency, within one month before the filing of a petition by or against him with a view to give a preference to any creditor or person for a claim against him, procures any part of his property to be * * * seized on execution, * * * the person * * * to be benefited * * * by such seizure having reasonable cause to believe that such person is insolvent, and that such * * * seizure * * * is made with a view to prevent his property from coming to his assignee in insolvency, or to prevent the same from being distributed ratably among his creditors, or to defeat the object of, or in any way hinder, impede, or delay the operation of, or to evade, any provisions of this act, such transfer, payment, conveyance, pledge, or assignment is void."

The fact that a transfer is not made in the usual and ordinary course of business is only *prima facie* evidence of fraud. Section 55, Insolvent Act of 1880. The evidence shows that Christal had made several demands upon O'Donnell for payment of the money after it became due, and before he commenced his action. The defendant testified that he did not know that O'Donnell was insolvent, or that he owed any one except himself; that he had no idea of trying to get ahead of O'Donnell's creditors, and did nothing to prevent O'Donnell's property from being distributed among the creditors; that O'Donnell did not offer any preference, or ask him to bring the suit, or talk with him at all about it, except that he consented to file an answer, doubtless to save costs of summons and attachment. The matter seems to have been left by the defendant to his attorney entirely, and without any intention whatever of securing any preference over the other creditors. Upon the showing, we cannot see that the court erred in granting a new trial. Considering all the presumptions in the case and the testimony of the witnesses, it must be conceded the evidence is conflicting. Order affirmed.

We concur: SEARLS, C. J.; MCKINSTRY, J.

76 Cal. 594

MELLOR v. CROUCH, Judge of Superior Court. (No. 12,602.)

(Supreme Court of California. June 18, 1888.)

NEW TRIAL—STATEMENT—SETTLEMENT—NOTICE.

Where defendant serves on plaintiff a statement and notice of a motion for a new trial, and plaintiff gives notice of amendments to the statement, which defendant does not accept, but delivers the statement and amendments to the clerk for the judge, and the latter fixes a time for a hearing, and the clerk gives notice of the time to both parties, it is the duty of the judge to proceed to settle the statement without any notice by defendant to plaintiff, under Civil Code Cal. § 659, providing that, if such amendment be not adopted, the moving party can serve five days' notice on the other party, and proceed before the judge, or leave the statement with the clerk for the judge, who, under section 650, is required to fix a time for settling the same, while the clerk is required to give notice to the parties.

Department 2. Original proceedings in *mandamus*.

F. E. Johnston, for petitioner. *Thomas P. Stoney* and *Dennis Spencer*, for respondent.

McFARLAND, J. Petition for a writ of mandate to compel respondent, judge of the superior court of Napa county, to settle a statement on motion for a new trial. Petitioner was defendant in a certain action pending in the said superior court, and, judgment having been rendered in favor of the plaintiff therein, the petitioner served and filed a notice of intention to move for a new trial, and, in due time, prepared a draft for a statement on motion for new trial, and served it upon the attorney for plaintiff. In due time the attorney for plaintiff therein prepared and served upon petitioner certain amendments to said statement. Within 10 days thereafter the petitioner, not desiring to adopt said amendments, delivered said proposed statement and said amendments to the clerk of said court for the judge thereof, the respondent herein; but petitioner did not serve upon the plaintiff in said action any notice that he had delivered said statement and amendments to said clerk, nor did he serve any notice whatever. The said clerk immediately delivered said papers to said judge, who afterwards designated a time at which he would settle said statement, and the clerk notified the parties of such designation. But at the time designated the attorneys for plaintiff in said action appeared and objected to the settlement of the statement, because petitioner had given no notice to plaintiff of his intention to present the statement and amendments to the judge, or to deliver the same to the clerk, or that he had not adopted the amendments. And for these reasons alone the respondent refuses to settle the statement. The proceeding in mandate was submitted on a demurrer to the petition, it being agreed that the facts are correctly stated in the petition, and that final judgment may follow the disposition of the demurrer. We think that it is the duty of the respondent to settle the statement. The parts of the Code of Civil Procedure which govern the determination of the question here presented are contained in sections 659 and 650. Section 659 provides as follows: "If not adopted, the proposed statement and amendment shall, within ten days thereafter, be presented by the moving party to the judge, upon five days' notice to the adverse party, or delivered to the clerk of the court for the judge; and thereupon the same proceedings for the settlement of the statement shall be taken by the parties and clerk and judge, as are required for the settlement of bills of exception by section 650." Section 650 has a similar provision about proposed bills of exceptions and amendments, and the delivery thereof to the judge or clerk, and proceeds as follows: "When received by the clerk he must immediately deliver them to the judge. * * * When received from the clerk the judge must designate the time at which he will settle the bill, and the clerk must immediately notify the parties of such designation. At the time designated the judge must settle the bill." The obvious purpose of these provisions is that the parties

may have notice of the time when the statement will be settled. When the statement and amendments are presented directly to the judge there is no provision for any notice of the time of settlement to be thereafter given by either the judge or clerk; and in such case, therefore, the five days' notice mentioned in section 659 must be given by the party himself. But when the papers are delivered to the clerk for the judge, the purpose of the Code is effected through the requirement that then the judge must designate a time for the settlement, and the clerk must give notice of it. The provision about the five days' notice in section 659 qualifies, we think, only the preceding clause of the sentence, and is not applicable to the case when the statement and amendments are delivered to the clerk for the judge. The point that petitioner did not notify plaintiff in the said action of his refusal to adopt the amendments, and that he thereby elected to adopt them, cannot be maintained. The Code provides for no method of signifying a refusal to adopt other than the delivery of the statement and amendments to the clerk or judge. The demurrer to the petition is overruled, and it is ordered that the writ issue as prayed for.

We concur: SEARLS, C. J.; THORNTON, J.; SHARPSTEIN, J.

76 Cal. 624

SAN FRANCISCO SAV. UNION *v.* MYERS *et al.* (No. 11,325.)

(Supreme Court of California. June 20, 1888.)

1. APPEAL—REVIEW—MATTER NOT APPARENT ON RECORD.

That a judgment was indorsed "agreed to" does not show that it was rendered by consent, especially as the judgment recited a hearing, and purported to be rendered upon the evidence, and the alleged stipulation of consent was not made part of the bill of exceptions.

2. SAME—DECISION—REVERSAL.

Where a judgment in foreclosure is rendered in excess of the demand in the complaint, for an amount expended during litigation under authority of the mortgage in the absence of any showing that the excess was not in fact due, such judgment will not be modified on appeal, but reversed, though by the terms of the mortgage the effect of a new trial is to enable the plaintiff to collect 2 per cent. interest per month on the sum due up to the entry of a new judgment.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; N. HAMILTON, Judge.

Edward Lynch, for appellant. *Wm. F. Herrin*, for respondent.

HAYNE, C. Suit to foreclose a mortgage. It appears that the judgment in favor of the plaintiff was based in part upon certain expenditures which he was authorized by the mortgage to make, but which were not alleged in the complaint. That the complaint does not support the judgment is unquestionably a ground for reversal. The respondent contends, however, that the judgment was in pursuance of a stipulation. What is claimed to constitute a stipulation consists in the words "agreed to," which, the transcript states, appear in lead pencil on the back of the judgment. There is nothing to show that the judgment was based upon this "agreement," nor even when the latter was written. Upon the motion to dismiss the appeal it was held that the judgment was not a consent judgment, the court, per MCKINSTRY, J., saying: "It does not appear whether they [the names] were signed before or after the judgment was rendered or entered; or, if signed before, that the words 'agreed to' were intended to mean anything more than that the draft of the decree or judgment prepared to be presented to the judge was agreed to as properly expressing the judgment ordered by the court." 72 Cal. 162, 13 Pac. Rep. 403. In addition to this it may be stated that even a formal stipulation appearing in a transcript is not a part of the judgment roll, and must therefore be incorporated in a bill of exceptions in order to constitute part of the record on appeal. *Spinetti v. Brignardello*, 53 Cal. 283. In the case

of *Hopkins v. Wiard*, 72 Cal. 260, 13 Pac. Rep. 687, cited by counsel, the record on file shows that all the facts were set forth in the bill of exceptions, so that even if it be assumed in favor of respondent that a stipulation could give the court jurisdiction as to expenditures not alleged in the complaint, it does not appear from the record that there was any such stipulation. We do not think that a stipulation can be presumed. If it could, it would be necessary to have a bill of exceptions in every case to show affirmatively that the judgment was not by consent, which is certainly not the case.

The appellant asks that the judgment be not reversed, but that it be modified by striking out so much as is not authorized by the complaint, so that he shall not be subjected to a retrial in the court below. It is not suggested that the excess was not in fact due to the respondent. The avowed ground is that if a new trial be ordered, the respondent "would be enabled to collect interest at 2 per cent. per month up to the entry of a new judgment." The respondent, however, is not responsible for this. The appeal is the appellant's own act; and while, in a case like the present, it is in the discretion of the court to order either a new trial or a modification, it would be somewhat strange for it to act upon the principle that the respondent ought to be prevented from obtaining what will be admittedly due under his contract. We advise, that the judgment be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause is remanded for a new trial.

MAGGINI v. PEZZONI. (No. 12,563.)

(*Supreme Court of California.* June 20, 1888.)

1. EQUITY—CANCELLATION OF DEED.

Where, in an action by an administratrix to set aside an alleged voluntary deed of her intestate, the court finds that the intestate was at the time of unsound mind, and incapable of making a deed, and that the deed was without consideration, a judgment for plaintiff will be sustained, though the court also found that no unfair advantage was taken of the intestate or undue influence exercised over him by defendant, thereby negating in part the allegations of the complaint.

2. SAME—PLEADING.

In an action to set aside a deed, the complaint alleged that the deed was procured through undue influence, and was without consideration, and that it was recorded in the office of the county recorder, but did not, except inferentially, aver its execution. *Held*, that such defect, not affecting the substantial rights of the parties, was not ground for reversal, after trial and judgment on the merits, under Code Civil Proc. Cal. § 475, which provides that no judgment shall be reversed by reason of error or defect not affecting the substantial rights of the parties.

In bank. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

Action by Augusta Maggini, administratrix of Charles Maggini, deceased, against Antonio Pezzoni, to set aside a deed alleged to have been fraudulently procured by the defendant of the deceased, shortly before his death. Judgment for plaintiff. Defendant appeals.

J. M. Wilcoxon and *W. C. Stratton*, for appellant. *B. F. Thomas* and *Thos. McNulta*, for respondent.

SHARPSTEIN, J. The appeal is from the judgment, and two questions are presented for our consideration: *First.* Does the complainant state facts sufficient to constitute a cause of action? *Second.* Do the findings support the judgment? The action is brought to have a certain deed vacated and set aside, and the record thereof canceled. The plaintiff sues as the administra-

trix of Charles Maggini, deceased, and alleges that at a time when he was of unsound mind and incapable of making any contract or transacting any business, the defendant, by taking an unfair advantage of said Maggini's weakness of mind and incapacity to transact business, induced and procured him to give an apparent consent to the execution and delivery of a grant deed for certain premises described in said complaint to the defendant, for the pretended consideration of \$1,000; that the deed was given without consideration and that it is recorded in the office of the county recorder. The objection to the complaint is that it does not contain a direct, positive allegation that said Charles Maggini executed a deed to the defendant. This is an objection which ought to have been obviated when the complaint was demurred to, if not before; but we are not disposed to treat the objection now as a fatal one. "The court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed by reason of such error or defect." Code Civil Proc. § 475. Here there is an attempt to allege what should be alleged in plain, positive language. The failure constitutes a defect in the pleading, which, in our opinion, does not affect the substantial rights of the parties. The court found that a deed was executed by said Maggini to the defendant, and a copy of the deed is contained in one of the findings. With nothing outside of the judgment roll before us, we must assume that all the findings are justified by the evidence. That being so, we think the substantial rights of the parties were not affected by the defect objected to. The findings that said Charles Maggini was, at the time of executing said deed, of unsound mind, and incapable of making a deed, and that he made it without consideration, are, in our opinion, sufficient to support the judgment. The finding that defendant took no unfair advantage of said Maggini, and exercised no undue influence over him, negatives some of the allegations of the complaint; but the allegation that at the date of the execution of the deed said Maggini was of unsound mind, and incapable of making a contract, and that there was no consideration for the deed, is found to be true, and that is sufficient to entitle the plaintiff to the relief granted her. Judgment affirmed.

WE CONCUR: SEARLS, C. J.; MCFARLAND, J.; MCKINSTRY, J.; THORNTON, J.; PATERSON, J.

76 Cal. 616

ARMSTRONG v. LOWE. (No. 12,540.)

(Supreme Court of California. June 19, 1888.)

PRINCIPAL AND AGENT—POWERS OF AGENT—REAL-ESTATE BROKERS.

A contract in writing, whereby the owner of land authorizes real-estate brokers to sell and receive deposit on same, at a certain price per acre, does not authorize them to execute a contract to convey.

Commissioners' decision. In bank. Appeal from superior court, San Luis Obispo county; D. S. GREGORY, Judge.

Action by W. M. Armstrong against D. Lowe to recover damages for breach of an alleged contract to sell and convey land. Defendant had made the following contract with a firm of real-estate agents: "SAN LUIS OBISPO, CAL., January 6, 1887. *Cook & Henderson, Real-Estate Agents*: You are hereby authorized to sell my property, and receive deposit on same, situated in * * *, county of San Luis Obispo, * * * for two hundred dollars per acre, cash." Plaintiff testified that he entered into negotiations with Cook & Henderson for the purchase of the land, and introduced in evidence a written contract of sale signed by Cook & Henderson. Trial being had without a jury, the court found that defendant never agreed or contracted to sell or convey to plaintiff, and that plaintiff never at any time agreed to purchase of defendant any land whatever, and that plaintiff never at any time paid to the defendant any sum of money upon any contract concerning any real estate, and dismissed the complaint. Plaintiff moved for a new trial, which being overruled, plaintiff appeals.

J. M. Wilcoxson, for appellant. *Venable & Goodchild* and *W. H. Spencer*, for respondent.

HAYNE, C. The sole question in this case is whether the real-estate brokers whom the defendant employed "to sell" certain real property had authority to execute a contract to convey. We think that, upon the authority of *Duffy v. Hobson*, 40 Cal. 244, 245, it must be held that they had not, and that the case of *Rutenberg v. Main*, 47 Cal. 219, is not in point. We therefore advise that the judgment and order denying a new trial be affirmed.

I concur: FOOTE, C.

BELCHER, C. C., took no part in this opinion.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

76 Cal. 415

WHEATON v. NORTH BRITISH & MERCANTILE INS. CO. (No. 9,929.)

(Supreme Court of California. June 7, 1888.)

1. INSURANCE—APPLICATION—OVERVALUATION.

In an action on a fire insurance policy which made the application a warranty and a part thereof, and provided that, if any false representation was made of the condition, etc., of the property, "or any overvaluation, or any misrepresentation whatever, either in a written application or otherwise, * * * this policy shall become void," there was evidence that the insured stated to the agent that the value of the property was about \$1,500. The application, which was written by the agent, and which did not state the extent of his agency, stated the value to be \$1,800. The true value was \$1,302. There was evidence that insured did not read the application, or

know of the statement therein as to value. *Held*, that neither the oral nor written representation debarred plaintiff from recovering unless intentionally or fraudulently made, or so negligently made as to induce an overvaluation.

2. SAME—ACTS OF AGENT.

In such an action an instruction that if the insurance agent had seen the property, and inserted a value in the application not given by the insured, and the latter signed the application without reading it, and without having his attention called to the valuation, and without knowing the valuation inserted therein, and was induced to do so by an act on the part of the company, the company was estopped from denying the correctness of such valuation, was as favorable to the company as it could require.

3. SAME—CONDITIONS OF POLICY—WAIVER—ESTOPPEL.

In an action on a fire insurance policy, an instruction that if the company's agent had knowledge of the overvaluation of the property in the application, and, after the fire, sent others to examine as to the value, and was informed by them that the value was much less than that stated in the application, and believed them; and afterwards requested proofs of loss from the insured, and thereby put him to the trouble and expense of making such proofs, the jury would be authorized to find that defendant waived any forfeiture resulting from any overvaluation in the application, is error where the policy requires proofs of loss to be furnished, and it is not shown that the agent knew or believed that the overvaluation was intentional, since a waiver by estoppel, to be binding, must be made with full knowledge of the circumstances, and must cause the other party to suffer some loss that he would not otherwise have sustained.

4. SAME—PROOF OF LOSS—WAIVER.

Where a fire insurance policy provided that proofs of loss should be served as soon after the loss as possible, and that the use of general terms, or anything less than a specific agreement indorsed on the policy, should not be construed as a waiver of any condition therein, and that the agent had no power to waive any of its printed conditions, nor to revive a forfeited policy, an instruction that delay in furnishing proofs was waived if, when served on the agent, he omitted to make objection on the ground of delay, and kept and never attempted to return them, the facts not being controverted, is not reversible error, though it is bad practice to instruct the jury to infer a fact from other facts, since the provisions of the policy refer to waiver of the conditions of the contract, and not to such matters as making proof of loss, which may be waived by an agent.

5. SAME—ACTIONS—INSTRUCTIONS.

Where the statement on motion for new trial, in an action on an insurance policy contained no specification of insufficiency of evidence to sustain a finding that a forfeiture of the policy on the ground of misrepresentation was waived, and the defendant did not ask for an instruction indicating what facts should appear to make an instruction as to waiver appropriate, an instruction that the company need not take advantage of a breach of warranty, but might waive a forfeiture by any act which, after its full knowledge of the forfeiture, subjects the insured to trouble and expense as to his claim for insurance, is not ground for reversal of a judgment for plaintiff as having been misleading.

Department 1. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

Action by Wheaton against the North British & Mercantile Insurance Company upon a policy of fire insurance. Defendant's local agent was Otto, and its general agent in the state was Grant. The policy provided that "persons sustaining loss or damage by fire shall forthwith give notice of said loss to the company, and, as soon thereafter as possible, render a particular account of such loss, signed," etc. Among the instructions given were the following: "If the written application for the insurance policy in question was filled up by Mr. Otto, or his clerk, in the absence of Mr. Wheaton, the applicant for insurance; and if Mr. Otto was the local agent, at Santa Cruz, of the defendant, and had seen the property described in the application, and inserted the value of such property in the application, in the absence of Mr. Wheaton, and without such valuation being dictated or given to him by Mr. Wheaton, and Mr. Wheaton signed the application on the front and reverse sides without reading it, and without having his attention called to said valuation, and without knowing what valuations were inserted in such application, and was induced to do so by any act or acts upon the part of the defendant,—then the corporation defendant is estopped from denying the correctness of the valuations expressed in said application." "That the delay in the presentation, by

the plaintiff to the defendant, of the preliminary proofs, was waived if, when the preliminary proofs were served upon the agent of the defendant, he omitted to make any objection on the ground of delay in their presentation by Mr. Wheaton, and kept such preliminary proofs, and never returned them, or attempted to return them, to Mr. Wheaton." Plaintiff had judgment, and defendant appealed.

T. C. Van Ness, for appellant. *McAllister & Bergin*, for respondent.

MCKINSTRY, J. In *Insurance Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. Rep. 837, the insured signed an application for a life policy, containing declarations as to his life, and past and present health, warranting the truth of such declarations. The application contained the stipulation that inasmuch as only the officers at the home office had authority to determine whether or not a policy should issue on any application, and they acted only on the written statements and representations referred to, no statements or representations made or information given to the persons soliciting or taking the application for the policy should be binding on the company, or in any manner affect its rights, unless they were reduced to writing, and presented to the home office in the application. There it appeared the agent of the company asked questions of the applicant, and the latter made answers which, if correctly written down, "would probably have caused the company to decline the risk." The agent, without the knowledge of the applicant, wrote down false answers, concealing the truth, which were signed by the applicant without reading, and by the agent transmitted to the company, and the company thereupon assumed the risk. It was said that it was the duty of the applicant to read the application before signing it; and as the application on its face showed that the power of the agent was limited, and as it was conditioned in the policy that the answers were part of it, and that no statement to the agent not thus transmitted should be binding on the principal, the policy was void. It seems to have been held that the insured must be presumed to have had notice of the limitations upon the powers of the agent contained in the application which he would have received if he had read the application. The case is distinguished from *Insurance Co. v. Wilkinson*, 13 Wall. 222, and *Insurance Co. v. Mahone*, 21 Wall. 152; the court saying: "In neither of these cases was there any limitation upon the power of the agent brought to the notice of the assured."

In the case at bar there was evidence that the plaintiff did not read the application prepared by the agent, and had no knowledge of the statement therein as to the values of the property insured. The application does not contain any express limitation upon or define expressly the authority of the agent. The present case is within the principles laid down in *Insurance Co. v. Wilkinson*, 13 Wall. 222, and *Insurance Co. v. Mahone*, 21 Wall. 152. In *Insurance Co. v. Wilkinson* it was held that insurance companies who do business at a distance from their principal place of business are responsible for the acts of their agent within the general scope of the business intrusted to his care, and no limitations of his authority will be binding on parties with whom he deals which are not brought to their knowledge. Hence, when the agent undertakes to prepare the application for the insured, he will be regarded in doing so as the agent of the insurance company, and not of the insured. In *Insurance Co. v. Mahone* a like ruling was made; and it was held that an answer to a question put to an applicant, as written down by the agent of the company when he takes the application signed by the applicant, may be proved by the testimony of persons who were present not to have been the answer given by the applicant. The law bearing upon the question is very clearly laid down by May in his work on Insurance: "Insurers may and often do find themselves in such a position that they cannot avail themselves either of breach of warranty or of misrepresentation or concealment; and, when in

this position, they are said to be estopped from availing themselves, or to have waived the right to avail themselves, of such a defense. And the rule here is, with reference to the negotiations had at the time of taking out the policy, that when the application is reduced to writing by the insurer or his agent upon the oral statement of the applicant, whether the application is or is not made tantamount to a warranty by being made part of the contract, the insurer being under a strong moral obligation to secure to the applicant the protection for which he pays, if a controversy arises upon the truthfulness of the application, and statements alleged by the insurer to be essential are omitted, and others falsely made, and he seeks to avoid the contract on that ground, parol evidence is admissible to show that, at the time the negotiations were pending, the facts alleged to have been omitted or falsely stated were in fact truly stated." Page 751, § 497.

Of course, it was for the jury who tried this cause to decide whether the plaintiff knew of the contents of the application before he signed it, or whether he gave a different valuation to that therein inserted, and had reason to believe that his statement as to value had been written down as he gave it. In the answer as written down by the agent of defendant herein, the properties insured are stated to be severally worth \$900, \$500, and \$400,—\$1,800 in the aggregate. There was testimony that, prior to the preparation of the written application, the plaintiff stated to the agent of the defendant that the value of the whole property insured was about \$1,500. The amount of insurance was \$1,100,—\$600, \$300, and \$200. At the trial it was stipulated that the value of the insured property at the time of the insurance, and also at the time of the fire, was the amount stated in the plaintiff's preliminary proof of loss,—\$1,302.18. The policy contains the clause: "Special reference being made to assured's application and survey No. 261,707, which is his warranty, and a part hereof." It also contains the stipulation and condition: "If any false representation is made by the assured of the condition, situation, or occupancy of the property, or any overvaluation, or any misrepresentation whatever, either in a written application or otherwise, * * * this policy shall become void." In *Helbing v. Insurance Co.*, 54 Cal. 156, it was held that a provision in a policy of insurance that the application shall be considered a warranty, and if the property insured is overvalued in it the policy shall be void, applies only where the statements as to value are intentionally false; that the question of fraud is one of fact; that although, where the discrepancy between the statement in the application and the actual value of the property is so great as to convey the conviction of fraud to the reasonable mind, the jury may and ought to find fraud, yet, where the discrepancy is very considerable, the jury may find the application not to have been fraudulent, even in the absence of explanatory evidence. There have been decisions in other states to the contrary of the view of this court in *Helbing v. Insurance Co.*; the question being the construction of a condition that the policy shall be void in case of overvaluation. But, as said by Mr. Wood: "There can be no doubt that, in conformity with the ordinary rules of construction applied to insurance contracts, and the ordinary principles of justice and fair dealing upon which they are supposed to be predicated, a policy cannot be held to be void for breach of such a condition, unless the overvaluation is intentional and fraudulent, and not a fair expression of the honest judgment of the insurer, and the fact that the property has been considerably overvalued does not, of itself, establish such fraud on the part of the assured as avoids the policy, * * * and the burden is on the insurer to establish both the overvaluation and the fraud." 1 Wood, Ins. § 235. See cases *pro* and *con* cited in notes to the section. The estimate of value is an opinion. The answer to the question asked as to value is to be treated as if the question read, "What, in your honest judgment and opinion, is the value of the property?" The same learned writer says: "The doctrine that held the insurer up to a strictly

exact valuation would be extremely unjust, and would result in vitiating one-half of the policies issued; for, under the rule, the difference of one cent is as disastrous as a difference of a large amount." *Id.* Moreover, the language of the provision in the policy here sued on, that, if any false representation is made by the assured, etc., the policy shall become void, when read as a whole, very clearly shows that a willful misrepresentation as to the value of the property, or one made with such gross and reckless carelessness as in law would be treated as willful, was in the contemplation of the parties. If so, the previous clause does not make the valuation a warranty. Even when the statements in the application are declared to be warranties, they will not be regarded as such if qualified by other stipulations which afford a fair inference that the parties themselves did not so intend them. The provision that an intentional overvaluation of the property should avoid the policy was utterly unnecessary, and must be disregarded, if it was intended the applicant should warrant the exact correctness of his valuation. *May, Ins. § 161.* The case at bar does not, however, require a full consideration of the doctrines of warranty, as applied to insurance contracts, which, whatever their form, are treated as conditions precedent. There was evidence that the \$1,800 valuation was no part of the contract between these parties. If it be said that the statement of plaintiff—"about fifteen hundred dollars"—was not true, that statement was no part of the contract as merged in the writings; therefore no warranty. A representation is clearly distinguishable from a warranty; the former being a part of the proceedings which propose a contract, and the latter a part of the contract when completed. A misrepresentation renders the contract void on the ground of fraud; a non-compliance with a warranty is an express breach of the contract. *Ang. Ins. 146, 147.* A fraudulent misrepresentation will avoid the contract, whether it is expressly so stipulated or not. Representations are *dehors* the contract. If the policy was issued to the plaintiff without any answer in the application to the inquiry as to value, there could be no breach of warranty as to value. *Carson v. Insurance Co.*, 43 N. J. Law, 300. That an overestimate of about \$200 was not necessarily intentional or fraudulent is, as appears from what has been said, very clear. The charge of the court to the effect that the overvaluation did not deprive the plaintiff of his right to recover unless it was intentionally or knowingly made, or the application was so negligently made as to induce an overvaluation, was, under the circumstances, not erroneous. The charge, in so far as it seems to make the plaintiff's right to recover depend upon affirmative fraudulent acts and conduct of the defendant's agent, which induced the plaintiff to sign the application, was at least as favorable to the defendant as it was entitled to ask.

The court below instructed the jury: "When there has been a breach by the insured of the warranty contained in an application for insurance, the insurance company may or may not take advantage of such breach, and claim a forfeiture; but it may also waive a forfeiture, and this it may do by any act on its part which, after its full knowledge of such forfeiture, subjects the insured party to trouble and expense as to his claim for insurance on said forfeited policy." The sixth subdivision of the policy reads: "The use of general terms, or anything less than a distinct specific agreement clearly expressed and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction therein." And by the twelfth subdivision: "It is further understood and made part of this contract that the agent of this company has no authority to waive, modify, or strike from this policy any of its printed conditions, * * * nor, in case this policy shall become void by reason of a violation of any of the conditions thereof, has the agent power to revive the same," etc. The witness Heacock testified that the plaintiff did in fact read the application, and questions attached, before signing them. If the jury believed such testimony, it was evidence tending

to show that the plaintiff had knowledge of the answer valuing the insured property at \$1,800; that he approved of the statement, and by ratification recognized Heacock as his agent in preparing the application. If he did, with knowledge of the contents of the application, sign it, he was bound by the statements contained in it. And the difference of \$500 was some evidence of an intentional overvaluation. Whether he did or did not know its contents was a question of fact for the jury. Upon the hypothesis that he did know, the charge last quoted was material, and may have controlled the action of the jury in finding their verdict. It becomes important, therefore, to inquire whether the charge correctly declares the law. It is contended by respondent that the limitation of the agent's power contained in subdivisions of the policy 6 and 12, above quoted, do not apply to a waiver of forfeiture based on an overvaluation of the property insured. But, if the statement that the property was worth \$1,800 was the statement of the plaintiff, its correctness as the fair judgment of plaintiff was a condition entering into and forming a part of the contract of insurance; and it is to such conditions, and not to mere omissions in the mode or manner provided for proving the loss after a fire, that a clause, "nothing less than a distinct specific agreement, clearly expressed and indorsed on this policy, shall operate as a waiver of any printed or written condition or restriction therein," refers. *Blake v. Insurance Co.*, 12 Gray, 265; *Insurance Co. v. Ice Co.*, 36 Md. 102; *McCormick v. Springfield Co.*, 66 Cal. 361, 5 Pac. Rep. 617. It is said in 1 Wood, Ins. § 235, that when the insurer, knowing the facts, does that which is inconsistent with its intention to insist upon a strict compliance with the conditions of the contract, it is treated as having waived their performance, and the assured may recover without proving performance; "and that, too, even though the policy provides that none of its conditions shall be waived except by written agreement." But the cases referred to are those in which the agent authorized to do so has waived the condition. There is a class of cases in which it has been held that, where the policy contains a provision that if the premium shall not be paid on a day certain, or shall not be paid when the policy is delivered, the policy shall be void, and that no agent is authorized to waive any condition without authority in writing; still, as the company may at any time authorize its agents to make agreements extending the time for payment of premiums, or waiving forfeiture for non-payment, it is not bound to act on the declaration in its policy that they have no such authority; that whether it has exercised its option to empower its agents to give credit or extend time is provable by evidence oral or written; and, as showing that the company has given its agent such power, evidence is admissible as to its practice in allowing him to extend the time. *Carson v. Insurance Co.*, *supra*; *Insurance Co. v. Norton*, 96 U. S. 243; *Insurance Co. v. Doster*, 106 U. S. 30, 1 Sup. Ct. Rep. 18. But, where the policy contained the provision that no agent had power to waive any condition without authority from the secretary in writing, and the agent delivered a policy without payment of the premium, and there was no evidence, oral or written, that he had power to do so, and the premium was not paid, it was held the holder of the policy could not recover. *Insurance Co. v. Springs Co.*, 100 Pa. St. 137. The class of cases referred to is very different from that in which the policy provides that there can be no waiver except in writing indorsed on the policy. In the last case the mode enters into and is a part of the power. The insured has full notice, when he enters into the contract, that a condition cannot be waived by an agent to whom the provision as to written indorsement relates, except in the manner in the contract provided. It is insisted by appellant that the instruction last quoted must have misled the jury. The statement on motion for new trial contains no specification of insufficiency of evidence to sustain a finding that a forfeiture was waived,—a finding which may have been included in the general verdict; and the defendant did not ask for an instruc-

tion indicating what facts should appear to make appropriate the instruction given. Under the circumstances, we think the order refusing a new trial should not be reversed, because of the possible ill effect of a charge abstractly correct. We say "abstractly correct," for it cannot be doubted that an insurer may waive a condition orally, or by his acts or conduct. It may be remarked that this court has not held, in a case in which the question was necessarily decided, that a provision in a policy that there shall be no waiver of a condition, except by writing indorsed on the policy, applies to a waiver by a "general agent" of a foreign corporation, so named, and registered as such under the statute, with presumed original powers co-extensive with those of his principal, where no restriction upon his powers is inserted in the policy. See *Steen v. Niagara Co.*, 89 N. Y. 315. In *McCormick v. Springfield Co.*, *supra*, it was held that the facts were insufficient to prove a waiver or estoppel. If what is there said seems to imply that a general agent, restrictions upon whose general powers are not inserted in the policy, or brought home to the insured, can never waive a forfeiture, except by writing, etc., the statement is mere *dictum*. In *Gladding v. Insurance Co.*, 66 Cal. 6, 4 Pac. Rep. 764, the scope or extent of the agent's authority did not appear. Nor do the exigencies of the present case demand a determination of the question suggested.

The court below charged the jury that the delay in the presentation by plaintiff to defendant of proofs of loss was waived if certain acts of the general agent of the defendant were proved to their satisfaction. The clause in the policy as to no waiver except by indorsement refers to those provisions of the policy which enter into and form a part of the contract of insurance, and which are properly designated as "conditions." It has no reference to those stipulations which are to be performed after a loss has occurred, such as giving notice, and furnishing preliminary proofs. *Insurance Co. v. Ice Co.*, *Blake v. Insurance Co.*, *supra*. There can be no doubt that the agent may waive a delay in presenting preliminary proofs. Whether, in this case, the agent did waive it, was, however, a question of fact for the jury, and it is not a practice to be commended for a court to instruct the jury that they must infer a fact from other facts. Const. art. 6, § 19. Yet, as the jury would not have been justified in finding, upon the facts recited, that the delay was not waived, the instruction did not injure the defendant. It would appear that the facts stated in the instruction were not controverted.

The court below instructed the jury: "If Mr. Grant was, at the time and after the fire in question, the agent of the defendant, and, as such, had knowledge of the fire in question, and also of the valuation of \$1,800 of the insured property in question in plaintiff's application for insurance, and sent Mr. Sexton or Mr. Dimond to Santa Cruz to examine, after the fire, as to the value of the insured property in question, and was informed by the report of said Sexton or Dimond that said insured property was overvalued in said application, and was of much less value than \$1,800, and believed said report; and if Mr. Grant, after all this, requested the plaintiff to make out preliminary proofs, and present vouchers in support of his claim on the policy of insurance in question, and thereupon the plaintiff was put to the trouble and expense of making preliminary proofs as to his said claim by said action of Mr. Grant,—if you find such action established by the evidence,—you will be authorized to find that the defendants waived any forfeiture resulting from any overvaluation of the insured property in plaintiff's application for said insurance." It has been held that an adjustment of a claim by an insurer after a loss, and an agreement to pay a certain sum in liquidation, is a new contract, and that, in an action on such new contract, the insurer cannot, in the absence of fraud, set up a breach of warranty or condition of the policy, even if ignorant of the breach until after the agreement to pay. 2 Wood, Ins. § 450. We understand this to mean fraud on the part of the insured which induces the insurer

to enter into the settlement. But here there was no such adjustment or agreement, and the action is on the policy. The waiver spoken of in the instruction is another term for estoppel. There can be no estoppel where the facts are not known, as no one can be presumed to have waived that, the existence of which he has not known. *Finley v. Lycoming Co.*, 30 Pa. St. 311; *Forbes v. Agawam Co.*, 9 Cush. 470; *Allen v. Vermont Co.*, 12 Vt. 366; *Biddle Boggs v. Mining Co.*, 14 Cal. 279. And the facts proved must be such that an estoppel is clearly deducible from them. Estoppels are not favored. *Franklin v. Merida*, 35 Cal. 558. The representation, whether by word or act, to justify a prudent man in acting upon it, must be plain, not doubtful or matter of questionable inference. Certainty is essential to all estoppels. *Bigelow, Estop.* 559. It is true, the jury were told that, if the recited acts were proved, they were "authorized," not required, to find the estoppel. But, as we have seen, the difference between the statement of value in the application and the actual value, even if very great, is at most but evidence of an intentional overvaluation; and, to constitute a breach of the condition, the overvaluation must be intentional. It would appear that a "considerable" overvaluation does not of itself establish fraud *prima facie*. 1 Wood, Ins. § 235. Even if it be conceded that, had the jury inferred fraud from an overvaluation of \$500, the verdict would not have been set aside, it is certain that if they had found no fraud, notwithstanding an overvaluation of \$500 unexplained, we would not annul the verdict as being against the evidence. From the circumstances assumed in the instruction the agent of the defendant was not bound to know as a fact that there had been a breach of the condition. He may have believed no fraud, although he accepted as true the statements contained in the reports of his subordinates. Even if those reports aroused his suspicions, he may, as a prudent and reasonable man, have reserved the matter for further investigation. He was not estopped, as having knowledge of a fact, because another fact was brought to his attention which might have excited his suspicion, or even if the fact of which he had notice ought to have put him upon inquiry. The appropriate time for investigation as to breaches of warranty or falsity of representation is when application is made for payment of a claim, and presentation of the proofs. 2 Wood, Ins. § 450. It would be unjust to the agent of defendant to assume that he anticipated the possible result of such investigation, and determined there had been an intentional overvaluation prior to the investigation. And it would place an insurer in the power of a fraudulent applicant if, having some reason to suspect a fraudulent representation, although not in possession of evidence on which he could prudently rely to prove it, he should be held to be estopped from establishing the fact that the representation was intentionally false, because he had received or asked for proofs of the loss. Even if the jury would have been authorized to infer that the agent knew of the intent to overvalue if he knew of the overvaluation, they were not so instructed. They were told they might find an estoppel from the agent's knowledge of an overvaluation, and his request for preliminary proofs; and must have understood that they could find the estoppel by direct inference from his knowledge of the overvaluation, whether he had or had not knowledge that it was intentional. This they were not authorized to do. The question is not whether there was any evidence tending to prove knowledge by the agent of a fraudulent overvaluation, but whether the jury could properly be instructed that they could directly infer, from a fact which tended to prove another fact, that which they were authorized to infer only from the fact which the probative fact tended to prove. As an intentional overvaluation would alone avoid the policy, it would seem clear that knowledge by the defendant of such intentional overvaluation was one of the facts necessary to be proved to make out an estoppel. If so, the jury were not authorized to find estoppel upon mere knowledge of the overvaluation, and request by defendant for the production of proofs of loss.

In cases like the present it must appear that the insured was misled to his prejudice; and, where no act has been done or left undone by the insured in reliance on the act or non-action of the insurer, there can be no estoppel. May, Ins. § 507; *McCormick v. Springfield Co.*, *supra*. The acts or declarations must have influenced the conduct of the other party, to his injury. *Biddle Boggs v. Mining Co.*, *supra*. An estoppel can never arise by implication alone, except by some conduct which induces action in reliance upon it to an extent which renders it fraud to recede from what the party has been induced to expect. *Security Co. v. Fay*, 22 Mich. 467. An equitable estoppel is only called into existence for the prevention of wrong and redress of injury. There must be some element of wrong in the action of the party creating it. He must know, or have sufficient reason to believe, that another party will place himself in a different position, or subject himself to additional injury, in consequence of the action or representation. The jury were not authorized to find that the plaintiff was "put to the trouble and expense of making preliminary proofs as to his claim" by the agent's request that he make such proofs. The plaintiff could not have been induced to go to such trouble and expense by the mere waiver of time within which the proofs were to be made, or of the stipulated mode of making them. It was equally his duty to make them, whether the time and mode were waived or not. His action is to be referred to the contract; his motive to the necessity of making the proofs as a preliminary to securing the insurance. After he was requested to make the proofs he had agreed to make, he made them; but the statement that he was induced to make them by the request is only a *post hoc ergo propter hoc*. The waiver was for his benefit, and simply left him with a right to make proofs after the time, or in a different manner, from that prescribed. Such must have been understood by both parties to be the purpose of the waiver as to the production of the preliminary proofs or the request for them. Nor were the jury authorized to find that the plaintiff would have abandoned all claim against the defendant had he been informed that the latter would resist the claim in reliance upon a breach of the condition as to overvaluation. Whether the defendant waived any forfeiture by reason of a breach of that condition or not, it was the duty of the plaintiff to make proof of his loss, and no greater effect should be referred to a request for such proof than such as would naturally, or in the usual course of things, be caused by it. His request cannot be enlarged beyond its natural import and meaning,—a waiver of plaintiff's previous failure to produce, or irregularity in producing, the preliminary proofs. The plaintiff's "trouble and expense" in preparing such proofs could not operate to estop the defendant from asserting a right which had no direct relation to or connection with their production. Were the jury authorized to find, upon the facts recited in the instruction, that it was a fraud on the part of the defendant to insist upon a breach of the condition with respect to an intentional overvaluation? There can be but one answer to the question. The facts recited could not establish an estoppel such as the jury were instructed could arise from them. Judgment and order reversed, and cause remanded for a new trial.

We concur: SEARLS, C. J.; PATERSON, J.

76 Cal. 545

WOOD v. STROTHER. (No. 11,397.)

(Supreme Court of California. June 13, 1888.)

1. MUNICIPAL CORPORATIONS—STREET ASSESSMENT WARRANTS—MANDAMUS TO COMPEL AUDITOR TO COUNTERSIGN.

Under Laws Cal. 1871-72, p. 813, § 10, providing that the auditor, before countersigning a street assessment warrant, "shall examine the contract, the steps taken previous thereto, and the record of assessments, and must be satisfied that the pro-

ceedings have been legal and fair," *mandamus* is the proper remedy to compel him to countersign the warrant, since there is no other remedy in law or equity, and the determination of the auditor was not intended to be final.

2. SAME—STREET ASSESSMENT WARRANTS—FORMER INVALID ASSESSMENT.

In proceedings for *mandamus* to compel the auditor to countersign a street assessment warrant, pursuant to Laws Cal. 1871-72, p. 813, it is no defense that a previous invalid assessment has been issued, or that some of the property owners then paid their proportion, as such payments are to be treated as advances.

3. SAME—STREET ASSESSMENT WARRANTS—DISCRETION OF AUDITOR IN COUNTERSIGNING.

In Laws Cal. 1871-72, p. 813, § 10, providing that the auditor must be satisfied, before countersigning a street assessment warrant, that the proceedings have been "legal and fair," as it is not possible that it was the intention to give the auditor power to refuse to sign upon his own notion of fairness, though the proceedings may have been legal, the word "fair" is surplusage.

4. SAME—STREET ASSESSMENT DECLARED VOID—DELAY IN MAKING SECOND ASSESSMENT.

Where there is considerable litigation over a street improvement assessment required to be made within no specified time by Laws Cal. 1871-72, p. 813, providing therefor, and finally declared void in May, 1883, a delay until May 1885, to make a second assessment, is not such a delay as will deprive a party of his right to the assessment.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Action by J. M. Wood against F. F. Strother, auditor of the city and county of San Francisco, to compel the defendant to countersign a warrant issued by the superintendent of public streets for \$2,294, the amount of an assessment for macadamizing and curbing by plaintiff's assignor of a certain street along premises assessed. Judgment was in favor of plaintiff, awarding the writ of *mandamus*. Defendant appeals.

City and Co. Atty. George Flournoy, Jr., for appellant. *J. C. Bates*, for respondent.

HAYNE, C. This is an appeal from a judgment awarding a writ of *mandamus* to the auditor of San Francisco to countersign a street assessment warrant under the act of 1872. That act provides that the warrant shall be countersigned by the auditor, "who, before countersigning it, shall examine the contract, the steps taken previous thereto, and the record of assessments, and must be satisfied that the proceedings have been legal and fair." Laws 1871-72, p. 813, § 10. The word "fair" seems very loosely used in the above provision. In common usage it would convey some idea of justice or equity. But it is not possible that it could have been intended that in a case where the proceedings are legal—that is to say, in accordance with the requirements of the act—the auditor could refuse to sign upon the ground that the law was not just, or upon his own undefined notions of fairness. The word, therefore, adds nothing to the force of the word "legal," but is one of those expressions which are put in for the sake of the sound, and which convey no definite meaning.

With reference to the legality of the proceedings which the auditor is to examine, viz., "the contract, the steps taken previous thereto, and the record of the assessments," we think there can be no doubt but that if a competent court finds, after examination, that they are illegal, it will not compel the auditor to sign the warrant. The first question, therefore, is whether the proceedings were illegal. We see no illegality in them. The first defense states that the defendant "has no information or belief upon the subject sufficient to enable him to answer," and therefore he denies, *seriatim*, that the various proceedings set forth in the complaint were taken. The second defense avers "that he has examined said contract, and the steps taken previous thereto, as they are set out and referred to in said petition, and the record of said assessment mentioned in said petition, and is not satisfied that the proceedings upon which the same is based are or have been legal or fair." It is to be observed of these two defenses that they are not necessarily inconsistent.

ent; for the second does not specify wherein the proceedings are illegal, nor does it say that the auditor is satisfied that they are so. It simply says that he has not made up his mind on the question. But it would make no difference if the defense had set up that he was satisfied that the proceedings were illegal; for the court finds facts which show that the steps required by the street law were taken. The appeal is from the judgment only, and none of the evidence is brought up. The findings, therefore, are to be taken to be true; and it follows that the proceedings were "legal."

The second and third defenses set up matters which are outside of the proceedings referred to by the section under which the auditor acted, namely, that a former assessment had been made for the same work, and that "the greater part of the amounts therein assessed were many years since paid to and collected by plaintiff or his assignor, and that the plaintiff had lost his right by lapse of time." The court finds that no valid assessment had previously been issued. If there was a previous assessment which was invalid, that would not, of itself, be a reason why a valid assessment should not be made if the prior proceedings are sufficient to support it. *Himmelmänn v. Cofran*, 36 Cal. 412. Nor would the fact that some of the property owners had paid their proportion before the invalidity was discovered, affect the question. Such payments would be regarded as payments in advance; and the contractor would not be allowed to collect the sums over again any more than the holder of a note who has received payment before it was due would be allowed to do so. If the contractor should refuse to discharge the lien of record, a court of equity is amply competent to afford the necessary relief. The fact that some have paid in advance can afford no protection to those who have not paid.

Nor is the lapse of time a sufficient reason why the auditor should refuse to sign. The act fixes no time in which the assessment must be made. *Dyer v. Scalmanini*, 69 Cal. 640, 11 Pac. Rep. 327. Doubtless it must be done in a reasonable time. But the question of reasonableness of time is to be determined upon a consideration of all the circumstances. An apparently unreasonable delay might be explained by evidence. It does not seem to us that the auditor is charged with the duty of conducting an investigation into such outside circumstances. And if it be said that the writ of *mandamus* issues only in the discretion of the court, or, as it is sometimes said, is a "prerogative" writ, the answer is that we cannot say that there was an unreasonable delay. There was considerable litigation over the first assessment, which was not declared void until May 30, 1883. The second assessment was made May 12, 1885. We do not think that the lapse of time should deprive the party of his assessment.

The proceedings being "legal," the auditor was wrong in his refusal to countersign the warrant; and the remaining question is whether he can be compelled to sign by the writ of *mandamus*; in other words, whether *mandamus* is the proper remedy. The learned counsel for the appellant has directed most of his argument to this question. The argument against the writ is, in substance, that the statute requires the auditor to examine the proceedings, and satisfy himself that they are legal before signing; and that if he has examined them, and become satisfied that they are not legal, the most that can be said is that he has committed an error in a matter confided to his discretion; and that the function of the writ is not to review such exercise of discretion. It must be acknowledged that this argument is exceedingly plausible. There are innumerable cases in which it has been laid down that *mandamus* cannot issue to control discretion. The rule—which is undoubtedly correct, when properly understood—has been expressed in various forms. It has been repeatedly said that the writ cannot perform the functions of a writ of error; that it cannot issue to revise judicial action, but can only compel the performance of ministerial functions; and that it will issue to compel a tri-

bunal to act in some way, but not in any particular way. These formulas undoubtedly express a truth; but they express it in an inaccurate and misleading manner. And by reasoning from them, as if literally and in all cases true, courts have sometimes been led into error, and have frequently been forced to call acts "ministerial" which are plainly not so. An examination of the authorities will demonstrate the inaccuracy of the above phrases. Thus it is not accurate to say that the writ will not issue to control discretion; for it is well settled that it may issue to correct an abuse of discretion, if the case is otherwise proper. *Ex parte Bradley*, 7 Wall. 377; *State v. Lafayette Co.*, 41 Mo. 226; *Village of Glencoe v. People*, 78 Ill. 389; *People v. Superior Court*, 10 Wend. 285; *Railroad Co. v. Stockton*, 51 Cal. 339; Tapp. Mand. 14. So while, in one sense, it is correct to say that the writ cannot be made to perform the functions of a writ of error, in another sense it is not; for as was said by Chief Justice MARSHALL in *Ex parte Crane*, 5 Pet. 193: "A *mandamus* to an inferior court of the United States is in the nature of appellate jurisdiction." See, also, *People v. Bacon*, 18 Mich. 253. So it is not universally true that the writ will not issue to control judicial action, or to compel a tribunal, to whom the examination of a matter is intrusted, to act in a particular way. The cases in our own state show this. Thus in *Russell v. Elliott*, 2 Cal. 245, the writ issued to compel a judge to enter judgment upon the report of a referee. Here the judge had examined the matter, and had arrived at the conclusion that it was not proper that the judgment should be entered upon the report. But the higher court differed with him, and commanded him to do what as a judge he had refused to do. So in *Mining Co. v. Fremont*, 7 Cal. 130, the writ was issued to compel the judge of a district court to issue an attachment for contempt in disobeying an injunction. A motion had been made to the judge to commit the offender, but the judge had decided that he could not do so. Here the matter was certainly to be determined by the judge in the first instance. He erred in his conclusion. And to say that a correction of such error by *mandamus* is not revising judicial action, or not compelling the judge to act in a particular way, is a misuse of language. So it is well settled that a *mandamus* may issue to compel a judge to sign a bill of exceptions. *People v. Lee*, 14 Cal. 510; *People v. Rosborough*, 29 Cal. 416; *People v. Keyser*, 53 Cal. 184; *Lin Tai v. Hewill*, 56 Cal. 118; *People v. Crane*, 60 Cal. 279. Whether the party has a right to have a bill, or whether it is in time, are certainly judicial questions, and they are to be decided in the first instance by the judge, who, if he decide them correctly, will not be compelled by the writ to take back his decision. *Clark v. Crane*, 57 Cal. 629. Is anything gained by calling such decision a "ministerial" act? So in *Railroad Co. v. Stockton*, 51 Cal. 329, a *mandamus* was issued to compel the delivery of certain bonds, although the act provided that the bonds were to be delivered upon certificate of the council that the "road has been constructed and the track laid in a manner and of a character acceptable to them."

Decisions similar in principle have been made in other courts. In *King v. Justices*, 5 Barn. & Adol. 667, the writ issued to compel the justices of the West Riding to hear an appeal which they had dismissed upon the ground that a certain notice had not been given. PARKE, J., said: "We have no right to interfere with the discretionary power of the sessions. Where they have that power their discretion is to be confided in. But the question, what is such reasonable notice as gives them jurisdiction to entertain an appeal? is a legal question, of which they are not the exclusive judges; and this court will see that in determining such a point they act legally and according to the jurisdiction which they possess." In *Reg. v. Recorder*, 1 Eng. Law & Eq. 294, the foregoing seems to have been limited to cases where the erroneous decision was upon preliminary matters. The court, per PATTESON, J., said: "*Queen v. Goodrich*, [19 Law J. Q. B. 413,] draws the true distinction, that when any
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preliminary step is necessary in order to give the court of quarter sessions power to hear the appeal, and the court comes to a wrong conclusion of law, not of fact, in respect to that preliminary step, this court will interfere by *mandamus*." The doctrine of the foregoing cases was approved in *Castello v. Circuit Court*, 28 Mo. 274, in which the court declared that it had seen no American cases to the contrary. In New York, where the formulas as to discretion, judicial action, etc., have often been repeated, it has been held that the writ may issue to compel a judge to vacate an order granting a new trial upon the ground of newly-discovered evidence, which order was in violation of the established rules that there must be no laches, and that the newly-discovered evidence must not be cumulative merely; there being no other adequate remedy. *People v. Superior Court*, 10 Wend. 285, 5 Wend. 114. So where the court of common pleas set aside the report of referees upon the merits, and erred in doing so, the writ issued to correct the error. *People v. Court of Common Pleas*, 12 Wend. 246. So where the court of common pleas granted the plaintiff leave to amend his declaration, but, under an erroneous view of the law, refused to grant leave to the defendant to plead, a higher court (per BRONSON, J.) awarded a *mandamus* commanding the inferior court, either to allow the defendant to plead or refuse to allow the declaration to be amended. *People v. Court of Common Pleas*, 18 Wend. 534. In Michigan, the rule as to discretion, etc., prevails. See *Houghton Co. v. Auditor General*, 36 Mich. 273; *Parks v. Circuit Judge*, 38 Mich. 244; *Wells v. Circuit Judge*, 39 Mich. 21; *Railroad Co. v. Circuit Judge*, 40 Mich. 168; *Stork v. Superior Court*, 41 Mich. 5. Yet in that state the writ has issued in the following cases: To compel a judge to set aside a judgment rendered against the relator, because of an illegal notice of trial, (*People v. Bacon*, 18 Mich. 247;) to compel a court to vacate an order overruling a motion for relator's discharge from arrest, (*Watson v. Superior Court*, 40 Mich. 730;) to compel a judge to vacate an injunction, (*Van Norman v. Circuit Judge*, 45 Mich. 205, 7 N. W. Rep. 796;) to compel a judge to vacate an order denying a motion to amend a record, (*Frederick v. Circuit Judge*, 52 Mich. 529, 18 N. W. Rep. 343.) In Alabama the rule as to discretion prevails. See *Ex parte Railroad Co.*, 44 Ala. 655, 656. But in that state the writ has issued in the following cases: In *Ex parte Lowe*, 20 Ala. 330, the court had granted a new trial upon condition that costs were paid within a certain time. The costs were paid, but not, as was claimed, within the time prescribed by the order. The court took this view, and made the judgment absolute. The higher court considered that the view of the lower court was erroneous, and awarded a *mandamus* to compel a new trial. So, where a court gave an improper construction to a stipulation of record, and ordered a trial where it ought to have ordered a judgment in accordance with the stipulation, the writ was issued to compel a judgment. *Ex parte Lawrence*, 34 Ala. 446. So the writ was issued to compel a probate judge to approve a bond which had been tendered to him, and which he had refused to approve, (*Ex parte Candee*, 48 Ala. 387,) and to compel a chancellor to reinstate a bill which he had ordered stricken from the docket, (*Ex parte State*, 51 Ala. 69.) And decisions similar in principle have been made in other states. In *Ex parte Pile*, 9 Ark. 336, a judge was compelled by the writ to issue an injunction which he had refused to issue. In *State v. McArthur*, 13 Wis. 407, the writ issued to compel a change of venue. In *Com. v. Sessions of Norfolk*, 5 Mass. 435, it issued to compel a justice to accept a verdict and render judgment thereon. And see, also, *State v. Lazarus*, 36 La. Ann. 579; *Com. v. Sessions of Middlesex*, 9 Mass. 388; *Rand v. Townshend*, 26 Vt. 670; *Delaney v. Goddin*, 12 Grat. 266; *Gresham v. Pyron*, 17 Ga. 263; *Ex parte Martin*, 5 Ark. 371; *Barnett v. Circuit Court*, Hardin, 182.

In view of the foregoing cases, it seems a mere perversion of language to say that the writ will never issue to control judicial action, or to compel a tribunal to act in a particular way. It is by no means intended to assert that

the writ could issue in this state in all the cases above referred to. The propriety of the issuance of the writ in any case must depend upon whether, under the law of the state where the litigation arises, the determination was intended to be final; and, if not, upon whether the system of practice furnishes any other adequate remedy. These things might be different in different states. But the cases cited serve to show that the formulas above mentioned are not universally and literally true, and that it is dangerous to reason from them as if they were so. In every case the tribunal that is to act must determine in the first instance whether the case is a proper one for its action. And in our opinion the true tests are whether its determination is intended by law to be final, and, if not, whether there is any other "plain, speedy, and adequate remedy." If the determination of the tribunal was intended to be final, it is plain that it cannot be disturbed, either on *mandamus* or in any other way. If it was not intended to be final, but there is another "plain, speedy, and adequate remedy," the writ cannot issue; for it was not designed to usurp the place of other remedies. But if the determination was not intended to be final, and there is no other adequate remedy, the writ must issue. Otherwise there would be an admitted wrong without a remedy. The writ issues in such case to prevent a failure of justice. And this is its ancient office. In the language of Lord MANSFIELD: "It was introduced to prevent disorder from a failure of justice, and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where, in justice and good government, there ought to be one." *Rex v. Barker*, 3 Burrows, 1268. See, also, 3 Bl. Comm. 110; Tapp. Mand. 9; *Com. v. Sessions of Hampden*, 2 Pick. 418.

It will generally happen that where discretion is committed to an officer, or where a judicial tribunal is called upon to act, its determination is either final, or only subject to review in certain prescribed ways. But, as above shown, this is not universally true, and it is dangerous to reason as if it were so. The ultimate test is, in our opinion, as we have stated. In the present case there can be no doubt that the auditor was to examine the proceedings, and satisfy himself that they were legal, for the statute expressly says so; and if they were found by the court to be illegal the writ could not issue. But, being perfectly legal, the question is whether the determination of the auditor was intended to be final; and we can see no ground for saying that it was. There is nothing in the language of the act which shows that it was intended to be final. It certainly would not be final in favor of the contractor. In the numerous cases in which street assessments have been before the court we have never seen it suggested that the signature of the auditor cured previous illegality, and it seems clear that it would not do so. Why, then, should it be final against the contractor, and be conclusive that the proceedings are illegal, when it is apparent that they are not so? If the auditor's determination of this purely legal question were intended to be final, it would have been natural for the charter to have given the parties interested a hearing. Nothing of the kind is provided. The proposition, therefore, must go to this extent: that the auditor is clothed with absolute and despotic authority over the rights of the contractor. We are not prepared to go so far. If the determination of the auditor be not final, then, upon the principles above stated, the writ must issue; for under the street law the failure to sign the warrant brings the proceedings to a complete stop, and there is no other remedy in law or equity. We advise, therefore, that the judgment be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

76 Cal. 578

MALONE v. BIG FLAT GRAVEL CO. et al. (No. 9,876.)*(Supreme Court of California. June 16, 1888.)*

1. **MECHANIC'S LIEN—PROPERTY SUBJECT TO LIEN—MINING TOOLS AND MACHINERY.**
Under Civil Code Cal. § 661, "all machinery or tools used in working or developing a mine are to be deemed affixed to the mine," and therefore are subject to lien for labor in the mine; and blacksmithing and repair work done on such machinery and tools may be made a lien on the entire mining property.
2. **SAME—FOR WHAT OBTAINED—CONTRACT FOR LABOR OF OTHERS.**
A contractor for the labor of others at a fixed rate for each man per day is entitled to a lien for the labor furnished by him as an original contractor, but not if acting merely as an employment agent for the laborers.
3. **SAME—PROCEEDINGS TO PERFECT—FORM OF NOTICE.**
A notice of mechanic's lien, alleging in substance that the claimants were employed by the defendant company, without naming the company's agent, who in fact made the contract, is sufficient.
4. **SAME—WHEN TO BE FILED.**
Under Code Civil Proc. Cal. § 1187, providing that claims of lien "for the performance of any labor in a mining claim" must be filed within 30 days thereafter, laborers employed at a fixed compensation per month are not for that reason required to file notice of lien within 30 days from the end of each month.
5. **SAME—ENFORCEMENT—COMPLAINT.**
Where a notice of mechanic's lien sets out a contract for a fixed rate of compensation per month, and the complaint in the action to foreclose, to which the claim is attached as an exhibit, sets up a contract for labor "to the extent and value of" a sum named, without alleging any specific promise, the complaint is bad for ambiguity, and also because of the variance.
6. **SAME—JOINDER OF CLAIMS.**
In an action by an assignee to foreclose various liens for labor performed in a mining claim, there is no misjoinder of causes of action from the fact that several of the claims were filed against a claim of 40 acres, a part only of the entire property of the company, which consisted of several distinct claims, aggregating in all 500 acres, and that other claims were made against the entire tract.

Commissioners' decision. Department 1. Appeal from superior court, Del Norte county; **JAMES E. MURPHY**, Judge.

Action by John Malone, assignee of S. R. Heath and others, against the Big Flat Gravel Company and O. M. Paris, a judgment lien creditor of the company, to foreclose certain claims for liens for labor performed in the company's mine. Copies of the notices of lien were attached to the complaint as exhibits. Judgment for plaintiff. Defendants appeal.

W. H. H. Hart, (*Wm. H. Fifield*, of counsel,) for appellants. *Daniel Titus* and *L. F. Cooper*, for respondent.

HAYNE, C. Suit to foreclose laborers' liens. The plaintiff is the assignee of 26 liens for labor performed upon certain mining claims owned and operated by the Big Flat Gravel Mining Company. The proceedings arose under, and are to be governed by, the law as it stood in 1880. Each lien is set up in a separate count. The court below gave judgment for the plaintiff, and the appeal is by the company and one Paris, who held a judgment lien.

1. The contract set forth in the notices of lien are different from the contracts set forth in the complaint. The notices all set forth contracts for labor at a fixed rate. The lien of Heath, which is the first in the complaint, may be taken as a type of them all. Its statement of the contract is as follows, viz.: That the company "entered into a contract with said S. R. Heath, under and by virtue of which said labor was performed, and the following is a statement of the terms, time given, and condition of said contract: To work at general blacksmithing in and upon said premises for an indefinite time at the rate of seventy-five (\$75) dollars per month, payable on demand." In addition to the above, all the liens, (except that of Heath) speak of "the contract price." Independent of these latter words, however, we think it is plain that the statement in the lien is that of a contract by which the rate of compensation is fixed. The statement in the complaint is of contracts by which

the rate of compensation is not fixed. All the counts are similar in form. They allege in substance that the party performed labor upon the mine "to the extent and of the value of" so many dollars. If a promise had been alleged it might have been argued that such allegation would cover the case either of an express or of an implied promise, and that the allegation as to value was surplusage; but, no promise having been alleged, the only promise that can be inferred is the one implied by law to pay the reasonable value of the labor, which would leave the important question as to the amount unsettled. This is an essentially different contract from those set out in the notices of lien. And as we understand the law, the plaintiff can recover only upon the contracts stated in the notices of lien. We do not mean to say that a difference in the amounts stated and the amounts proved would be fatal, and it is possible that there may be other differences which would not be material. But we think that in all essentials the contracts must be the same.

Such difference was a ground of demurrer for ambiguity. *Frazer v. Barlow*, 63 Cal. 71. The demurrer specified the ambiguity, and should have been sustained. In addition to this, the notices of lien, when offered in evidence, were objected to on the ground of a variance; and it was error to overrule said objections. The foregoing is sufficient to dispose of the appeal; but inasmuch as certain questions, which will arise upon a retrial, have been argued, we proceed to consider them.

2. It is contended for appellants that there was a misjoinder of causes of action. The facts are that the company owned about 500 acres of *placer* mining ground, which consisted of four claims, designated respectively as A, B, C, and D. Claim C, which comprised 118 acres, appears to have been made up of smaller claims, among which is the "John Mains" claim of about 40 acres. Upon this 40-acre claim was a saw-mill, which was moved from its former position on claim A. The claims were all adjoining each other, and the whole 500 acres was in the form of a strip along Hurdy Gurdy creek, which strip was bounded on one side by the creek, on the other side by the Big Flat ditch, which was used to supply water to the claims, on the north by McGrew gulch, and on the south by French gulch. The whole appears to have been used and operated as one mine. Twenty-three of the liens are upon the "John Mains claim" of 40 acres, and upon the ditch. These notices mentioned the saw-mill and the connecting pipes, flumes, etc., and also some "giants." The remaining three liens are upon the whole \$500 acres, with the ditch and improvements.

The position is, in the first place, that the cause of action as to the "John Mains" claim should not have been joined with the cause of action as to the whole 500 acres, and that said 500 acres consisted of at least four separate claims, which should not have been joined with each other or with the ditch; and, in the second place, that there is stated a cause of action as to certain machinery, "giants," pipe, etc., which, if "lienable" at all, ought not to have been joined with the claims. We do not think there was a misjoinder. Section 1195 of the Code of Civil Procedure provides that "any number of persons claiming liens may join in the same action." This provision, it will be observed, does not say whether the lien must be all upon the same property or simply against the same person. We incline to the former construction. But we think that since the several claims all adjoin each other, with the ditch as a backbone, and are all owned by the same owner, and were used and operated as one mine, they may be considered as one piece of property for the purpose of the present question. We do not understand that the 500 acres consisted of land which was not subject to appropriation for mining purposes, as appears to have been the case in *Williams v. Association*, 66 Cal. 198, 5 Pac. Rep. 85. As we gather from the record, the 500 acres consisted of *placer* mining ground. And a party is not restricted in the quantity which he may acquire by purchase, but may purchase as many ad-

joining claims as he can, and have them included in one patent. *Smelting Co. v. Kemp*, 104 U. S. 636. We do not say that the unity of the property follows from the unity of ownership alone, but from that and the other circumstances mentioned. Taking the several claims to constitute one piece of property for the purposes of the mechanic's lien law, we think there was no misjoinder of causes of action. All the liens were upon the John Mains claim and the ditch and improvements, and the fact that three of them included something further is not material. The court can adjust the rights of the parties by its decrees. See, generally, *People v. Hagar*, 52 Cal. 171; *Brady v. Kelly*, Id. 371. With reference to the iron pipe, giants, etc., we think they must be regarded as part of the mine, whether they were attached to it or not; for the Civil Code provides that all "machinery or tools used in working or developing a mine are to be deemed affixed to the mine." Civil Code, § 661. The complaint is not very satisfactory in some of the above respects, but as the case must be reversed for the matter first mentioned, it can be amended so as to conform to the principles above stated.

3. It is contended for the appellants that the statement in the notices of lien as to the name of the person by whom the claimant was employed is not sufficient. All the notices state in substance that the claimants were employed by the Big Flat Gravel Mining Company. The argument is that this is the statement of a conclusion of law, and the Code requires the notice of lien to state who, in fact, employed the claimant. The case of *McDonald v. Backus*, 45 Cal. 262, contains the statement (the other cases cited are not, in our judgment, in point) that the notice of lien is required to state facts, and not mere conclusions of law. This was said to show that a notice of lien was sufficient if it gave the name of one member of the firm by which the claimant was employed, omitting the other members, and not giving the firm name. Possibly that case was correctly decided. We express no opinion as to it. But we do not think that the broad statement as to conclusions of law can be maintained. According to it, if the owner sends his office boy to order repairs upon a building, and the boy simply tells the laborer to make the repairs, without saying for whom, the notice of lien must give the name of the office boy as that of the person by whom he was employed. And the result would be similar if the person who sent for the laborer was himself a contractor. What good would it do for the claimant to put in his notice the name of the contractor's office boy, or that of any chance messenger,—say, an American District Telegraph boy,—as that of the person by whom he was employed? The word "employed" is not appropriate in such a connection. Nor is there anything in the nature of the case which would give such a meaning to the word. In our opinion, the intention was that the claimant should put enough in his notice of lien to enable the owner to understand whether the claimant was an original or subcontractor; in other words, whether the claimant asserted that he contracted with the owner, and had a personal claim against him, or whether he contracted with the contractor, and looked only to him and the property. The rights and duties of the two classes of claimants are materially different in several respects, and it is important for the owner to know which attitude the claimant assumes. But we should prefer not to lay down any rule about facts and conclusions of law. And in this connection we may say, as was said in *Wood v. Wrede*, 46 Cal. 637, that "we are certainly not disposed to defeat a lien by a nice criticism of the language in which the claim is set forth."

4. It is urged that several of the claims are not "lienable." The lien of Heath shows that he was a blacksmith. He worked in the blacksmith shop which was upon the property, sharpened picks and drills, made pipe, and did other necessary work. It is said that this was not labor upon the mining claim. But, as we have shown, the tools and machinery used in working and developing the mine are "deemed affixed to the mine." Civil Code, § 661.

Hence it would seem to follow that work upon the tools and machinery, while they are so used, is work upon the mine. This applies to several liens. The notice of lien filed by Ah Jake states that "the said Big Flat Gravel Mining Company was to pay to the said Ah Jake the sum of \$50 per month for his individual labor and services, and also the further sum of \$1 per day for the labor of one certain class which he might furnish, and the sum of \$1.25 per day for the labor of another certain class." It is said that Ah Jake could not have a lien for the labor which he furnished in accordance with the above; that the laborers so furnished should have filed liens themselves; and that there could not be two liens for the same labor. It will be observed that the contract stated in the notice of lien is that the sums to be paid for laborers furnished by Ah Jake are to be paid to him. He was the original contractor, and the laborers were the subcontractors. And we think he was as much entitled to a lien as any other original contractor. The maxim *qui facit per alium facit per se* applies. It is no objection that the subcontractors could also file liens. That is the case wherever a subcontractor files a lien. The court below adjusts its decree so that the owner does not have to pay twice. If the transaction stated in the notice of lien had shown that Ah Jake simply acted the part of an employment office, and that the company was liable directly to the laborers, he would not have been entitled to a lien for their labor. There are some small matters shown by the evidence which are not "lien-able," as, for example, the deer and bear meat supplied by Morris. This should be deducted from the amount due him; but we do not think it vitiates his lien for what was due. We do not deem it incumbent upon us to go through the mass of small details collected by counsel for appellants. It is sufficient to say that the character of the work should not be scrutinized too strictly. If the labor had a legitimate connection with the working of the mine, it is sufficient within the meaning of the lien law.

5. It is contended that, where the laborers worked by the month, the notice of lien should be filed within 30 days from the end of each month. This assumes that each month is separate and distinct from every other month, and requires a separate notice of lien. But we do not think that this can be implied from the words "within thirty days * * * after the performance of any labor in a mining claim." Code Civil Proc. § 1187. Upon the same reasoning, we should have to say that persons who worked by the day should file a separate notice for each day's work.

The other points do not require special notice. We, therefore, advise that the judgment be reversed, and the cause remanded, with directions to sustain the demurrer, with leave to amend.

I concur: FOOTE, C.

BELCHER, C. C., took no part in this opinion.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded, with directions to the court below to sustain the demurrer, with leave to amend.

1. EVIDENCE—HEARSAY—STATEMENT OF PARTY.

In an action to have a deed absolute upon its face declared a conveyance in trust, and the land restored to the grantors, on the ground of repudiation of the trust, declarations made by plaintiffs to their attorney, in defendants' absence, touching the conveyance, are inadmissible in evidence in their favor.

2. JUDGMENT—PARTIES.

When a party is joined as defendant in a suit, and no judgment is entered or rendered either for or against him in the final decree, the cause is not disposed of as to him.

In bank. Appeal from superior court, San Luis Obispo county; D. S. GREGORY, Judge.

This was a suit brought by George Schultz and Henry Von Barga against George D. McLean and C. P. Robinson to have an absolute deed declared a trust conveyance and to have the lands restored to plaintiffs on the ground of defendants' repudiation of the trust. There was a decree in favor of plaintiffs. Both defendants appeal from the order denying a new trial, and defendant McLean also appeals from the judgment.

T. M. Osment, F. Adams, and V. A. Gregg, (John Garber, of counsel,) for appellants. *T. C. Van Ness and J. A. Waymire, (J. P. Hoge, of counsel,)* for respondents.

THORNTON, J. The court below erred in allowing the following question to be put by plaintiffs to Waymire, their attorney in this case, who was called by them: "What statement did Schultz make to you in regard to the contract which was made between him and McLean, at the time he first consulted you in regard to this suit, and before you drafted the complaint? I want to know whether the statement made to you was the same statement made here on the stand." And also erred in admitting the answer to the foregoing question. Schultz went to Waymire, and made the statement inquired about to him in regard to his case. Neither of the defendants was present when this statement was made. If such a statement is admissible, a party can make evidence for himself. For what reason or on what ground the court admitted it we cannot conjecture. For the foregoing error the judgment and order denying a new trial must be reversed, and the cause remanded. No judgment has been entered or rendered either against or in favor of defendant Robinson. The cause is not then disposed of as to him. *Diggins v. Reay*, 54 Cal. 526. The court should have passed on the cause as to all the defendants. Judgment and order reversed, and cause remanded.

We concur: SEARLS, C. J.; MCFARLAND, J.; MCKINSTRY, J.; PATERSON, J.; SHARFSTEIN, J.

SCHULTZ *et al.* v. McLEAN. (No. 11,436.)

(*Supreme Court of California.* June 19, 1888.)

In bank. Appeal from superior court, San Luis Obispo county; D. S. GREGORY, Judge.

Appeal of George D. McLean, defendant, from the judgment in an action by George Schultz and Henry Von Barga against George D. McLean and C. P. Robinson. See *Schultz v. McLean*, ante, 775.

F. Adams, V. A. Gregg, and T. M. Osment, for appellants. *T. C. Van Ness, and J. A. Waymire*, for appellees.

PER CURIAM. The judgment and order in this cause were reversed in cause numbered 11,150, ante, 773, and therefore the order herein will also be reversed. Ordered accordingly.

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PEOPLE v. BURKHART *et al.* (No. 12,581.)

(*Supreme Court of California.* June 19, 1888.)

SHERIFF—ACTION AGAINST—STATUTE OF LIMITATIONS.

When a sheriff is *ex officio* tax collector, and gives separate bonds for the faithful performance of the duties of each office, an action on his bond as tax collector, for taxes collected and not paid over, is not barred by the expiration of the statutory period prescribed by Code Civil Proc. Cal. § 839, within which actions may be brought against a sheriff.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; HENRY M. WILLIS, Judge.

Rowell & Rowell, for appellant. *Andrew B. Paris*, Dist. Atty., for the People.

FOOTE, C. This is an action against a tax collector, and the sureties on his bond, as such, for taxes collected by him, and not paid over to the county treasurer, as required by law. The plaintiff had judgment as prayed for, and from that the appeal is prosecuted. The only point made for the reversal of the judgment is that the action was barred by the statute of limitations of two years under Code Civil Proc. § 339, subd. 2. From the findings it appears that the failure to pay over the taxes as required by law had taken place about two years and eleven months prior to the bringing of the action, and that the defendant was sheriff and *ex officio* tax collector of his county. As to the time within which actions must be initiated to save the bar of the statute, section 339, Code Civil Proc., reads as follows: "Within two years: (1) * * *; (2) an action against a sheriff, coroner, or constable, upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution," etc. It is claimed that the defendant was tax collector because he was sheriff, and therefore the obligation he incurred by not paying over the taxes he had collected was as a sheriff, and not as tax collector, and hence the statute *supra* had run in his behalf. It is true, he was tax collector *ex officio* because he was sheriff; but, when he became tax collector, he was both sheriff and tax collector. He was liable faithfully to perform the duties pertaining to both offices, and gave separate bonds for such performance. The offices are distinct, although held by the same person, and required separate bonds. *People v. Ross*, 38 Cal. 76; County Government Act, §§ 57-59; *Butte Co. v. Morgan*, 18 Pac. Rep. 115. "The duties and obligations of the one are entirely independent of the duties of the other. * * * They are not so blended that the bond executed for the faithful performance of the duties appertaining to the one would embrace, in the absence of the statute, the obligations of the other. * * * The duties of sheriff, as such, relate to the execution of the orders, judgments, and processes of the court. * * * They have no relation to the collection of revenue." *People v. Edwards*, 9 Cal. 292. It is clear that the obligation which the defendant incurred was by virtue of his failure to perform his duty as tax collector; and that being so, section 337, Code Civil Proc., would have applied had four years elapsed from the time of his dereliction of duty until suit brought. Section 339, subd. 2, *supra*, did not apply, and the action is not barred. *San Francisco v. Heyne-mann*, 71 Cal. 153, 11 Pac. Rep. 870. We therefore advise that the judgment be affirmed.

I concur: HAYNE, C

BELCHER, C. C., did not take part in this opinion.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

76 Cal. 610

LIGARE v. CALIFORNIA SOUTH. R. CO. (No. 12,346.)

(Supreme Court of California. June 19, 1888.)

1. WRITS—SUMMONS—SIGNATURE OF CLERK.

Where a summons is issued on a blank, to which the clerk's name is printed, the affixing by him of the seal of the court thereto is a sufficient adoption of the printed signature, within the meaning of Code Civil Proc. Cal. § 407, requiring a summons to be signed by the clerk.

2. SAME—PUBLICATION—AFFIDAVIT.

Under Code Civil Proc. Cal. § 412, providing for an order of publication, if defendant "cannot, after due diligence, be found within the state," an affidavit to obtain such order, which states that defendants "have been sought for to obtain service of summons thereon, but after diligent search and inquiry cannot be found within the state," and states, further, that affiant "has made inquiry of all persons from whom he could expect to obtain information as to the residence of defendants," that summons and *alias* summons had been placed for service in the hands of the sheriff of the county where the suit was instituted, and of the sheriffs of several other counties, and that all such writs were returned unserved, after diligent search for defendants, is sufficient to show due diligence, when attacked collaterally.

3. SAME.

An affidavit for an order of publication against a defendant who cannot, "after due diligence, be found within the state," need not state that defendant's place of business or residence is unknown, as, under Code Civil Proc. Cal. § 413, the affidavit is only required to so state when it is against a "non-resident or absent defendant."

4. SAME.

Under Code Civil Proc. Cal. § 412, requiring that an affidavit for publication of summons, or the verified complaint on file, shall show a cause of action, before an order of publication issues against a non-resident or absent defendant, the cause of action may be shown either by the affidavit or the complaint, and an affidavit which refers to, and adopts a complaint on file, showing a cause of action, is sufficient.

5. SAME—ORDER.

In such case, the order of publication is not invalid, on collateral attack, although it states that the question was determined from the affidavit, "the files in the case, and other evidence produced and considered."

Commissioners' decision. In bank. Appeal from superior court, San Diego county; JOHN D. WORKS, Judge.

Petition by George C. Ligare against the California Southern Railroad Company, in the nature of a bill to quiet title, in which plaintiff seeks relief from a judgment by default against him, while a non-resident, in a former proceeding by defendant to condemn land. This proceeding attacks the former one for alleged defects in the order of publication therein, and prays for further proceedings in the nature of a new trial. The relief prayed for was refused, and plaintiff appeals.

J. E. Deakin, for appellant. *A. Brunson* and *M. A. Luce*, for respondent.

HAYNE, C. The sole question in this case is as to the sufficiency of a service of summons by publication to sustain a judgment by default, in a proceeding to condemn land. The particulars in which the publication proceedings are supposed to be insufficient are the following:

1. It is said that the summons was not signed by the clerk. The statute requires that it should be so signed. Code Civil Proc. § 407. But we think the affixing by the clerk of the seal of the court to a form to which was appended his printed name, was an adoption of the printed signature which for the purpose in hand was sufficient. See *Williams v. McDonald*, 58 Cal. 529; *Hancock v. Bowman*, 49 Cal. 413.

2. It is contended that the affidavit for publication does not show that a cause of action existed against Ligare, the plaintiff here. The statute requires that it must appear "by such affidavit, or by the verified complaint on file, that a cause of action exists." Code Civil Proc. § 412. It will be observed of this provision that it does not require the fact to appear in both ways. It is sufficient if it appear in either way. If there is a verified complaint on file, the affidavit may be silent on the subject. And on the other hand, if the fact appears from the affidavit, it does not matter that the complaint is not verified. It appears that the original complaint was verified, but that the fictitious names of certain other defendants were ordered stricken out, and the real names inserted, and that a document purporting to be an amended complaint, which was the same as the original in all respects, except as to the said names, was filed, but was not verified. The affidavit refers "to the verified complaint on file herein, and which is made part and portion of this af-

fidavit." Inasmuch as the so-called amended complaint made no change in the issues, it is somewhat doubtful whether, so far as this party is concerned, it superseded the original. See *Brock v. Martinovich*, 55 Cal. 516; *Torney v. Pierce*, 49 Cal. 306. But, if we assume that it did, we nevertheless think the objection is not well taken. The affidavit could refer to any document on file, and adopt its contents. In such case the oath to the affidavit is an oath to the truth of the document referred to. The affidavit here did refer to the original complaint and adopt its contents, and this complaint stated a cause of action. The fact that a cause of action existed, therefore, appeared from the affidavit. And, as above shown, it made no difference that the document which was then performing the functions of a complaint was not verified.

3. It is argued that the affidavit for publication was insufficient on the question of diligence. The Code provides that service may be made by publication (among other cases) where the person on whom it is to be made "cannot, after due diligence, be found within the state." Code Civil Proc. § 412. The affidavit in question first states that certain defendants, among whom is the plaintiff here, "have been sought for to obtain service of summons thereon, but after diligent search and inquiry cannot be found within the state." It then goes on to show what kind of search and inquiry have been made, viz., that the affiant "has made inquiry of all persons from whom he could expect to obtain information as to the residence of said defendants." It is not expressly stated what was the result of these inquiries. But the statement must be read in connection with what preceded it, viz., that after inquiry the said defendants "cannot be found within the state." And, so reading it, we think it is to be inferred that the inquiries were fruitless. The affidavit then goes on to state that "a summons and *alias* summonses" had been placed in the hands of the sheriff of San Diego, (which was where the property was situated,) with instructions to serve it, and that he had made return that the defendants could not be found in his county; and that "*alias* summonses" had been placed in the hands of the sheriffs of San Francisco, Los Angeles, Santa Clara, San Bernardino, Alameda, Humboldt, Yolo, Sacramento, and others," with instructions to make service, but that "they have all returned said summonses, with return either indorsed thereon, or written responses, that they have made diligent inquiry and search within their counties and cannot find any of said defendants herein mentioned." The affidavit is not required to follow the language of the statute, but is to state the evidence from which diligence can be inferred. *Ricketson v. Richardson*, 26 Cal. 153. And we think the court was authorized to infer diligence from the above-mentioned affidavit. Possibly it would have been held insufficient on an appeal, but it is otherwise upon a collateral attack. As was said by SAWYER, J., delivering the opinion in *Forbes v. Hyde*, 31 Cal. 348: "There is a marked distinction between an affidavit which presents some evidence on a vital point, but clearly of a character too unsatisfactory to justify an order for publication of summons based upon it, and an affidavit which presents no evidence at all tending to prove the essential fact. In the former case the judge might be satisfied upon very slender and inconclusive testimony; but there being some appreciable evidence of a legal character, which calls into action the judgment of the judge, he has jurisdiction to consider and pass upon it. He may be wholly and egregiously wrong in his conclusion upon the weight of the evidence, but he has jurisdiction to act upon it, and his action is simply erroneous. His order would in such case be reversed on appeal. But as there was jurisdiction to act, until reversed or attacked by some direct proceeding to annul it, the order and judgment based upon it would be valid. Such a judgment could not be collaterally attacked." We do not commend the affidavit in question as a model, but we think its showing of diligence is sufficient upon a collateral attack.

4. It is urged that the affidavit does not state that Ligare's place of business was not known to the plaintiff in the condemnation proceeding. Section 412 provides that service may be by publication where the person on whom it is to be made "resides out of the state, or has departed from the state, or cannot after due diligence be found within the state, or conceals himself to avoid service of summons," etc. It will be observed that these conditions are stated disjunctively. And in *Anderson v. Goff*, 72 Cal. 69, 13 Pac. Rep. 73, it was held that when the defendant is a non-resident no showing of diligence is necessary. And it is obvious that, upon the same principle, if any of the conditions mentioned exist, the others are immaterial. It is to be further observed that section 412 does not require the affidavit to state that the residence of the defendant is not known to the affiant. The requirement as to want of such knowledge results from section 413, which provides that, "where the residence of a non-resident or absent defendant is known," the order must direct a copy to be deposited in the post-office for him. This provision has been held to require that the affidavit must show whether or not such residence is known. *Ricketson v. Richardson*, 26 Cal. 153, 154. But it can only require in the cases specified, viz., in the case of "a non-resident or absent defendant." As above shown, there are several cases in which publication may be made, viz., where the defendant "resides out of the state," or where he "has departed from the state," or where he "cannot, after diligence, be found in the state," or "where he conceals himself to avoid service of summons." It is only in the two first-mentioned cases that section 413 requires the order to direct the deposit in the post-office, and, consequently, it is only in such cases that the affidavit is required to state whether the defendant's residence is known to the affiant. It may very well be that the legislature considered it useless to require the deposit where the defendant was within the state, but was concealing himself to avoid service of summons, or could not, after due diligence, be found. But whether there was any reason for the distinction or not, the cases in which the deposit is to be made are distinctly specified, and the court ought not to extend the requirements to other cases. The affidavit in question brings the case within the "due diligence" clause, and was sufficient without the statement as to knowledge of the residence.

5. It is objected that the order states that the court went outside of the affidavit in determining whether a case for publication existed. This is based upon the following recital in the order: "Upon reading and filing the affidavit of M. A. Luce, and it satisfactorily appearing therefrom, and from the files in the cause and other evidence produced and considered," etc. The argument is that the Code provides that the judge must be satisfied from the affidavit, and cannot be satisfied in any other way. But we have shown that the affidavit was sufficient, and the recital is that the judge had read it, and was satisfied "therefrom." This being so, it does not matter that the judge had additional sources of information. It would be straining the language to say that the recital meant that the court was not entirely satisfied from the affidavit, but that its satisfaction arose partially from the affidavit, and partially from the other evidence. Certainly, such a construction would not be given on a collateral attack.

We therefore advise that the judgment and order denying a new trial be affirmed.

I concur: FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

76 Cal. 626

BANK OF CALIFORNIA v. TAAFFE *et al.* (No. 11,219.)

(Supreme Court of California. June 20, 1888.)

1. FORCIBLE ENTRY AND DETAINER—WHEN LIES—POSSESSION.

Under Code Civil Proc. Cal. § 1160, which provides that the action of forcible entry will lie where plaintiff has been "in peaceable and undisturbed possession" for five days, preceding such entry, where defendant came to plaintiff on the evening of the day the latter took possession, and wanted to know by what authority he was there, but no hostile demonstrations were made, plaintiff's possession is sufficient to enable him to bring the action.

2. SAME—FORCE.

Code Civil Proc. Cal. § 1159, provides that every person is guilty of forcible entry who enters by breaking open doors, windows, etc. Section 1160 provides that a person is guilty of forcible detainer who by force, or by menaces and threats of violence, unlawfully holds, etc. In an action for forcible entry and detainer, defendant had entered, during plaintiff's absence, through a window, and had put plaintiff's things out in the yard. On plaintiff's return, defendant stood at the window with a pistol in his hand, and told plaintiff not to come around there, but did not threaten to shoot. *Held*, that there was force, within the meaning of the statute, although the pistol was not loaded.

3. APPEAL—REVIEW—HARMLESS ERROR.

In an action for forcible entry and detainer, where plaintiff had been in possession for the period required by the statute to enable him to bring the action, and the court refused to admit documents showing title in plaintiff as bearing on defendant's good faith, but received them to show that defendant's title had been transferred to plaintiff, no injury could have been produced by their admission for that purpose, as no finding was made upon the subject of title.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; CHARLES HALSEY, Judge.

Action of forcible entry and detainer by the Bank of California against George Taafe, Anna Taafe, and John Finlay. Judgment for plaintiff, and defendants appeal. Code Civil Proc. § 1159, provides that every person is guilty of forcible entry who enters by breaking open doors, windows, etc. Section 1160 provides that a person is guilty of forcible detainer who by force, or by menaces and threats of violence, unlawfully holds, etc.

James L. Crittenden, Crittenden & Moses, and Henry E. Highton, for appellants. *Wilson & Wilson and Newlands, Allen & Herrin*, for respondent.

HAYNE, C. Action of forcible entry and detainer. The court below gave judgment against the defendants, George Taafe, Anna Taafe, and John Finlay, and they appeal from the judgment and an order denying their motion for a new trial. Several points are made on their behalf.

1. It is said that no peaceable possession by the plaintiff was shown. The statute provides that one who has been "in the peaceable and undisturbed possession" for five days preceding the unlawful entry may maintain the action. Code Civil Proc. § 1160. This provision is substantially the same as that of section 3 of the act of 1866. See Laws 1865-66, p. 769. The evidence shows that on June 24, 1879, one Thompson, who was the agent of the bank, went to the premises, which were then unoccupied, took off the locks on the doors, and put one Phillips, another employe of the bank, in possession. Phillips remained in possession for the bank until July 19th. On the evening of the day he went there, one of the defendants came there, and wanted to know by what authority he was there, and the reply was that he was there by authority of Mr. Thompson for the bank. This seems to have been all that was said. There was no hostile demonstration. Except for this there was no molestation of any kind. Phillips' testimony in this regard is as follows: "*Question*. During the time you were there, did anybody say you were in unlawful possession, or deny your right to be there? *Answer*. No, sir. *Q*. From the 24th of June to the 19th of July, 1879, did anybody come there, and demand the property in any way, directly or indirectly? *A*. No, sir; not at all. *Q*. You were not molested or troubled in any way in your possession? *A*. No, sir." There

is no testimony in conflict with this. The appellants contend that the possession was a mere "scrambling" possession, and cite the case of *Bowers v. Cherokee Bob*, 45 Cal. 498. In that case (which arose under the act of 1866) the plaintiff proved an undisturbed possession of more than five days; and the defendants offered to prove that, "about a month" before, they had attempted to enter, but were driven off by plaintiff by a hostile demonstration. The appellate court held that they ought to have been allowed to prove this because it tended to show that the plaintiff's possession was not "peaceable," but was "scrambling." The theory of the decisions seems to have been that the terrorizing effect of the hostile demonstration must be supposed to have continued down through the month. WALLACE, J., dissented on the ground that the occurrence "about a month" before was too remote to affect the character of the plaintiff's possession. The general doctrine as to scrambling possession has been followed in other cases. But in the present case there was no evidence of any previous hostile demonstration or use of force. When plaintiff took possession, on June 24, 1879, the place was unoccupied. It does not appear who had been in possession immediately before that, or that there was any disturbance or scrambling between the parties. The defendant Anna Taaffe says, in a general way, that she had been in possession since the death of her husband, in 1874, (but gives no facts in regard to such possession,) and that "they forced me out of possession," and that she could not tell how long she remained out. It is impossible to tell what she alludes to, or the time she refers to, or what kind of force was used. For all that appears in the record to the contrary she may have been "forced out" under a decree of a court. The witness Thompson, who had had charge of the real property of the bank for about two years previous to July, 1879, testifies that the first he had to do with the property was in January, 1879, when he found some tenants of Anna Taaffe in possession, and that he then served on them a demand for possession; but there was no disturbance of any kind. This being the evidence, it is very plain that the case is not like that of *Bowers v. Cherokee Bob*. In the first place, there was no evidence of any previous disturbance. And in the second place, if any act of force is to be inferred from the vague remark of Mrs. Taaffe, it was at least six months before the time the plaintiff took possession; and we think that in such case the observation of WALLACE, J., in the case referred to, would certainly apply, and that such occurrence was too remote to affect the character of plaintiff's possession.

2. It is contended that no force was used by the defendants. The evidence shows that during the temporary absence of Phillips, on July 19th, the defendant Finlay took possession. He found the door locked and got in the window, and put the things of Phillips out of the house. In so doing he acted as the agent of the other appellants. When Phillips returned, he found his things in the yard, and Finlay inside the house, standing at the window with a pistol in his hand. Finlay told him not to come around there, and Phillips said not to shoot as he was unarmed. After some conversation he left, and did not return. Phillips says he thought Finlay would shoot if he attempted to go in; but Finlay made no threat that he would shoot otherwise than by having the pistol in his hand, which he testified was not loaded; and not even put together. We think it clear that there was force within the meaning of the statute. See *Dickinson v. Maguire*, 9 Cal. 49; *Ely v. Yore*, 71 Cal. 133, 11 Pac. Rep. 868.

3. During the trial the defendants gave some vague evidence tending to show a long-continued possession by their predecessors many years previous, and introduced a chain of title from one William Taaffe. This evidence was introduced to show that the entry of defendants in July, 1879, "was made in good faith under a *bona fide* claim and color of title." In rebuttal, the plaintiff introduced a chain of title from William Taaffe to the bank. The plaintiff's counsel first offered the documents for the purpose of rebutting the evi-

dence of the defendants' good faith, but the court refused to admit them for this purpose. The counsel then reoffered them for the purpose of showing "that whatever possession William Taaffe had of this property was transferred to the plaintiff;" and the court thereupon admitted them. If it be conceded that there was error in the admission of this evidence, it is apparent that there was no injury. The question of title was put in issue by the pleadings, but no finding was made with respect to it. The evidence could not, therefore, have had any effect in this regard. The question of good or bad faith does not arise under the Code in this kind of action, (*Voll v. Hollis*, 60 Cal. 574, 575;) and, inasmuch as the court refused to admit the evidence as bearing upon that question, it is apparent that it could not have had any effect in that regard. And, so far as the question of possession is concerned, the evidence of the plaintiff's actual and peaceable possession for the period required by the statute is so clear that we do not think the result could have been different, or that the constructive possession supposed to arise from the documents could have had any appreciable effect upon the mind of the court. The other matters do not require special notice. We therefore advise that the judgment and order denying a new trial be affirmed.

I concur: FOOTE, C.

BELCHER, C. C., took no part in this decision.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

76 Cal. 618

THOMPSON v. BRANNAN *et al.* (No. 11,019.)

(*Supreme Court of California*. June 20, 1888.)

1. EJECTMENT—MESNE PROFITS—FINDINGS BY THE COURT.

In an action of ejectment, and to recover for the use and occupation of real estate where defendant denied the entry, charged in the complaint to have been unlawfully made, and the court found that he did make the entry, and, in a separate sentence, found, "The loss of said rents issues and profits in the sum of \$75," such findings, though clumsily drawn, substantially cover the issues.

2. WRITS—SERVICE BY MAIL—WHEN VALID.

Under Code Civil Proc. Cal. § 1011, providing for the service of papers upon an attorney at his office, or, if it be not open, at his residence, and, if the residence is unknown, by depositing the paper in the post-office, though the attorney of plaintiff, who desired to serve a cost-bill on defendant's attorney, lived at a different post-office from that of the latter, a deposit in the post-office at the residence of defendant's attorney is not a valid service; the act requiring a service at his own post-office to be personal.

Department 1. Appeal from superior court, Monterey county; J. K. ALEXANDER, Judge.

Action of ejectment by Albert Thompson against J. B. Brannan, J. W. Brannan, J. J. Cox, and Jacob Roberts, and for the rents and profits. Defendants denied the entry, and the court, after finding entry, found in a separate sentence, beginning with a capital letter, "The loss of said rents issues and profits in the sum of \$75." Defendants appeal, alleging that the latter clause of the finding is unintelligible.

N. A. Dorn, W. M. R. Parker, S. F. Geil, and H. V. Morehouse, for appellants. *D. W. Burchard, Burchard & Scott, and Burchard & Cothran*, for respondents.

PATERSON, J. The complaint alleged that while the plaintiff was seized in use, and in the possession, of the premises in controversy, defendants jointly, and without right, entered into possession thereof, and ousted and ejected plaintiff therefrom, and unlawfully withheld the possession thereof from plain-

tiff. to his damage in the sum of \$300; and the answer denied that the defendants, or any of them, took possession or "ousted or ejected plaintiff therefrom, or from any part thereof, or to his damage in any sum whatever." These allegations and denials made issues as to ouster and damages, and were so considered by the court. The findings of the court are clumsily drawn, but substantially cover the issues, and show upon their face that the ambiguity is due to erroneous capitalization and punctuation.

The judgment was entered July 7, 1884. A memorandum of costs was filed by plaintiff's attorney on July 11, 1884. An affidavit of service of the cost-bill was made by one Dexter, in which he stated "that he received the memorandum of costs herein, verified by D. W. Burchard, counsel for plaintiff. That he filed it on the 11th day of July, 1884, and took a copy thereof to serve on the defendants' counsel. He then placed a true copy of said memorandum of costs in an envelope, and duly stamped it, and addressed it to N. A. Dorn, counsel for defendants, and took it personally to the postmaster of Salinas City post-office, and told said postmaster to put it then and there (handing it to him) in Mr. Dorn's box. That thereafter, the exact date affiant does not remember, this affiant asked the said Dorn if he had so received the said paper on said 11th day of July, 1884, to which he, said Dorn, replied that he did so get it." Under the decisions of this court, we must hold that there was no service of the cost-bill. The attorney for the plaintiff lived at San Francisco, and the attorney for the defendant at Salinas City. In *Reed v. Allison*, 61 Cal. 461, it is said: "But a deposit in a post-office in the county or place in which a party may be served by mail, as his residence or office, would not constitute service on him by mail, because a service on him at his residence or office in his own county, to be effectual, must be made personally or constructively in the manner prescribed by subdivisions 1 and 2 of section 1011 of the Code of Civil Procedure. * * * Therefore, to constitute service by mail, the deposit in the post-office must be made in the post-office at the place where the attorney making the service resides or has his office; * * * and the affidavit of service must show a strict compliance with the provisions of the statute. Otherwise evidence must be held insufficient to establish the fact of service." See, also, *Cunningham v. Warnekey*, 61 Cal. 507; *Steele v. Supervisors*, 62 Cal. 6; *Insurance Co. v. Shepardson*, ante, 398, (in bank, filed May 31, 1888.) It is important that there should be a uniform rule in such cases, and we think that the decisions upon the question involved should be adhered to.

The cause is remanded, with directions to the court below to modify the judgment by striking out the words, "together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of \$97.75," and as so modified the judgment is affirmed.

We concur: SEARLS, C. J.; MCKINSTRY, J.

2 Cal. Unrep. 893

WISE v. HOGAN. (No. 11,147.)*

(Supreme Court of California. June 20, 1888.)

PLEADING—COMPLAINT—UNCERTAINTY.

A complaint alleging that defendant's intestate was indebted to plaintiff's intestate in the sum of \$5,000, for legal services rendered by plaintiff's intestate in prosecuting and defending numerous suits, drawing various instruments, consulting and advising with defendant's intestate about his business, at his request, which services are alleged to have been rendered between January 1, 1870, and October 11, 1883, is demurrable for uncertainty in not specifying the various items and the times of the rendition of such services.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; N. HAMILTON, Judge.

*Reversed in banc.: See 19 Pac. 278, 77 Cal. 184.

Action by John H. Wise, administrator of Tully R. Wise, deceased, against J. T. Hogan, administrator of Edmond Hogan, deceased, to recover for legal services rendered by plaintiff's intestate for defendant's intestate. Judgment for defendant on demurrer, and plaintiff appealed.

A. Heynemann, for appellant. *Henry Vrooman* and *J. C. Martin*, for respondent.

FOOTE, C. This is an action brought to recover a sum of money for the alleged services, as an attorney at law, rendered by the plaintiff's intestate to the defendant's intestate. The complaint was demurred to, and the demurrer sustained. Thereupon, the plaintiff declining to amend his pleading, judgment was given in favor of the defendant, from which this appeal is prosecuted.

The fourth clause of the complaint stating the cause of action is as follows: "Plaintiff further alleges that said Edmond Hogan, deceased, was indebted to Tully R. Wise, deceased, on an account for services rendered by said Tully R. Wise, as attorney and counselor at law, in the sum of \$5,000, as such attorney and counselor at law of the said Edmond Hogan, deceased; said services were rendered between the 1st day of January, 1870, and the 11th day of October, 1883; that said services consisted in prosecuting and defending numerous suits at law and equity as such attorney at law, at the request of the said Edmond Hogan, deceased; in drawing many and various instruments, and in consulting and advising said Edmond Hogan, deceased; for constant attendance in and about the business of said Edmond Hogan, deceased, at his request; that the said Edmond Hogan, deceased, has not paid the same, nor any part thereof." The second ground of the demurrer reads thus: *Second*. "That the said amended complaint is ambiguous and uncertain, more particularly specified in this: That it does not definitely, or with any certainty, appear therefrom what suits at law and equity were prosecuted or defended by the intestate, Tully R. Wise, deceased, or in what courts, or at what dates or times, said suits were prosecuted or defended, and it does not definitely or with any certainty appear therefrom what instruments were drawn by the said intestate, or as to what matters or upon what subjects consulting and advising were done by the said intestate, or at what times or dates said instruments were drawn, or said consultations and advisings had; and it does not definitely or with any certainty appear therefrom about what business of the said Edmond Hogan, deceased, the said intestate was in constant attendance; and it does not definitely or with any certainty appear therefrom what part, if any, of the said services charged in the complaint to have been rendered, or of the said indebtedness charged in the said complaint to have been incurred, was rendered or was incurred within the limit of the statute of limitations of the state of California, or within two years prior to the death of the said Edmond Hogan, deceased." We are satisfied that the demurrer was well taken, and advise that the judgment be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

increase in the volume of the water in such water-course; and the exclusion of evidence tending to show such increase in the volume of water, and the injury that would be caused to the defendant by removing such dam, is not error.

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Action by Eliss, plaintiff, against Johnson, defendant, to restrain the diversion of water from its natural channel. Judgment for plaintiff, and defendant appealed. Judgment affirmed in bank, February 10, 1888, and rehearing afterwards allowed. For former opinion, see 16 Pac. Rep. 542.

Brown & Daggett and Edward J. Pringle, for appellant. *Eugene R. Garber and Atwell & Bradley*, for respondent.

PER CURIAM. This case was decided in bank. 16 Pac. Rep. 542. A rehearing was subsequently granted, and the cause has been again argued orally and upon paper. Upon a careful examination of the record, we adhere to the conclusion reached in the former opinion. We think the photographs offered were original evidence, and not secondary, as stated in the former opinion, and that their admission in evidence was proper; but, when compared with the diagram which was admitted, we are of opinion, after studying the photographs in connection with the diagram and evidence, that defendant was in nowise injured by the exclusion of the former. As works of art, they are very creditable; as sources of information upon the pertinent questions involved, they have no appreciable value.

Upon the question of the statute of limitations, the court below found the facts against defendant. The theory that defendant only consented that the People's Ditch Company, Fowler, or the Kaweah, should run the water down Johnson slough to a given point, and then take it out, and conduct it across his land, upon condition that they should build a dam, and prevent it running upon his land below, loses most of its force when we realize that the ditch company was running the water for a practical purpose, and not merely for pleasure, and that to utilize the water for such purpose a conduit for its confinement was absolutely necessary. To give any particular force to the assertion of Johnson that he insisted upon a dam being built, and would have constructed it himself if the company had not, we must suppose that the water company were thereby induced to do something which they would not otherwise have done, which is not apparent here. It strikes us much as would the claim of an individual to the ownership of a necessary railway bridge across a stream, because he had given the right of way for the road across his land on condition that such stream should be bridged. As the bridge, in the one case, is a necessary integral part of the road, without which it could not be utilized, so, in the other, the dam was indispensable to the conduct of the water to the point of user. The cause was tried by a court well versed in questions of this kind, and entirely competent to give weight to every proper consideration bearing upon the evidence, and we do not feel authorized to disturb its findings as to the facts.

The other questions were properly disposed of in the former opinion. The judgment and order appealed from are affirmed.

76 Cal. 576

GRAY *et al.* v. AFRICAN METHODIST EPISCOPAL ZION CHURCH OF AMERICA. (No. 11,116.)

(*Supreme Court of California.* June 15, 1888.)

QUIETING TITLE—JUDGMENT—EFFECT.

In an action to quiet title to half of a certain lot of land, it appeared that the owner of the lot agreed in writing to convey it to certain persons upon the payment of their promissory note; that those persons wanted the lot for the use of others, who subsequently formed defendant corporation; that afterwards the owner, at the request of the makers of the note, who were unable to pay it or the interest

thereon, sold the half involved to plaintiff's grantor, and applied the sum received to the note, giving the makers a deed of the other half. *Held*, that a judgment confirming plaintiff's title should not be disturbed, no errors of law being committed at the trial.

Department 2. Appeal from superior court, Santa Clara county; F. E. SPENCER, Judge.

Action by Henry Gray and Elizabeth Gray against the African Methodist Episcopal Zion Church of America to quiet title to a certain lot of land.

J. C. Black, for appellant. *Moore & Moore* and *Burchard & Moore*, for respondents.

McFARLAND, J. This is an action to quiet title to the westerly one-half of a certain lot No. 8 in the city of San José. Plaintiffs had judgment in the court below, and defendant, a religious corporation, appeals.

There is really nothing in the appeal except the contention that the court ought not to have believed the statements of some of respondents' witnesses, and should have believed all the statements of the witnesses of appellant. Respondents derive their title to the half lot through mesne conveyances from one Betsy Langhorn, to whom it was conveyed in January, 1868, by one Jacob Madden. In January, 1864, Madden, who then owned the whole of said lot 8, agreed in writing to convey it to W. B. Smith, A. B. Smith, and James Lodge, upon the payment of their joint promissory note to Madden for \$620, due in 12 months, with interest at 2 per cent. per month. The Smiths and Lodge undoubtedly wanted the lot for the use of certain persons belonging to a religious society, who afterwards formed the corporation appellant herein, and who intended to build a church upon the lot. The agreement to convey upon the payment of the note was never recorded, and respondents knew nothing of it until a few weeks before this action was commenced, which was years after they had acquired the westerly half of the lot. Now appellant contends that when Mrs. Langhorn received her conveyance of the west half from Madden she took with the knowledge of, and subject to, the agreement of Madden to convey to the agents of the church society upon the payment of the said promissory note; that said note has been paid in full by appellant and its predecessors; and that respondents acquired the property subject to the trust, and should now convey to appellant. But the court finds that neither the respondents nor Betsy Langhorn ever held the legal title to the premises in trust for appellant, and finds that Betsy Langhorn bought the said west half for her own use and benefit, and paid for it with her own individual moneys. The court undoubtedly took as the truth the statement made by the witness Judge John H. Moore, and corroborated by other evidence. Moore testified that he knew all about the history of the transaction; that he kept the account of the moneys paid by the church people to Madden; that at the time of the deed to Betsy Langhorn the said Smiths and Lodge proposed, as they were short of money, and the high interest was accumulating, that Madden should sell the west half of the lot to her, and apply what she should pay for it to the note; that after this had been done there was still some money due on the note, but that, upon the urging of Moore, Madden gave them a deed to the east one-half of the lot on which the church building stands, and returned them their note; and that thus the whole transaction ended. These being the facts, we cannot see how any rights of appellant have been violated. The findings, we think, are sufficiently full, and we perceive no errors of law committed at the trial. Judgment and order denying a new trial affirmed.

We concur: SEARLS, C. J.; SHARPSTEIN, J.

(76 Cal. 647)

PARIS *et al.* v. RAYNOR. (No. 12,538.)

(Supreme Court of California. June 22, 1888.)

NEW TRIAL—WHEN GRANTED—STATEMENT OF CASE.

Where the statement on a motion for a new trial specified many alleged errors, to the most of which no objection had been made or exception taken at the trial, and there is no merit in the rest, but did not contain any specifications of insufficiency of the evidence, or the bill of particulars, or the charge of the court, such motion was properly overruled.

In bank. Appeal from superior court, San Bernardino county; JAMES A. GIBSON, Judge.

Action by Paris & Goodcell, lawyers, against P. A. Raynor, to recover for services rendered as attorneys at law. Judgment for plaintiffs. A motion for a new trial was overruled, and defendant appealed.

Ezra Crossman and *A. W. Blair*, for appellant. *Paris, Goodcell & Fox* and *Rowell & Rowell*, for respondents.

PATERSON, J. The statement on motion for a new trial contains no specifications of insufficiency of the evidence. It does specify 35 errors alleged to have been committed by the court during the trial of the cause. The examination of these specifications reveals the fact that about 30 of them are without objection or exception entered or reserved, and there is no merit in the others. A bill of particulars is no part of the judgment roll, neither are the instructions; and they are not incorporated into the statement herein. The statement does not purport to contain all the evidence. In fact, it cannot be said that it contains any evidence. It does not show, except by inference, that anything related in the statement occurred at the trial, or that any witness was sworn. Judgment and order affirmed.

We concur: **SEARLS, C. J.**; **McFARLAND, J.**; **SHARPSTEIN, J.**; **McKINSTRY, J.**

(77 Cal. 19)

WALLACE v. BENTLEY *et al.* (No. 12,467.)

(Supreme Court of California. June 25, 1888.)

DECEIT—ACTION FOR—DAMAGES—PROXIMATE CAUSE.

A complaint alleging that defendants represented to plaintiff that they were authorized to sell certain property which plaintiff agreed to buy; that plaintiff, relying on the truth of the representations made by defendants, did not seek to purchase from another agent, or from the owner; that the property rose in value, but the owner refused to convey it, as defendants had no authority to sell; and that, by reason of the fraudulent representations of defendants, plaintiff was prevented from purchasing said property, and thereby suffered damage,—shows no cause of action, as plaintiff's failure to negotiate with others was not a necessary consequence of defendants' representations.

In bank. Appeal from superior court, San Bernardino county.

Suit by J. C. Wallace against F. Bentley and John Jeffrey to recover damages alleged to have resulted from the false representations of defendants that they were authorized to sell certain property which plaintiff agreed to purchase, but which the owner refused to convey. Judgment for defendants, and plaintiff appeals.

Byron Waters, for appellant. *Curtis, Otis & Conner*, for respondents.

SHARPSTEIN, J. This appeal is from a judgment rendered in favor of the defendants after sustaining their demurrer to the complaint of the plaintiff, and his failure to amend within the time granted for that purpose. The only question which we have to determine is: Does the complaint state facts sufficient to constitute a cause of action? That is the sole ground of the demurrer. The complaint states that on the 18th day of March, 1887, one Swan

Carlson was the owner of a certain tract of land in San Bernardino county, together with 10 shares of stock of the Redlands Water Company, and that on that day the defendants represented to the plaintiff that they were the agents of said owner, authorized and empowered to sell said property for the sum of \$3,000, for which sum said owner was then offering to sell said property. Plaintiff was willing and desirous of purchasing said property at that price, and relying on the representations of the defendants, and having no knowledge of the truth or falsity of such representations, plaintiff accepted the offer of defendants, and paid them \$100 as part of the purchase price of said property; at the same time taking from them an instrument in writing, of which the following is a copy: "SAN BERNARDINO, Cal., March 18, 1887. Received from J. C. Wallace the sum of \$100 as first payment upon five acres in lot 8, block H, in Redlands, the purchase price of which is \$3,000, payable as follows: One-third cash, less the above-mentioned \$100; the balance to be paid on or before two years, with interest at 10 per cent. per annum, on condition that an acceptable title and abstract be furnished. BENTLEY & JEFFREY, Agents for S. Carlson." The plaintiff, relying on the truth of the representations made by the defendants, did not seek to purchase said property from any other agents, nor from the owner, though for two weeks afterwards said property could have been bought for said above-mentioned sum from a duly-authorized agent of said owner. It is further alleged that all such representations of the defendants were false, and that they had no authority whatever from the owner of said property to sell or negotiate a sale of the same, or any part thereof. Plaintiff for the first time on April 8, 1887, discovered that such representations were false. That within three weeks after the 18th day of March, 1887, said property had become of the value of \$4,000, and is still of that value. That the owner refused to ratify the contract made between defendants and plaintiff, and about the first of April sold said property to some person other than plaintiff for the sum of \$4,000. Plaintiff has at all times been ready and willing to comply with his part of the said contract made with defendants. That, by reason of the false and fraudulent representations of defendants, plaintiff was prevented from purchasing said property, to his damage \$1,000, for which sum he demands judgment against defendants.

The theory of the pleader evidently was that, upon the facts alleged, the liability of the defendants is the same as that of the owner of the property would be if he had authorized the defendants to sell the property, and then, after they had sold it, he had sold and conveyed it to some one else. Had that been the case, he, and not the defendants, would have been liable for the damages claimed in this case. But the owner is not liable on the contract, because the defendants had no authority from him to make it. The defendants are not liable unless the contract contains apt words to charge them personally. *Hall v. Crandall*, 29 Cal. 568; *Lander v. Castro*, 43 Cal. 497. If not liable upon the contract because they did not undertake to contract on their own behalf, the plaintiff's remedy against the defendants "is an action to recover the money, if any has been paid them, or the value of the work or labor, if any has been performed for him, under the supposed contract, or special damages resulting to the plaintiff by reason of the defendants' wrong in undertaking to act for another without authority." *Hall v. Crandall*, *supra*. This action is not for the recovery of any money paid by the plaintiff to the defendants; and the only attempt to allege facts entitling the plaintiff to special damages is that, by reason of the representations of the defendants, he was prevented from purchasing the premises. But the facts alleged do not constitute prevention. The plaintiff had the same right, after negotiating with the defendants, that he had before negotiating with them, to negotiate with the owner of the premises, or any authorized agent of his, for the purchase of the property. Plaintiff's failure to do so was not a necessary conse-

quence of the defendants' representation that they had authority to act for the owner. That constituted no legal obstacle to his doing so. The facts alleged are not, in our opinion, sufficient to constitute a cause of action on any ground upon which actions are maintainable against persons falsely representing themselves as agents for others. That an action is maintainable against one who obtains anything of value by such false representation, we do not doubt. But this action is not for the recovery of anything obtained by defendants from plaintiff, but for profits which he might have made if the person for whom the defendants had assumed to act had performed the agreement which defendants, without authority, made in his name. To so hold would be to hold that defendants were liable on the contract, which would be contrary to the doctrine of all the decisions on the subject in this state. Judgment affirmed.

We concur: SEARLS, C. J.; MCFARLAND, J.; THORNTON, J.; PATERSON, J.

77 Cal. 28

NEALE *et al.* v. SUPERIOR COURT OF SAN DIEGO COUNTY. (No. 12,704.)

(*Supreme Court of California.* June 25, 1888.)

1. EMINENT DOMAIN—PROCEDURE—POSSESSION PENDING APPEAL.

Under Code Civil Proc. Cal. § 1254, relating to the taking of land for public use, which provides that at any time after judgment, or pending an appeal, when the plaintiff shall have paid into court the amount of the judgment and costs, and such further sum as may be required by the court, the court may authorize plaintiff to take possession of the land condemned, when possession is taken without such an order the court may order possession to be restored to defendant.

2. APPEAL—EFFECT—STAY OF EXECUTION.

Under Code Civil Proc. Cal. § 945, which provides that an appeal from an order shall not stay execution unless a written undertaking is given, an appeal from an order requiring the delivery of possession of land will, where an undertaking is given, stay the enforcement of the order.

In bank. Original proceedings in *mandamus*.

Code Civil Proc. Cal. § 1254, relating to the taking of land for public use, provides that at any time after trial and judgment, or pending an appeal, whenever the plaintiff shall have paid into court, for the defendant, the full amount of the judgment, and such further sum as may be required by the court as a fund to pay any further damages and costs that may be recovered in said proceeding, as well as all damages that may be sustained by the defendant, if, for any cause, the property shall not be taken for public use, the superior court in which the proceeding was tried may, upon notice of not less than 10 days, authorize the plaintiff, if already in possession, to continue therein, and if not, then to take possession of and use the property during the pendency of and until the final conclusion of the litigation, and may, if necessary, stay all actions and proceedings against the plaintiff on account thereof.

Hunsaker, Britt & Lamme and *J. E. Deakin*, for petitioners. *Henderson & McDonald*, for respondents.

PER CURIAM. This is an application for a writ of mandate. The San Diego Land & Town Company, a corporation, commenced an action against the petitioners here, to condemn and take for public use certain real estate in the county of San Diego. Such proceedings were had in the cause for condemnation that a judgment for the sum of \$100,575.90 was awarded petitioners as compensation for said land. Pending the proceedings, and before any compensation was made, said corporation, without leave or license from petitioners, and without right or title, entered into possession of said property, or most of it, flooded the same with water, and are using it as a reservoir. Thereafter petitioners applied to the Hon. EDWIN PARKER, superior judge of San Diego county, and judge of the court in which the proceedings for condemna-

tion were pending, for an order restoring possession of said property to them, and on the 16th day of April, 1888, an order was made and entered by the court, requiring said corporation to pay said judgment before that time entered, prior to the 28th day of April, 1888, or to restore possession of said property to petitioners herein. On or about May 1, 1888, the corporation appealed to this court from said last-mentioned order, and filed a bond on appeal under section 945 of the Code of Civil Procedure, in the sum of \$30,000, duly approved, as a stay of proceedings under that order. The corporation has not made compensation for said land, and still retains possession thereof.

1. The superior court in which the proceedings for condemnation were pending had authority to prevent the plaintiff therein from taking possession of the land sought to be condemned until an order therefor was made by the court. Code Civil Proc. § 1254. Possession having been taken pending the proceedings, and in advance of such order, the court was authorized to make the order of April 16th, requiring the possession to be restored to the owners, the petitioners herein. *In re Bryan*, 65 Cal. 375, 4 Pac. Rep. 304; Const. Cal. art. 1, § 14.

2. Did the appeal entitle the corporation to a stay of proceedings under section 945 of the Code of Civil Procedure? The order in question required the delivery of possession of real property. That section provides that an appeal from such an order shall not stay execution unless a written undertaking, as therein specified, shall be given. In the present case such an undertaking, duly approved, was given. It would seem that the converse of the proposition must be true, and that, if the undertaking is given, it does stay the execution of the order appealed from. The very object of the undertaking is to secure the person in whose favor the judgment or order is made for the damages which he may sustain by the delay. There is a broad distinction between cases of this kind, where the order requires an act to be performed, and an injunction which restrains the performance of an act. In the case of an injunction the appellant usually has security upon which he can rely in case of a reversal; here he has none. If, as petitioners claim, the corporation is in possession of the property as a trespasser without any authority, they may proceed against it by an ordinary action to recover possession; but, having elected to proceed through the instrumentality of an order, from which an appeal lies to this court, they subject themselves to the conditions of such appeal. The application for a writ of mandate is denied.

77 Cal. 22

NEWMAN v. SMITH *et al.* (No. 12,494.)

(Supreme Court of California. June 25, 1888.)

1. EQUITY—RESCISSION OF CONTRACT—COMPLAINT.

In an action for the rescission of a contract for the sale of land, a complaint alleging that plaintiff held certain religious views regarding the spirits of the dead, and their communication with the living, and had considered it her life-work to fit up a home where people of that faith could congregate, and had made plans for the improvement of the land in question for such purpose, which she was unable to carry out through failing health; that defendant, knowing her views and wishes, in order to induce her to sell the property to him for less than its value, falsely and fraudulently represented that he held the same faith, and desired to establish such a home upon the property, where a nook should always be reserved for plaintiff; that defendant never had any intention of establishing such a home, but was purchasing the property as agent for a co-defendant, who had no intention of making good his promises and representations; relying upon which she made the contract to convey the property for \$4,000 less than its true value, and upon discovery of the fraud offered to return the payment made,—states a good cause of action.

2. SAME.

Where a complaint for the rescission of a contract for the sale of land alleges an offer to return the payment made, without specifying the time when such offer was made, objection on that ground can be raised only by special demurrer.

3. SAME.

Where, in an action for the rescission of a contract for the sale of land, the plaintiff also seeks to recover damages for anxiety, worry, and harassment arising from Cal.Rep. 16-19 P.—51

the facts complained of, and for expenses in taking care of the property, a demurrer will not be sustained on the ground of misjoinder of actions, inasmuch as there can be no recovery of damages for the causes stated, and those allegations will be treated as surplusage.

Commissioners' decision. In bank. Appeal from superior court, San Bernardino county.

Clara Foltz and Byron Waters, (Wm. G. Webb, of counsel,) for appellants.
H. C. Rolfe, for respondents.

HAYNE, C. Suit to set aside a written contract for the sale of land on the ground of fraud. The court below gave final judgment for the defendants upon demurrer to the complaint, and the plaintiff appeals. The complaint shows substantially the following facts: The plaintiff, who was the owner of the property, held "certain religious views regarding the spirits of the dead, and their communication with the living," and had "considered it her life-work to fit up a home where congenial people of like faith could congregate and be made welcome, and where full discussion of their religious views might be indulged in," and "had already made plans for the improvement of said property for such purpose," but, "owing to failing health and financial reverses, plaintiff was prompted to dispose of the property to some one who was in harmony with her religious views, and who would in some measure carry out her plans; that only with a view of said property being used for the purpose aforesaid would plaintiff ever dispose of it." The defendant Smith knew the plaintiff's views, wishes, and purposes above mentioned; and, in order to induce the plaintiff to sell the property to him, represented that he was of the same religious belief as plaintiff, and in accord with her plans as to the property, and desired to establish just such a home upon the property, "where plaintiff would always be warmly welcomed, and that she should have a little nook wherever she should choose upon said premises." The complaint alleges that all the said representations were false, and were made "willfully, falsely, and fraudulently, and with intent to deceive and defraud plaintiff, and induce her to enter into certain contracts hereinafter set out, and obtain said property for less than its value;" that Smith never had any intention of establishing such a home, or of purchasing said property for himself, but throughout the whole negotiation "was acting for and was the agent of said defendant the South Riverside Land & Water Company, and was endeavoring to secure said property for said company, and at all times acted under its instruction and advice;" that said company never had any intention of making good the representations and promises of Smith, but intended to use the property for an entirely different purpose; that plaintiff believed said representations, and, relying upon the truth of the same, gave Smith a written option of purchase within a specified time. Subsequently (for reasons and under circumstances which seem to us irrelevant) this written option was superseded by a written contract to sell and convey the property for a certain sum. It is alleged that this sum was \$4,000 less than the real value of the property; and "that it was wholly in consequence of the false and fraudulent representations herein recited that she agreed to take said or any sum of money less than \$15,000 for said property;" and that "but for such fraud of the said Smith this plaintiff would never have signed either of the contracts, agreements, or bonds referred to." Plaintiff was paid \$500 upon said contract before she discovered the fraud which had been practiced upon her. She offered to return this, but it was refused.

The trial court sustained the demurrer on the ground that the complaint did not state a cause of action. In this we think the court erred. Although there is much irrelevant matter in the complaint, we think it stated a cause of action. The position of the respondents in this regard is that none of the representations or promises were inserted in the writing, and that, therefore, they could not be shown. But it is elementary that fraudulent misrepresen-

tations, as to a material matter by which a party was induced to enter into a contract to his damage, is ground for an action at law or relief in equity, notwithstanding that the contract was in writing, and the representations were not. "One who willfully deceives another, with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers." Civil Code, § 1709. Fraud vitiates all transactions, and cannot be put beyond the reach of the law by so simple a device as a writing. The question, therefore, is whether the complaint shows what the law recognizes as a fraud; and we think that it does. The uses to which the plaintiff intended to put the property were not unlawful. We do not think that at this period, in this country, a court is justified in pronouncing any form of religious belief superstitious, or contrary to public policy, when not followed by acts which are recognized as hurtful to society. From a legal point of view, therefore, the intentions of plaintiff are entitled to as much consideration as if she had designed to establish a hospital or endow a seminary or build an hotel. This being so, the case is that Smith, who knew the views of the plaintiff, for the purpose of deceiving her to her injury, falsely pretended that he was of the same religious belief as she was, and that if she would sell him the property he would carry out her views, and held out a prospect of a "little nook" for herself. She was justified in believing him, for she could not look into his mind, and see the falsehood lurking there. The representations were material; for it is admitted by the demurrer that she was induced by them to enter into the contract which she would not otherwise have done. And they operated to her damage; for she was induced by them to agree to sell the property for \$4,000 less than its value. The case is as if she had been induced to sign an obligation by representations that it was for the purpose of establishing a free college, which never was the intention. See *Elsass v. Institute*, 77 Ind. 72. It makes no difference that the representations took the form of a promise. A promise made without any intention of performing it is fraud, (Civil Code, § 1710; *Id.* § 1572;) and, if by means of it a party has been induced to alter his position to his injury, is ground for relief in equity, (*Brisson v. Brisson*, 17 Pac. Rep. 690.) As was said in *Mitchell v. Kintzer*, (in reasoning to a different point:) "It may safely be averred that all deceitful practices, in depriving or endeavoring to deprive another of his known right by means of some artful device or plan contrary to the rules of common honesty, is fraud." 5 Pa. St. 216. It is hardly necessary to say that there must be what the law considers to be a fraudulent intent. The mere failure to perform an oral promise would not be fraud. There is a great difference between a fraudulent and a non-fraudulent representation. Pol. Cont. 461. It is the dishonest intention which taints the transaction. But this, according to the complaint, existed from the start. The South Riverside Company is alleged to have been a participant in the fraud. But, if Smith was its agent, it would make no difference if this were not so; for a principal cannot reap the fruits of its agent's fraud while repudiating the fraud.

The objection that the precise time at which the plaintiff offered to return the payment which had been made to her is not alleged, should have been taken by special demurrer.

The respondents contend, however, that the demurrer should have been sustained on the ground of misjoinder of causes of action. The basis for this is that the complaint attempts to claim damages for the "anxiety, worry, and harassment arising from the facts hereinbefore alleged," and for expenses in taking care of the property, and in remaining away from her home. It is sufficient to say that she has no right of action for these things. We do not say that a demurrer on this ground should be overruled because one of the causes of action is defectively stated; but where, as here, it appears that by no possibility can she recover for these things, we think the allegations on the subject should be treated as surplusage. We therefore advise that the judg-

ment be reversed, with directions to overrule the demurrer, with leave to answer.

I concur: FOOTE, C.

BELCHER, C. C., took no part in this opinion.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, with direction to overrule the demurrer, with leave to answer.

3 Cal. Unrep. 1

In re CASTLE DOME MINING & SMELTING CO. (No. 11,130.)

(*Supreme Court of California.* June 25, 1888.)

INSOLVENCY—JURISDICTION—FOREIGN CORPORATION.

Under the California insolvency act of 1880, which provides, in section 8, that the petition shall be filed in the county where the debtor resides, or has his place of business; and, in section 21, makes certain provisions in case of a non-resident debtor, the California courts have jurisdiction of proceedings in involuntary insolvency against a foreign corporation which has property and a place of business in the state.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; N. HAMILTON, Judge.

Olney, Chickering & Thomas, for appellants. *Clunie & Knight* and *Wm. H. Sharp*, for respondents.

HAYNE, C. This is an appeal from an order of the superior court of Alameda county dismissing proceedings in involuntary insolvency for want of jurisdiction. The corporation against which the proceedings were commenced, was organized under the laws of New York, and had its principal place of business there. Its mine was in Arizona, but its smelting works were situated and operated in Alameda county. No question arises, on this appeal, as to the validity of a discharge in case one shall be granted. The primary object of proceedings in involuntary insolvency is to have the proceeds of the property of the insolvent within the state distributed among the creditors in the manner pointed out in the statute. The granting of a discharge to the insolvent is a separate matter. The property may be taken, and its proceeds distributed among the creditors, although the insolvent be found to be not entitled to a discharge, and never gets it. If, therefore, the court had jurisdiction to distribute the proceeds of the property, its order was erroneous, irrespective of the question whether it could grant a discharge which would be valid out of the state. Now, in the first place, we think there can be no question as to the power of the state to pass a law to the effect that upon the insolvency of a corporation, domestic or foreign, its property within the state shall be taken, after due service of process, and the proceeds distributed among its creditors. It certainly has as much power to do that as it has to provide that the proceeds of the property shall be given to the creditor or creditors who shall have succeeded in getting an attachment. It is a mere question as to the remedy for the enforcement of the insolvent's obligations. As a matter of course, there must be due service of process. But the insolvency act provides for such service, and it is not disputed that due service was had in this case; the order to show cause having been served upon the president and upon the general manager within this state. In the second place, we think that the insolvency act of 1880 is such an act. The position of the respondents in this regard is not that the act does not apply to corporations. Such a position could not be taken, because the act is expressly made applicable to corporations. Section 36. The argument is that, upon a proper construction of the act, it must be held to apply only to residents of the state, and that a foreign corporation having its principal place of business elsewhere is not a

resident of the state. However this may be with respect to voluntary, we do not think it so as to involuntary, insolvency. The provision relied upon is that the petition "must be filed in the superior court of the county, or city and county, in which the debtor resides, or has his place of business." Section 8. It will be observed of this provision that residence is not the only condition mentioned. The petition may be filed where the debtor "has his place of business." And, when this provision is read in connection with subdivision 3 of section 21, (which speaks of certain things which may be done "in case of a non-resident * * * debtor,") it seems plain that the proceedings may be commenced against a non-resident, at all events if he has a place of business here. The corporation has a place of business in Alameda county; and, as this place of business is its only one in the state, it must be considered its principal place of business, so far as this state is concerned. In the language of one of the papers introduced in evidence by the respondents, it was "a corporation duly organized and existing under the laws of the state of New York, and whose principal place of business, within the limits of said state of California, is located in said county of Alameda." No question is made as to the regularity of the record on appeal. We therefore advise that the order appealed from be reversed, and the cause remanded for further proceedings.

I concur. FOOTE, C.

BELCHER, C. C., took no part in this opinion.

PER CURIAM. For the reasons given in the foregoing opinion the order is reversed, and the cause remanded for further proceedings.

77 Cal. 16

SMITH v. TALBOT. (No. 12,515.)

(*Supreme Court of California.* June 25, 1888.)

HIGHWAYS—OBSTRUCTION—ACTION BY ROAD OVERSEER.

Pol. Code Cal. §§ 2731, 2734, providing that the district road overseer may require encroachments upon "any highway duly laid out or erected" to be removed, and authorizing him, on the refusal of the owner of such encroachments to remove them or permit their removal, to bring an action to abate them, and to recover a certain penalty for their continuance after notice to remove them, contemplates only encroachments which come into existence after the highway is laid out; and no action lies under these sections for an alleged encroachment upon land claimed as a highway, which was erected before the highway was laid out, a remedy for this being given by Pol. Code Cal. § 2695.

Commissioners' decision. In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

The facts sufficiently appear from the opinion.

Brown & Daggett, for appellant. *Lambertson & Taylor*, for respondent.

FOOTE, C. This action was brought by a road overseer to recover a penalty of \$10 for each day upon which the defendant was alleged to have violated the statute in maintaining an encroachment upon a public highway, and to cause a removal thereof. Judgment was given against the defendant that the encroachment complained of be removed, and that he pay the sum of \$1,630 as penalty in maintaining it for 163 days after legal notice to remove it. From that and an order denying a new trial the defendant has appealed. He claims that the complaint does not state facts sufficient to constitute a cause of action. The complaint was evidently framed upon the supposition that the cause of action accrued under sections 2731 and 2734 of the Political Code, which are as follows: Sec. 2731. "If any highway duly laid out or erected is encroached upon by fences, buildings, or otherwise, the road overseer of

the district may, orally or in writing, require the encroachment to be removed from the highway." Sec. 2734. "If the encroachment is denied, and the owner, occupant, or person controlling the matter or thing charged with being an encroachment refuses either to remove, or permit the removal thereof, the road overseer must commence in the proper court an action to abate the same as a nuisance; and, if he recovers judgment, he may, in addition to having the same abated, recover \$10 for every day such nuisance remained after notice, and also his costs in said action." These sections evidently contemplate that when an action is brought to recover penalties inflicted under section 2734, *supra*, and the removal of the obstruction, that the facts shall show that it is a case where the encroachment or obstruction has not come into existence until after the highway is laid out or completed. In this case, according to the complaint, the defendant had erected his alleged encroachment upon the land claimed as a highway before the board of supervisors of the county had laid it out or erected it into a public highway.

As it seems to us, the remedy to which the road overseer is relegated is to be found in section 2695 of the Political Code, which is as follows: Sec. 2695, "When the alteration of an old or the opening of a new road makes it necessary to remove fences on land given, purchased, or condemned by order of a court for road or highway purposes, notice to remove the fences must be given by the road overseer to the owner, his occupant, or agent, or by posting the same on the fence; and, if the same is not done within ten days thereafter, or commenced and prosecuted with due diligence, the road overseer may cause it to be carefully removed at the expense of the owner, and recover of him the cost of such removal; and the fence material may be sold to satisfy the judgment." It is evident that the legislative intent was to make a difference in dealing with the man who, without claim or right, willfully encroaches upon the highway, and refuses to remove his obstruction on due notice, and the one who constructs a fence, or makes some other encroachment upon land which at that time is not a public highway, but after the placing of the obstruction becomes such a highway, the encroachment still remaining after due notice to remove it. It is to meet the inconveniences to the public arising from these two different classes of encroachments upon highways that the sections *supra* have been enacted. The facts set out in the complaint show no cause of action sufficient to support the judgment, which was evidently given under section 2734, *supra*.

It is unnecessary to notice the other points made, and we advise that the judgment and order be reversed, and the cause remanded.

I concur. HAYNE, C.

BELCHER, C. C., took no part in this decision.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded.

76 Cal. 621

WEBB v. TRESCONY. (No. 9,936.)

(*Supreme Court of California.* June 20, 1888.)

1. ATTORNEY AND CLIENT—COMPENSATION—WRONGFUL DISCHARGE—MEASURE OF DAMAGES.

Where an attorney at law is employed to defend a suit at an agreed compensation, and fully performs his agreement until discharged without cause, the measure of his damages is the compensation named in the contract.

2. SAME—PARTNERSHIP.

Though plaintiff, in an action to recover for his services as an attorney, had a partner at the time of making the contract with defendant, a motion for nonsuit on that ground is properly denied where it appears that his copartner was not interested in such contract.

3. ACTIONS—CONSOLIDATION—PRESUMPTION.

Where the record does not disclose the nature of another action pending between the same parties, it will be presumed that a refusal to consolidate was proper.

4. APPEAL—REQUISITES—BOND.

Where there is in the same transcript and notice an appeal from a judgment, with an appeal from an order denying a motion for new trial, one undertaking is sufficient.

Department 1. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

Hiram D. Tuttle, for appellant. *R. M. F. Soto and Dorn & Parker*, for respondent.

PATERSON, J. The appeal is from the judgment, and from an order denying defendant's motion for a new trial. Where there are several appeals in the same transcript, it is the general rule that there should be an undertaking on appeal for each order or judgment appealed from, and each appeal should be cited in the undertaking; but where there is, in the same transcript and notice, an appeal from a judgment, with an appeal from an order denying a motion for a new trial, one \$300 undertaking is sufficient. *Corcoran v. Desmond*, 71 Cal. 102, 11 Pac. Rep. 815. The motion to dismiss the appeal is therefore denied.

The plaintiff is an attorney and counselor at law, and the complaint alleges that about May 1, 1882, the defendant employed him to defend certain suits in which the defendant herein was defendant, for which the defendant agreed to pay the plaintiff the sum of \$950, and "that, in pursuance of the contract, plaintiff appeared for the defendant in each of said actions, and did all things necessary or proper for the defense of said actions, and each of them, up to the 21st day of May, A. D. 1883, on which date, without any cause whatever, the defendant discharged plaintiff from each of said actions, and took such proceedings that the above-entitled court duly made and gave an order discharging the plaintiff from each of said actions, and that, by reason of the breach of said contract by the defendant, the plaintiff had been damaged in the sum of \$950, the said contract price." The plaintiff recovered a judgment for the sum of \$950, and costs. The court instructed the jury as follows: "If you find from the evidence that the plaintiff and defendant entered into said contract as alleged in the complaint, and that plaintiff fully performed the covenants on his part until removed and discharged by defendant, and that plaintiff was not in fault, but was discharged without cause, then, and in such case, the measure of damages is deemed to be the full contract price agreed upon by the parties." It will be observed that in the allegation and in the instruction the plaintiff's right of recovery is based upon the fact that he was discharged without cause. In *Baldwin v. Bennett*, 4 Cal. 392, it was said: "The general rule as to the measure of damages in an action for a breach of contract is not the whole price agreed to be paid, but the actual loss sustained, which will consist of the value of the services rendered, and the damage sustained by the refusal to allow performance of the rest of the contract. To this rule there are, however, some exceptions. Where, from the nature of the contract, as in this case, no possible mode is left for ascertaining the damage, we will have presented the anomalous case of a wrong without a remedy, unless we adopt the only measure of damages which remains, and that is the price agreed to be paid. Without this, justice would be defeated, and parties encouraged to violate other contracts of similar character. The defendant not only breaks his contract, but also deprives the plaintiff of showing the amount of injury under the general rule. He cannot complain that a different rule is invoked, when it is the only one left to make him responsible for his want of good faith." See, also, *Coffee v. Meliggs*, 9 Cal. 364; *Kersey v. Garten*, 16 Cent. Law J. 472; *Weeks*, A'tys. 582, 583, and cases cited; section 3302, Civil Code. It is claimed that the court below erred in not consolidating this action with another action then pending between plain-

tiff and defendant. Conceding that section 1048 is mandatory, there is nothing in the record before us to show the nature of the cause of action in the case referred to. The presumption is, of course, that the court below, with the record in that case before it, ruled correctly.

Defendant's motion for a nonsuit was properly denied. Although the plaintiff had a partner at the time he entered into the contract with the defendant, it appears that his copartner was in no way interested in the contract with defendant. Judgment and order affirmed.

We concur: SEARIS, C. J.; MCKINSTRY, J

3 Cal. Unrep. 3

BRALY v. HENRY. (No. 12,402.)

(*Supreme Court of California.* June 25, 1888.)

1. NEGOTIABLE INSTRUMENTS—ACTIONS—EVIDENCE.

In an action on a note, where the question is whether or not plaintiff is an innocent holder for value, interrogatories whose evident purpose is to show that plaintiff took the note with notice of a partial failure of consideration, it having been held on a former appeal of the case that such partial failure of consideration was a defense *pro tanto*, are allowable, although defendant is precluded from questioning plaintiff's ownership of the note by the fact that the pleadings admit that it was indorsed and delivered to him.

2. APPEAL—REVIEW—PRESUMPTIONS.

An order of the trial court denying a motion for new trial, which forms part of the record on appeal, and recites that notice of such motion was given, sufficiently shows that there was such notice.

Commissioners' decision. In bank. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

Action on a promissory note by J. H. Braly against S. W. Henry. Judgment for plaintiff, and defendant appeals, after denial of his motion for new trial. For former appeal, see 11 Pac. Rep. 385. For affirmance of the decision on that appeal, on rehearing, see 12 Pac. Rep. 623.

W. D. Grady and Goucher & Geis, for appellant. *Geo. A. Nourse*, for respondent.

FOOTE, C. Upon the former appeal it was held that the partial failure of consideration was a defense *pro tanto*. 71 Cal. 481, 11 Pac. Rep. 385. When the case went back for trial, one of the principal questions was whether the plaintiff had purchased the note with notice of the partial failure of consideration, or, in other words, whether he was an innocent holder for value. On the retrial the plaintiff, on cross-examination, was asked whether he purchased the note, which question was objected to and excluded. He was also asked the following question: "Do you know anything about the consideration for which this note was given?" which question was objected to and excluded. He was also asked the following: "You knew all about the facts of this note having been executed for a stack of hay, at the time it was transferred to you, did you not?" which question was objected to and excluded. He was also asked the following: "You were a party in interest to the contract for the sale of the hay for which the note was executed, were you not?" which question was excluded on objection. He was also asked the following: "At the time the note was given, did you know what it was given for?" which question was excluded on objection. We think that the court committed error in not allowing the questions to be propounded to the witness and answered. It is evident that under the pleadings it was admitted that the note in controversy was indorsed and delivered to the plaintiff, and that, therefore, the defendant could not be allowed to show by evidence that plaintiff was not the owner of the note. Nevertheless, whether he was or not a purchaser for value, or took it with notice of the partial failure of consideration, which it

was the evident purpose of the defendant to elicit by his questions put to the plaintiff, was a material matter to the defendant's defense, and should have been allowed to be shown. While the interrogatories were not skillfully framed, yet their purpose is manifest, and they should have been allowed to be put. The order denying the motion for a new trial is part of the record on appeal, and this order recites that a notice of intention had been given. This sufficiently showed that there was such notice. We think the judgment and order appealed from should be reversed, and the cause remanded for a new trial.

I concur: HAYNE, C.

BELCHER, C. C., did not take part in this opinion.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

77 Cal. 7

PEOPLE v. BENTLEY. (No. 20,400.)

(*Supreme Court of California.* June 20, 1888.)

1. ROBBERY—FORMER CONVICTION OF ANOTHER OFFENSE.

A conviction of assault with a deadly weapon is not a bar to a prosecution for an attempt to commit robbery committed at the same time.¹

2. SAME—CONSPIRACY—DECLARATIONS OF ACCOMPLICE.

On a trial for attempt to commit robbery, the acts and declarations of a third party, tending to show a conspiracy between him and defendant to commit the crime, are admissible in evidence as part of the *res gestæ*. Following 17 Pac. Rep. 436.²

3. SAME—EVIDENCE.

On a trial for attempt to commit robbery the question asked a witness whether a third person lived in the same town with defendant at the time of the alleged crime is immaterial, where it is not attempted to be shown that such person could by any possibility have been the culprit, instead of defendant.

4. WITNESS—CREDIBILITY—CRIMINAL LAW.

Testimony as to defendant's character for truth and veracity by a witness knowing his general reputation in that regard is admissible to impeach his testimony.

Commissioners' decision. In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

W. A. Gray and Oregon Sanders, for appellant. George H. Johnson, Atty. Gen., for the People.

FOOTE, C. The defendant was tried and convicted of an attempt to commit robbery. From the judgment given in the premises, and an order refusing a new trial, he appeals. He contends that he has been formerly convicted of the same offense, which is alleged to be a bar to this prosecution. It was attempted, in his behalf, to introduce evidence to show that such was the fact, but it was ruled out by the trial court, and exception taken. The evidence offered tended to show that he had been convicted of an assault with a deadly weapon, under an information charging an assault with intent to commit murder. It is plain that the defendant had not formerly been convicted of an offense for which he could have been or was tried and convicted on the information charging the offense of which he here stands convicted. "It is be-

¹ The sufficiency of the plea of former conviction depends, not upon whether the defendant has already been tried for the same act, but whether he has been tried for the same offense. *State v. Stewart*, (Or.) 4 Pac. Rep. 128; *Burks v. State*, (Tex.) 6 S.W. Rep. 300; *Willis v. State*, (Tex.) Id. 857.

² As to what constitutes a conspiracy, and as to the admissibility in evidence of the declarations of co-conspirators, see the *Anarchists' Case*, (Ill.) 12 N.E. Rep. 865, and note; *Spencer v. State*, (Ga.) 3 S. E. Rep. 661; *Crump v. Com.*, (Va.) 6 S.E. Rep. 620; *Cortez v. State*, (Tex.) 6 S. W. Rep. 546.

lieved that no well-considered case can be found where a putting in jeopardy for one act," or a conviction for one act, "was held to bar a prosecution for another separate and distinct one, merely because they were so closely connected in point of time that it was impossible to separate the evidence relating to them." *Teat v. State*, 53 Miss. 456. According to the testimony in this case, the first thing done by the defendant and his confederate was an attempt to intimidate and rob; the next was to attack with a deadly weapon. It cannot be the law that a man having assaulted another with a deadly weapon, and having also attempted, before that, to rob him, can escape punishment for the attempt to rob because of conviction for assault with a deadly weapon. If the offenses do not possess the same elements, although both relate to the same transaction, it would seem that both may be punished. This view of the law seems to have been taken by the supreme court of this state in the case of *People v. Majors*, 65 Cal. 138, 3 Pac. Rep. 597, where many authorities bearing upon the matter in hand are cited and discussed. The offense of which the defendant was first convicted, was an effort to injure the person of the prosecutor with a deadly weapon. That of which he was last convicted, was an attempt to take away the goods of the prosecutor from his person by intimidation or violence. The essential elements of the two offenses are not the same.

The admissibility of the evidence of Moore, a witness for the prosecution, to prove a conspiracy to commit a felony, which was objected to by the defendant, but allowed by the court to go to the jury, has been determined heretofore against the defendant's contention in case *People v. Bentley*, 17 Pac. Rep. 436, (No. 20,364, decided by the supreme court, March 28, 1888,) where the facts surrounding the transaction are fully stated.

The question asked Evans, a witness, whether George Sevier lived in the same town with the defendant at the time of the alleged attempt to commit robbery, was immaterial. It was not shown, or attempted to be shown, that Sevier was anywhere in the immediate vicinity of Ridgway, the accomplice of the defendant, on the night when the offense was charged to have been committed, or that by any possibility Sevier might have been the culprit instead of the defendant.

The testimony of R. P. Grant as to the character of the defendant for truth, or the contrary, was admissible in impeachment of the defendant's testimony. The witness evidently knew the general reputation of the defendant in that regard.

The defendant emphatically denied all complicity or knowledge of the offense charged against him when he testified in his own behalf. The cross-examination to which he was subjected, was fairly directed to the rebuttal of the entire innocence which he thus proclaimed, and was legitimate and proper. There does not appear to be any merit in the defendant's points made upon appeal, and we advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

77 Cal. 1

PEOPLE v. FARMER. (No. 20,390.)

(Supreme Court of California. June 20, 1883.)

1. HOMICIDE—EVIDENCE—DYING DECLARATIONS.

The dying declarations of deceased are admissible upon trial for murder where it appears that, a few moments after receiving the fatal wound, deceased stated repeatedly that he was killed, that he never could get well, and that he would die; it appearing that he was told that the doctor in attendance said that he was sinking fast, and that, if he made any statement, he must make it soon, which he seemed

to believe, and that at no time after he was shot, either before or after the declaration, did he express any hope of recovery; though the scribe who wrote down the declaration, which was in the form of questions and answers, appended thereto the conclusion, "In view of the probability of my dying, I make the above statement as my dying declaration,"—as, upon all the facts, the declaration appeared to have been made when the deceased believed he was about to die.¹

3. SAME.—DYING DECLARATIONS.—STRIKING OUT IRRELEVANT PORTIONS.

Though a portion of a dying declaration may not be admissible because referring to distinct and past transactions, the declaration, if otherwise proper, should be received, and the objection to the incompetent portion called to the attention of the court below by motion to strike out, or some other appropriate method.

In bank. Appeal from superior court, Lake county; R. J. HUDSON, Judge.

Indictment against Wright J. Farmer for murder. Verdict of guilty of murder in the first degree, and defendant appealed.

F. E. Johnson and *R. C. Home*, for appellant. *Atty. Gen. Johnson*, for the People.

McFARLAND, J. The defendant was convicted of murder in the second degree, and appeals from the judgment. The only ground relied on for a reversal is error in admitting in evidence the dying declaration of the deceased; the contention being that the declaration was not made under a solemn sense of impending dissolution. Two witnesses, W. C. Goldsmith and William Newman, testified as to the condition of the deceased. Goldsmith testified that he knew the deceased, Thomas G. Christie, in his life-time; that he was shot, according to his information, a little after midnight; that witness saw him shortly afterwards; and that the statement offered in evidence as a dying declaration was made at 1:35 o'clock A. M. of the same night. His subsequent testimony was as follows: "*Question.* Do you know, and, if so, how do you know, whether Mr. Christie, at the time he made that statement, had any belief upon the subject whether he would die from the effect of that wound? *Answer.* He told me that he was killed; that he would die. I went in to see him, and I said: 'Are you hurt, Tommy, bad?' 'Oh!' said he, 'Mr. Goldsmith, I am killed.' I said: 'I guess not. Where are you hurt?' He put his hand to his side, and showed me." After some matters not material here, the testimony proceeds as follows: "*A.* He said he believed it would kill him. He said: 'It's no use; I can't get well.' When I first came in from supper, he told me that. There was no anticipation of taking this statement at that time. It was more than an hour before he gave the statement. *Q.* Then what did he say about that afterwards, just before the statement was made? *A.* He said he didn't believe he would get well. *Q.* He believed he would die? *A.* Yes, sir. *Q.* And he made a statement? *A.* Yes, sir; he made a statement, and said it was his dying statement. He was in his right mind, he declared, himself. I asked him, and he said he knew me and all the parties around there. He was in his right mind. I talked with him about other matters, and my opinion is that he was in his right mind. *Q. by the Court.* You think he saw things clearly, and, so far as his mind was concerned, saw things clearly, and was able to give it correctly? *A.* Yes, sir; he said he was in too much pain to give a statement, but he would give answers to questions, and what questions were asked him he answered them." After some discussion between the court and counsel, the testimony proceeds as follows: "*Q.* Now, what was it the dying man said, Mr. Witness? *A.* He said he could not get well. *Q.* What else did he say? *A.* He said,—I came out, and spoke to him, and I said, 'How are you hurt, Tommy?' *Q. by the Court.* What time was that? *A.* It was after 12 o'clock, I think. He said he was shot. I said, 'Where?' He said, 'Here.' I said, 'Who done it?' He said, 'Farmer.'

¹As to what must be shown in order to render a dying declaration admissible in evidence, see *Bryant v. State*, (Ga.) 4 S. E. Rep. 853, and note; *Walton v. State*, (Ga.) 5 S. E. Rep. 203; *Peak v. State*, (N. J.) 12 Atl. Rep. 701.

I said, 'Are you hurt bad?' He said, 'I am killed; I never can get well.' He said, 'I will die.' I said, 'Where are you hit?' He pulled his shirt down, and showed me where he was shot. *Q. by the Court.* How long was that before you took the statement? *A.* It was over an hour. *Q. by the Court.* Now, I wish you would detail everything that Mr. Christie said at the time he was going to make that dying statement? *A.* I asked the doctors— *Q.* They were present? *A.* Yes, sir." Here follows a description of the attempt of the doctors to probe the wound. The witness then proceeds as follows: "Then I says, 'Doctor, do you think there is any chance for him?' 'No,' he said, 'there is no possible show; he is sinking very fast.' *Q.* That was in the presence of the deceased? *A.* Yes, sir. *Q.* He could hear it? *A.* Yes, 'f he was listening. It was about five feet from him, in the same room, at the far end of the table that was setting there. So I went out in the other room, and stayed there a few minutes, and came back, and asked him how he was feeling,—if he did not want to send for some of his folks. He said, 'Yes;' for William and his mother. I believe he told me to send for his mother, and some boy sitting around there volunteered to go, and he said he would go after his brother, and he went, and during that time he was gone I saw him all the time. [The mother lived and was at Lakeport, a distance of 32 miles from where the deceased was at that time.] He complained that he was getting worse, that he did not think that he could live, and wondered how long it would be until William came. [William, the brother, only lived a short distance—a few miles—from where deceased then was.] I told him to keep up good courage; that was half the battle. I said, 'You may pull through.' He said, 'No; I can't.' He expressed the opinion,— 'No, I can't get well,' he said. I went in the room, and the doctor said, 'Ain't you a justice of the peace?' I said, 'Yes.' They said, 'I think you had better go and have him make an ante-mortem statement, for he can't live much longer, and he is sinking very rapidly.' Several persons were sitting there,—George Minstrell and others, and they said, 'Let's go right along.' We went in, and I told him the doctors said he could not live; that it was almost certain that he would die. *Q. by the Court.* You told Christie that? *A.* Yes, sir; that it was necessary to make a statement now if he wished to make any. He said that he could not; that he could not talk enough; it hurt him too bad to talk. I asked him if he could answer questions. He said, 'Yes.' I said, 'You know who I am?' 'Oh, yes,' he said, 'I know who you are, and I know everybody, and I know everything.' I said, 'You can answer questions?' He said, 'Yes.' So George W. Minstrell took a pencil, and I asked him the questions that are propounded in that instrument, just as they are there. That is the way it was done, and how it came to be done. He said, 'I am shot, and I never can get well.' It appeared to me that he thought he was almost in dissolution. It impressed me that he thought he would die right then when he said, 'I never can get well.' He died the next day. I took my watch out, and it was 1:35 o'clock A. M. when he made this statement, and I so had it written on the statement. I don't know exactly when he was brought in there, [the place where he was when the statement was made.] I went to supper; and when I came back it was ten or fifteen minutes to 12 o'clock midnight. He was brought in there while I was gone to supper. *The Court, to the District Attorney.* If you have other testimony upon this point, I would like to hear it." Thereupon the prosecution called one William Newman, who, being first duly sworn, testified: "*Question by Mr. Crump.* Were you present about the time Christie made that dying statement? *Answer.* I was present at the time,—most of the time,—and up to the time of his death. *Q.* About the time, or just before the time of that dying declaration, state, if anything, what you heard Tom say about his belief that he would die? *A.* As soon as I saw him, immediately after he was shot,—not more than two or three minutes after they took him out of the court,—he said, 'Billy, I am killed; for God's sake send

for mother.' We carried him inside, and he said: 'Send for Billy, too;' and we got Frank Adams to go for Billy, and his mother was sent for. Every few minutes he would say, 'Send for mother, for God's sake. I am going to die.' He spoke several times about his dying. That is the only way he talked. He did not talk as if he had any hope of recovery. I was with him when he made the statement. He said to send for his mother; that he wanted to see her before he died. *Q. by the Court.* He said he knew he was bound to die? *A.* Yes, sir."

This was all the evidence upon the point. It would serve to no good purpose to restate here the rules which govern the admissibility of dying declarations. They are well established and generally understood, and the difficulty always is in applying them to particular cases. It is sufficient to say, in the case at bar, that, in our opinion, the circumstances in proof warranted the court in admitting the declaration. And we do not think, as argued by counsel for appellant, that the correctness of the ruling is impeached by the fact that the scribe who reduced the statement to writing concluded it with these words: "In view of the probability of my dying, I make the above statement as my dying declaration." The deceased was in too much pain to make a statement in a narrative form. It was taken by question and answer. It is quite as likely that the word "probability" was suggested by the person who wrote it as that it originated with the deceased. At all events, the condition of the declarant's mind as to his apprehension of death must be determined from all that was said and done, and all the circumstances surrounding him, and not from a critical consideration of the exact meaning of a word used only once during all the conversations. And, taking all the evidence into consideration, we think that it sufficiently appears that, when the statement was made, the deceased believed that he was about to die.

Counsel contends here, for the first time, that the statement was erroneously admitted because it contains the following: "*Question.* What did he shoot you for? *Answer.* He had no reason whatever." This contention, of course, rests upon the rule that a dying declaration is admissible only as evidence of the circumstances under which the mortal injury was received,—the facts of the *res gestæ*,—and not as evidence of former and distinct transactions, or when it is mere expression of an opinion. It is doubtful if this contention could be sustained, even if the point had been properly presented. A fair construction of the matter complained of is that it referred solely to the time of the homicide, and the circumstances immediately surrounding it, and merely meant that at that time deceased had attempted no violence towards defendant. "Where, in making a dying declaration, the declarant, in speaking of the fatal wound, said it was done without any provocation on his part, it has been held that this declaration is not incompetent; it relating to fact, not opinion." Whart. Crim. Ev. § 294, and cases there cited. But, in any view, this specific objection to a part of the declaration should have been called to the attention of the court below by a motion to strike out, or by some other appropriate method. The judgment is affirmed.

We concur: SEARLS, C. J.; MCKINSTRY, J.; PATERSON, J.; SHARPSTEIN, J.; THORNTON, J.

77 Cal. 10

MORITZ v. LAVELLE. (No. 12,230.)

(Supreme Court of California. June 20, 1888.)

1. FRAUDS, STATUTE OF—AGREEMENT TO CONVEY INTEREST IN MINES—WHEN STATUTE APPLIES.

An agreement was entered into between plaintiff and defendant to occupy and relocate a mine, plaintiff agreeing to pay the expense of defendant in examining the mine, and, if it was determined to open it, to join him there, the mine to be for the joint use and benefit of both; which agreement plaintiff performed on his part.

After locating and staking off the mine together, notices were posted, as required by law, in the name of defendant as locator, with plaintiff as a witness. They commenced operating the mine together, when defendant refused to convey to plaintiff one-half interest therein, and expelled him therefrom. *Held*, that the case did not fall within the statute of frauds, and that the defendant should be compelled to convey to plaintiff an undivided one-half interest in said mine.

2. SPECIFIC PERFORMANCE—PLEADING—CITIZENSHIP OF PLAINTIFF.

In such case, a complaint for specific performance of the contract need not allege the citizenship of plaintiff.

3. PLEADING—ALLEGING PERFORMANCE OF CONDITIONS—WHEN SUFFICIENT.

The allegation in a pleading in relation to the performance of a condition precedent, that "plaintiff has performed all and singular his agreements and covenants with defendant," is sufficient on demurrer.

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Action by Frank Moritz against A. Lavelle for specific performance of contract. Judgment for plaintiff, and defendant appealed.

W. A. Gray and Oregon Sanders, for appellant. W. B. Wallace, for respondent.

PATERSON, J. The plaintiff and defendant entered into a verbal agreement to occupy and relocate a mine in Tulare county for their joint use and benefit. The plaintiff promised to pay all the expenses of the defendant, and furnish him with an outfit necessary to make the trip from Calaveras county to Tulare county, and to make the necessary examination of the mine; to pay the defendant's board for a certain time, and furnish him with provisions, clothing, and blankets. It was agreed that if the mine had been abandoned, the plaintiff should join the defendant at the mine, and assist in working the same. Pursuant to the agreement, the plaintiff furnished the defendant with all he had promised to furnish him. The defendant visited the mine, found that it was abandoned, notified the plaintiff of the fact, and the plaintiff joined him thereafter at the mine. The parties staked off the mine, erected the necessary monuments, completed the relocation of the mine by placing notices of relocation thereon, as required by law. These notices were signed by the defendant alone as locator, and by plaintiff as a witness, with the express oral agreement between them that, in consideration of the agreement which we have referred to, the defendant would transfer and deed to the plaintiff the undivided one-half interest in and to the mine. The parties thereafter commenced working the mine, and the plaintiff demanded a transfer to him of the undivided one-half interest which the defendant had promised to convey. The defendant refused to make a conveyance of any interest, and denied that plaintiff owned any interest therein, and forcibly expelled him from the mine. The court below gave judgment for the plaintiff, as prayed for, namely, that defendant execute and deliver to the plaintiff a deed transferring the undivided one-half interest in and to the mine.

It is claimed that there having been no agreement in writing, and no such part performance as will take the case out of the statute of frauds, the contract cannot be enforced. But the statute of frauds has no application in cases of this kind. In *Gore v. McBrayer*, 18 Cal. 582, *Gore, McBrayer* and others entered into an oral agreement to prospect for quartz. The court there held that the statute of frauds, which requires an instrument in writing to create an interest in land, does not apply to the taking up of mining claims. In *Settembre v. Putnam*, 30 Cal. 450, it was held that where mining partners, under a verbal agreement, claim and develop a lode upon the land of another, and authorize one of their number to buy the claim for the benefit of all, and he procures a deed in his own name, he holds the legal title to the interest of his partners in trust for them. See, also, *Sandfoss v. Jones*, 35 Cal. 487; *Hirbour v. Reedling*, 3 Mont. 13; *Murley v. Ennis*, 2 Colo. 300; *Welland v. Huber*, 8 Nev. 205.

It was not necessary for the plaintiff to allege citizenship in his complaint. *Thompson v. Spray*, 14 Pac. Rep. 182.

The complaint alleges "that plaintiff has performed all and singular his agreements and covenants with defendant." This allegation is sufficient, we think, as to the performance of conditions on his part. *Navigation Co. v. Wright*, 6 Cal. 258.

The demurrer to the complaint, therefore, was properly overruled, and the plaintiff was entitled to judgment. Judgment affirmed.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; McFARLAND, J.; MCKINSTRY, J.; THORNTON, J.

76 Cal. 439

In re BURDICK'S ESTATE. (No. 12,573.)

(*Supreme Court of California.* June 21, 1888.)

HOMESTEAD—RIGHT OF WIDOW.

Under Code Civil Proc. Cal. § 1474, which provides that a homestead selected from community property shall, on the death of the husband or wife, vest absolutely in the survivor, and Id. § 1476, which provides that if the value of such homestead, at the time of its selection, exceeds \$5,000, it may be divided or sold, and the excess over \$5,000 distributed, a homestead of less value than \$5,000, when selected, will, as against the heirs of the husband, vest in the wife absolutely upon his death, although at that time worth much more than that amount. SEARLS, C. J., and THORNTON, J., dissenting.

In bank. Appeal from superior court, Los Angeles county; W. P. GARDINER, Judge.

Frank B. Daley, for appellant. *Lee & Scott*, for respondent.

McFARLAND, J. Kate Burdick is the surviving wife of Horace Burdick, deceased; and during his life-time said Horace Burdick executed in due form, and had recorded, a declaration of homestead upon the land involved herein. This land, at the time said declaration was made, was community property; and it remained the valid homestead of the husband and wife, who resided on it with their minor children, until the death of said Horace, which occurred May 7, 1887. On June 16, 1887, Frederick Eaton was appointed administrator of the estate of said Horace; and on October 6th the surviving wife, Kate Burdick, filed her petition in the superior court asking that the said homestead premises be set apart to her. On the filing of this petition the court made an order appointing appraisers and directing that, if said homestead premises be returned in the inventory appraised at more than \$5,000, the appraisers should ascertain and appraise the value thereof at the time the homestead was selected, on October 7, 1870. The appraisers filed an inventory, in which the present value of the premises was put at \$45,000, and reported the value of the same at the time of the selection of the homestead as \$4,000. Thereupon the court made an order denying the petition of the widow, and from this order she appeals to this court.

It does not appear that the estate was at all in debt; and in its opinion the court below says that "the facts of the present case doubtless are that there are no creditors to suffer." At all events, there are no creditors opposing the petition of appellant. Indeed, it does not appear from the record that any one opposed it. We think the court erred in denying appellant's petition. A homestead, under the Codes, is impressed with two main qualities—*First*, exemption from execution; and, *second*, the right of survivorship, by which, upon the death of husband or wife, it goes to the survivor, and not to the heirs. It is with the latter quality alone that we have to deal with in the case at bar, as the contest here, if with any one, is with heirs, and not creditors.

Section 1474, Code Civil Proc., provides that "if the homestead selected by the husband and wife, or either of them, during their coverture, and recorded

while both were living, was selected from the community property, * * * it vests, on the death of the husband or wife, absolutely in the survivor." And the "homestead" here mentioned is defined in the Codes as follows: "The homestead consists of the dwelling-house in which the claimant resides, and the land on which the same is situated, selected as in this title provided." Assuming, therefore, that a homestead is in every way valid,—that is, that it does not cover an unreasonably large amount of land, or is not in any way fraudulent, or sham, and has been the *bona fide* residence of the parties, and has been executed and recorded in the manner provided by law,—then, it goes, —that is, the dwelling-house and land go,—absolutely to the survivor, except in the cases where this right of survivorship is modified by some other provision of the Codes. And there is no such provision limiting the right of ownership where the value of the homestead at the time of its selection was less than \$5,000. It is provided in section 1476 of the Code of Civil Procedure that if the value at the time of the selection of the homestead "exceeded five thousand dollars," or if it had been appraised as provided in the Civil Code and its appraised value exceeded that sum, (which was not the case here,) then it may be divided or sold, and the excess over \$5,000 distributed. But there is no such provision as to a homestead of less value than \$5,000 at the time of its selection. In the latter case it goes absolutely to the survivor, although at the time of the death of the husband its value may exceed \$5,000. Some early decisions of this court, relied on by respondents, were made under statutory provisions materially different from those now in force.

The judgment and order of the court below are reversed, with instructions to set aside the homestead to petitioner, as prayed for in her petition.

We concur: MCKINSTRY, J.; SHARPSTEIN, J.; PATERSON, J.

I dissent: SEARLS, C. J.

THORNTON, J. I dissent. In the life-time of Horace Burdick, deceased, and during his intermarriage with the petitioner, Kate Burdick, he selected as a homestead the parcel of land involved herein. A proper declaration of homestead as to the parcel of land was duly made and filed by the decedent, on the 7th day of October, 1870. At the time of making and filing this declaration, the decedent, with his family, consisting of his wife, above mentioned, and his minor children, resided on the premises. The parcel of land so selected as a homestead was, at the time of such selection, community property. The decedent died on the 7th of May, 1887, and on the 16th day of June, in the same year, letters of administration on the estate of decedent were issued to Frederick Eaton. On the 6th of October, 1887, Kate Burdick, widow of deceased, filed in the superior court a petition asking that the premises above mentioned be set apart to her. On the filing of this petition the court made an order appointing appraisers of the estate of decedent, and by said order directed that, if the homestead premises above mentioned be returned in the inventory appraised at more than \$5,000, the appraisers, before they make their return, ascertain and appraise the value of said homestead at the time it was selected, on the 7th of October, 1870, etc. On the 29th of October, 1887, the appraisers filed an inventory, in which the said premises were appraised at the sum of \$45,000, and reported the appraised value of the same at the time of the selection as a homestead at the sum of \$4,000. The court below denied the petition of the widow, who reserved an exception to the ruling of the court, and brings the case to this court on appeal.

Whether the estate of decedent is indebted does not appear. But it is so rare that persons die without being indebted that we may properly assume, in our reasoning on the question presented, that there are creditors of the estate whose claims are to be paid. It is pertinent here to remark that the inventory and appraisement, which are inserted in the bill of exceptions, make

the whole estate \$51,096.18, and this on a request that the court declare that property amounting to \$45,000 be withdrawn from the payment of the claims of creditors. Of such a proposition it may be justly said that the law must be very clear which would justify a court in coming to such a conclusion. It would be a most extraordinary exemption law which would require such a thing to be done. It would be almost as extraordinary to withdraw from the participation of the heirs, even to the extent allowed of the homestead of the value of \$5,000, so large a portion of the estate as is here required. While the constitution allows, and, in fact, enjoins, legislation to protect from forced sale a certain portion of the homestead, it certainly was not intended to authorize an exemption so unreasonable as to include four-fifths of the property of an estate. "The homestead [we give here the definition of the Civil Code] consists of the dwelling-house in which the claimant resides, and the land on which the same is situated, selected as in this title provided." Civil Code, § 1237. The mode of selection is pointed out in sections 1262 and 1263 of the Civil Code. The declaration required by the section 1262 must contain "an estimate of" the "actual cash value" of the premises. Now, while it is not declared in the foregoing sections that the homestead shall not exceed \$5,000 in value, still it is evident that the law was passed in pursuance of the provision of the constitution above quoted, and that it was intended as a law of exemption from forced sale to an amount to be fixed by the legislature. The amount of exemption is fixed in section 1260, in the case of any head of a family who is married, at \$5,000. This sum cannot be exceeded. This, then, in the case of the married head of a family, is the homestead spoken of in all the laws on the subject; that is, the residence of the family not exceeding in value the aforementioned sum of \$5,000. We think the above is the homestead spoken of in section 1265 of the Civil Code, and in the various sections of the Code of Civil Procedure. It is clear from the last clause in section 1265 that the excess above \$5,000 is in all cases subject to the debts of the deceased. Now, it is said that where the premises when selected are less in value than \$5,000 that no provision is made by law, on the death of the husband or wife, for cutting down or limiting the homestead to that sum, and section 1476 is cited to that effect. This seems to be correct of that section, and from this it is argued that, as no provision is made for thus limiting the homestead in the case just mentioned, therefore the whole property used as a homestead during the life of one of the spouses passes to the survivor, although at the time of such death it may be of a value greatly exceeding \$5,000. Section 1476 clearly provides for the case of limiting the homestead on the decease of one of the spouses to \$5,000 in value, where the premises at the date of their selection exceeded \$5,000. The construction urged leads to this result: That when one of the spouses departs this life, and the homestead at its date of its selection was of a value exceeding \$5,000, it may be cut down to \$5,000, but where it was, at the date of its selection, of a value less than \$5,000, it cannot be limited or cut down, but passes to the survivor of the married pair, irrespective of value. In the case last supposed the survivor must have the homestead, though it be of a value exceeding \$100,000, and constitutes the entire estate, thus leaving the creditors unpaid, and depriving the heirs of all share in the estate of their ancestor. Such a result savors of a solecism. If there is no method provided by statute for cutting down and limiting the homestead to \$5,000 in the case such as is presented herein, we think that the superior court, under section 187, Code Civil Proc., may adopt a method. We think the court below has the power and jurisdiction to limit the homestead as above; and, having such power and jurisdiction, it is vested, by section 187, *supra*, with all necessary and appropriate means to carry out and execute such power. Such is the doctrine laid down in *Mawson v. Mawson*, 50 Cal. 539, which is applicable herein. I think the order should be affirmed.

77 Cal. 54

BULL v. COE et al. (No. 12,955.)

(Supreme Court of California. June 27, 1888.)

1. HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE—ACKNOWLEDGMENT OF DEED.

A deed is duly acknowledged by a married woman when the notary certifies, in accordance with the Civil Code Cal. § 1191, that he "made her acquainted with the contents of the instrument," although the deed shows that it is subject to conditions contained in another instrument not signed by her, and not executed in fact at that time, and the contents whereof were unknown to the notary.

2. SAME—EQUITABLE MORTGAGE.

A married woman executing a deed absolute in form, but intended as a mortgage to secure advances to be made to her husband, according to the terms of another instrument fixing the amount of such advances referred to in the deed which her husband delivered by her authority, such deed is security for the advances made in pursuance of said instrument, although the latter was not actually executed until after the deed, and although the amount of advances made was greater than the wife intended or supposed it would be, no fraud being shown.

3. PARTNERSHIP—ACTION BETWEEN PARTNERS.

One partner lent his copartner the means to pay in his share of the partnership capital, advancing it as required, and taking security therefor. *Held*, that this was not a partnership transaction, and an action to enforce the security would lie before settlement of the partnership accounts.

4. MORTGAGE—FORECLOSURE.

A mortgage executed by one person to secure the debt of another may be enforced against the mortgaged property after the debtor's death, although the holder of the note fails to present it as a claim against his estate.

5. SAME.

Code Civil Proc. Cal. § 726, providing that there can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage, does not prevent a mortgagee, who also has the title to property purchased jointly with his debtor, but conveyed to the mortgagee separately as further security for the same debt, from foreclosing the mortgage, waiving, if he chooses, the security of the other property.

6. HOMESTEAD—MORTGAGE—FORECLOSURE—PRESENTATION OF CLAIM AGAINST DECEDENT'S ESTATE.

Under Code Civil Proc. Cal. § 1475, providing that claims secured by liens or incumbrances "on the homestead" must be presented and allowed as other claims against the estate, a deed absolute, intended as a mortgage, executed by a husband and wife upon the wife's separate property, which has been declared a homestead, to secure the debt of the husband, can be foreclosed after the death of the husband, although no claim has been presented against the estate, upon which the creditor has waived all demands for the mortgage debt. Overruling 15 Pac. Rep. 123.

7. PRINCIPAL AND SURETY—RELEASE OF SURETY—PLEADING.

If a surety would defend on the ground that the creditor has released his principal, whereby he is discharged, he must plead such new matter specially; and although evidence is introduced tending to establish such defense, if the case is not tried on that theory the question cannot be raised on appeal.

Commissioner's decision. In bank. Appeal from superior court, Los Angeles county; A. BRUNSON, Judge.

On rehearing. For former opinion, see 15 Pac. Rep. 123.

Wells, Van Dyke & Lee and *Wm. H. Sharp*, for appellant. *Chapman & Hendrick, Bicknell & White*, and *W. C. Belcher*, for respondents.

HAYNE, C. Suit to foreclose a mortgage. The material facts are as follows: Charles L. Strong, John O. Earl, and Alpheus Bull agreed together to purchase and operate a certain mine. Each was to furnish one-third of the capital, and be interested in that proportion. Strong had no money, and Bull agreed to advance his share, taking as security a mortgage upon a piece of real property of which Mrs. Strong was the owner, and upon which a homestead had been declared, and taking, also, the title to the mine in his own name as additional security. The mortgage was by a deed absolute in form, duly signed and acknowledged by the Strong's. The terms of the contract were in a separate paper signed by Bull only. The money was advanced by Bull, as required from time to time, in accordance with the terms of his con-

tract. After a time the mine proved a failure, and Strong died. The defendant Coe was appointed administrator of his estate, and gave notice to the creditors to present their claims. Bull did not present any claim against the estate, but commenced his action of foreclosure upon the property mortgaged by Mrs. Strong, under section 1500 of the Code of Civil Procedure. The court below gave judgment for the defendants, and the plaintiff appeals. The following are the only questions which, we think, require notice:

1. It is contended that there was no proper acknowledgment of the deed by Mrs. Strong. The argument is that this deed expressly declares that the property is conveyed "in trust, the conditions of which are stated in a separate instrument;" that it appears from the evidence that this separate instrument was not signed until the next day, and that, therefore, its contents could not have been explained to her; that, where one contract refers to another, the two are considered as one, and that therefore she was not made acquainted by the notary with the contents of the instrument, as the law requires. We are not prepared to say that the certificate of the notary can be contradicted, in the absence of proper allegations of fraud. We express no opinion upon that point. But assuming in favor of respondent that the certificate can be contradicted, we nevertheless do not think the point well taken. The statute requires that the notary shall certify that he "made her acquainted with the contents of the instrument." Civil Code, § 1191. What instrument? Manifestly the one which the married woman has signed, and which the notary has before him. It would be absurd to say that he is to explain the contents of a document which he has not before him, and knows nothing about. It is perfectly true that for certain purposes two instruments which refer to each other are considered as one. But this is merely a fiction of law, which is not to be extended to a case like this. We think the notary did his whole duty if he explained that the instrument was a deed of the property to the grantee named therein, subject to the conditions appearing in the document referred to, which conditions and document were not before him. Any other construction would not only be unwarranted by the language of the statute, but would be dangerous to the security of business transactions.

2. It is argued that Mrs. Strong never authorized the mortgage for so large a sum. She does not deny that she executed and acknowledged the deed; nor does she deny that her husband had authority to deliver it. Her answer admits that the deed was given to secure advances to the amount of \$3,000, but denies that it was given for any other purpose. The husband, therefore, had authority to deliver the deed. Furthermore, he had authority to deliver it "in accordance with its terms and manifest purpose." *Arnaz v. Escandon*, 59 Cal. 498. And by its terms it was a conveyance "in trust, the conditions of which are stated in a separate instrument in hands of the parties of the first part." If that separate instrument had been in the hands of parties of the first part there could be no doubt but that she would have been bound by it, whether she knew its contents or not. It was not, in fact, signed until the next day. Its terms appear to have been agreed upon by the husband and Bull. It is not pretended that there ever was any other instrument agreed upon, or in the hands of the parties of the first part, or that there was not the most perfect good faith on the part of Bull. Nor is any imputation expressly made upon the good faith of the husband. There is no evidence that he was limited to any particular amount. Mrs. Strong does not say that she so limited him. She says: "I never pledged the ranch myself for any such amount. I was never informed that any one else had, until I was writing these letters for information." This is not inconsistent with the fact that she put the deed in the hands of her husband, to be used by him as he thought best, or without inquiry as to what was to be done with it. Under the circumstances, we think Strong was the ostensible agent of his wife.

3. It is contended that the action cannot be maintained because there was

no settlement of the partnership accounts. The court finds that "the entire claim of plaintiff, whatever may be its amount, or the balance due, grows out of the purchase and working of the said mine by the said Earl, Bull, and Strong as mining partners, and not otherwise, and no accounting was ever had between the partners during the life-time of the said Strong, nor any balance struck between them." In other words, the court found that the loan by Bull to Strong was a partnership transaction. So far as this involves a conclusion of law, the conclusion is erroneous; and so far as it is a finding of fact, it is not sustained by the evidence. The uncontradicted evidence shows that the transaction as to the loan was entirely between Strong and Bull. Earl had nothing to do with it. Strong had obtained information concerning the mine; and he came to Earl and Bull to get them to go in with him. He had no money to pay for his share, and he borrowed it from Bull, giving the mortgage above mentioned as security. The character of the transaction is not changed by the fact that the money was not paid down at once, but was advanced by Bull as required. The mortgage was to cover future advances; and the transaction was purely and simply a loan from Bull to Strong. It is well settled in this state, as elsewhere, that one partner cannot sue another upon a demand arising out of the partnership transactions, in the absence of a settlement of the accounts. But by the terms of this rule it does not apply where the transaction is not a partnership matter. And it seems plain that a loan from one partner to another is not a partnership transaction, notwithstanding the fact that the borrower intends to put the money into the firm and does so. Accordingly it is well settled that the lender in such a case can maintain an action for the recovery of the money, although there has been no settlement of the partnership accounts. *Currier v. Webster*, 45 N. H. 226; *Crater v. Bininger*, 45 N. Y. 545; *Morgan v. Nunes*, 54 Miss. 312, 313; *Scott v. Campbell*, 30 Ala. 730; *Grigsby v. Nance*, 3 Ala. (N. S.) 350, 351; *Terrell v. Richards*, 1 Nott & McC. 20.

4. The title to the mine was taken in the name of Bull as additional security for the loan. And it is argued that, under the provision that "there can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage" (Code Civil Proc. § 726) the plaintiff cannot foreclose the mortgage upon Mrs. Strong's property without at the same time foreclosing on the mine. But the plaintiff has commenced only one action. The fact that he has omitted some of the security would, under the decisions, be a waiver of the mortgage upon the omitted portion. *Mascarel v. Raffour*, 51 Cal. 242. And (aside from the question of suretyship, which is considered below) the mortgagee is free to make such waiver if he chooses. The chief argument of the respondent in this regard is that the mortgaged property constitutes a fund which must first be exhausted before a personal judgment can be had against the mortgagor; and this proposition seems to be established by the decisions. See *Bartlett v. Cottle*, 63 Cal. 366; *Biddell v. Brizzolara*, 64 Cal. 362. But the plaintiff here does not seek a personal judgment against any one; and hence the rule has no application.

5. It is contended for the respondent that Mrs. Strong was a mere surety, and was discharged, for two reasons: (a) Because no claim was presented against the estate of the principal debtor. If we assume that the fact of suretyship sufficiently appears, the point is, nevertheless, not well taken. The precise point was decided in favor of the appellant in *Sichel v. Carrillo*, 42 Cal. 500. The only argument made by respondent in this regard is that the decision is incorrect in principle, and unsupported by authority. But to this we cannot agree. It was well settled in this state, as elsewhere, that mere delay of the creditor to proceed against the principal would not discharge the surety. *Humphreys v. Crane*, 5 Cal. 173; *Kritzer v. Mills*, 9 Cal. 22, 23; *Hartman v. Burlingame*, Id. 557; *Williams v. Covillaud*, 10 Cal. 419; *Peoplo v. Jenkins*, 17 Cal. 500. And this is still the law. *Preston v. Hood*, 64

Cal. 408, 1 Pac. Rep. 487; Civil Code, § 2823. In extension of this principle it was held that the surety was not discharged even if the delay of the creditor was such that his remedy against the principal became barred by limitation. *Whiting v. Clark*, 17 Cal. 407. And it was but a short step from this to the position that the loss of the creditor's remedy against the estate of the principal by non-action as to presentation of the claim did not discharge the surety. This was the decision in *Sichel v. Carrillo*. And the point has been ruled the same way in other states. *Johnson v. Bank*, 4 Smedes & M. 165; *McBroom v. Governor*, 6 Port. (Ala.) 32; *Villars v. Palmer*, 67 Ill. 204. And see *Banks v. State*, 62 Md. 88. (b) It is claimed that the surety was discharged because the plaintiff, in his complaint in this action, expressly released his claim against the estate of the principal. The statement in the complaint in this regard is that the plaintiff "hereby expressly waives all recourse against any of the property or estate of said Charles L. Strong, deceased, not included in the aforesaid deed; and he relies solely on his lien on the premises described in said deed for the repayment of his said advances." In making this waiver the learned counsel for the plaintiff must have proceeded upon the theory that both of the Strong's were principal debtors. If, however, Strong was alone the principal, and his wife was the sole owner of the property, and was a mere surety for him, it is a very grave question whether she was not discharged by this act of the plaintiff. Was she a mere surety? There can be no doubt but that the debt was the debt of the husband alone. The complaint expressly alleges that the mortgage was given to secure money advanced and to be advanced "to and for account of said Charles L. Strong;" and the evidence accords with this allegation. The appellant says in his reply brief that "the money advanced by the plaintiff was as much for her benefit as that of her husband;" but there is nothing in either the pleadings or the evidence to justify this remark. The only possible sense in which, upon this record, she can be said to have been interested, is that in which every wife may be said to be interested in her husband's transactions; and it is hardly necessary to say that this general interest does not make her separate property liable for his debts. The debt being the debt of the husband alone, if the property mortgaged was the separate property of the wife, she was a surety so far as the property is concerned. *Spear v. Ward*, 20 Cal. 674; *Hassey v. Wilke*, 55 Cal. 528. The court finds that it was her separate property; and, while the evidence upon the question is meager, we cannot say from the record that the finding of fact ought not to stand. The difficulty about the defense is that it is not pleaded. The release of a surety by discharge of the principal is new matter, and must be pleaded. *Mulford v. Estudillo*, 23 Cal. 100; *Bostwick v. McEvoy*, 62 Cal. 502, 503. And there is nothing either in the complaint or in Mrs. Strong's answer which states either that she was a surety or that the property was her separate property. From some of the phraseology of the answer the contrary inference is to be drawn. Nor can it be said that the cause was tried upon the theory that any such defense was set up. The evidence as to the ownership of the property may have come in with reference to the homestead. Wherever the course of the parties at the trial is allowed to supply omissions in pleading, such course must appear clearly, and be beyond all controversy. This defense, therefore, cannot be considered.

6. It is argued that there was a valid homestead upon the property, and that for this reason a claim ought to have been presented against the estate. When the case was here before we were of opinion that the case of *Camp v. Grider*, 62 Cal. 21, required claims upon the homestead to be presented; and that it made no difference that the homestead was upon the separate property of the survivor. With reference to the latter proposition, further examination and reflection, after rehearing, have convinced us that we erred, and the fact that the homestead was upon the separate property of the survivor takes it out of the rule laid down in *Camp v. Grider*. Except for the homestead it is clear

that the separate property of the survivor is not a part of the estate of the decedent, and that (all demands against the estate being waived) it is not necessary or proper to present a mortgage upon such separate property as a claim against the estate. Now, whatever may be the nature of the interest which the husband acquired in his wife's separate property by virtue of the homestead, it vested in the wife at his death. *In re Burdick's Estate*, ante, 805, (No. 12,573, filed June 20, 1888.) It was not a part of his estate, and since the plaintiff made no claim against the estate, nor against property which was a part of the estate, it was not necessary to present a claim to the administrator. See, generally, *Shadt v. Heppe*, 45 Cal. 437. We think the somewhat general language of the statute is not to be construed so as to cover such a case.

It cannot be contended that the failure to present a claim as to the debt extinguished it, and that the lien, being a mere incident to the debt, expired with it; because, although a claim which is not presented becomes "barred," it is not "extinguished." *Whitmore v. Savings Union*, 50 Cal. 149.

No question as to the rights of general creditors of the estate is involved here, because the plaintiff, having waived all claim against the estate, is not such a creditor. And we desire what is said above to be understood with reference to the precise facts of the case before us, viz., where the homestead is upon the separate property of the survivor. We neither express nor intimate any opinion as to what would be the rule where the homestead is upon the separate property of the decedent, or upon the community property.

The positions as to the power of the court to grant a rehearing, and the sufficiency of the order granting it, do not require special notice.

We therefore advise that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

I concur: FOOTE, C.

BELCHER, C. C., took no part in this opinion.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

76 Cal. 633

PEOPLE v. FREESE. (No. 12,543.)

(*Supreme Court of California*. June 21, 1888.)

OFFICE AND OFFICER—PILOT COMMISSIONERS—TENURE OF OFFICE.

Pol. Code Cal. § 368, subd. 3, provides for the appointment of pilot commissioners by the governor, with the consent of the senate. * Id. § 369, provides that the officers enumerated in said subdivision 3 shall hold their offices during the governor's pleasure. Id. § 2440, provides: "There must be appointed by the governor, by and with the advice of the senate, * * * a board of pilot commissioners for the ports of San Francisco, Mare Island, and Benicia." And Id. § 2442, provides: "The commissioners hold their offices during the pleasure of the power appointing them, not exceeding four years from the date of their commissions." *Held*, that the appointment and tenure of the commissioners of the above ports are controlled by sections 2440 and 2442, and under the latter section they cannot be removed by the governor without the concurrence of the senate. PATERSON and MCFARLAND, JJ., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; W. T. WALLACE, Judge.

Pol. Code Cal. § 2440, provides that "there must be appointed by the governor, by and with the advice of the senate, * * * a board of pilot commissioners for the ports of San Francisco, Mare Island, and Benicia." Id. § 2442, provides that "the commissioners hold their offices during the pleasure of the power appointing them, not exceeding four years from the date of their commissions."

George A. Johnson, Atty. Gen. Page & Eells, Geo. A. Knight, and Oliver P. Evans, for the People. Stanly, Stoney & Hayes, for respondent.

PER CURIAM. This is an action in the nature of *quo warranto*, to oust the defendant from the office of pilot commissioner for the ports of San Francisco, Benicia, and Mare Island, and to instate the relator therein. The defendant was nominated by Gov. Bartlett, and confirmed by the senate in January, 1887. In February following he duly qualified, and has ever since continued to discharge the duties of the office. On September 28, 1887, Gov. Waterman, who had in the mean time succeeded Gov. Bartlett, issued to the relator a commission appointing him to the office, "*vice A. C. Freese, removed.*" The relator, Travers, therewith qualified, and on the 3d of October, 1887, presented to the board of pilot commissioners, defendant being present, his commission from the governor, and demanded that he be let into the possession and enjoyment of the office in place of the defendant. Members of the board, defendant included, refused to recognize the relator as a pilot commissioner, or to let him into possession or enjoyment of the office. The legislature has not been in session at any time since the appointment of the relator.

Section 368 of the Political Code provides: "The following executive officers are appointed by the governor, with the consent of the senate: (1) The inspector of gas-meters; * * * (2) directors of the insane asylum; * * * (3) pilot commissioners. * * *" Section 369 of the Political Code provides: "The officers enumerated in the first subdivision of the last section hold their offices for the term of two years; those in the second subdivision for the term of four years; and those in the third subdivision during the governor's pleasure." Section 2440 of the Political Code provides: "There must be appointed by the governor, by and with the advice of the senate, three experienced and competent ship-masters or nautical men, * * * a board of pilot commissioners for the ports of San Francisco, Mare Island, and Benicia." Section 2442 provides: "The commissioners hold their offices during the pleasure of the power appointing them, not exceeding four years from the date of their commission." Under section 369 the governor may remove a pilot commissioner at his pleasure, but under section 2442 such commissioner can be removed only by the joint act of the governor and the senate; for where an appointment is made by the chief executive, by and with the advice or consent of the senate, the former alone is not the "appointing power." *People v. Cazneau*, 20 Cal. 507; *People v. Tilton*, 37 Cal. 619. Sections 368 and 2440 of the Political Code agree that the appointment of pilot commissioner must be by the governor, by and with the consent or advice of the senate; but the question for solution here is whether such commissioners hold their offices "during the governor's pleasure," as provided in section 369, or "during the pleasure of the power appointing them," as provided in section 2442. Which of these two sections shall control? Section 369 is found in part 3, tit. 1, art. 2, Pol. Code. This part of the Code provides for the government of the state. Title 1 provides for "the mode of election and appointment and term of office of civil executive officers." It consists of seven chapters, treating of the classification of public officers, legislative officers, judicial officers, salaries of judicial, ministerial and other officers, and general provisions relating to different classes of officers. The board of pilot commissioners for the ports of San Francisco, Mare Island, and Benicia was created by section 2440, art. 5, c. 1, tit. 6, pt. 3, Pol. Code. The board acquires all its powers from articles 5 and 6 of this chapter. It prescribes the duties, compensation of the members thereof, and regulates their proceedings. If sections 368 and 369 were repealed, the board would not be affected thereby. Section 368 refers generally to the power of the commissioners, and a special provision, like section 2442, applicable to a particular board, would seem to operate as an exception to the general rule. Section 2442 is almost identically

the same as section 3 of the act of the legislature approved March 22, 1870, entitled "An act to establish pilots and pilot regulations for the ports of San Francisco, Mare Island, Vallejo, and Benicia," and must be construed as a continuation thereof. Section 5 of the Political Code provides: "The provisions of this Code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as new enactments."

We see nothing in the provisions of section 4481 of the Political Code inconsistent with this view. The subject-matter of a title should be ascertained not so much from the head-lines as from its contents. The qualifications, appointment, term of office, organization, compensation, and powers and duties of pilot commissioners are the subject-matters of articles 5, 6, and 7 of chapter 1, tit. 6. The term of office and appointment of pilot commissioners, it is true, is a part of the subject-matter of sections 368 and 369 of title 1, but the provisions of title 6 as to such appointment and term of office are parts of the subject-matter of a subdivision of the Code which applies especially and exclusively to the board of pilot commissioners for the ports of San Francisco, Mare Island, and Benicia, and the board of pilot commissioners for Humboldt bay and bar, and the officers composing said board. The term of office of these commissioners is a part of the subject-matter of title 6. Title 1 names 69 civil executive offices. It contains an enumeration and classification of officers whose election, appointment, term, organization, powers, and duties are in nearly all cases provided for elsewhere in the Code. It does not legislate comprehensively upon the subjects referred to in its title, but seems to be rather of the nature of an index to the subject-matter of offices. Judgment affirmed.

PATERSON and McFARLAND, JJ., (*dissenting*.) We dissent. Sections 2440 and 2442 are a portion of title 6, pt. 3. This title relates to "public ways," and is divided into six chapters, which provide respectively for public waters, highways, toll-roads, toll-bridges, and ferries, wharves, chutes, and piers,—miscellaneous provisions relating to public ways. The rules for the construction of the Codes and the provisions thereof are given in sections 4478-4484 of the Political Code. It is there provided, among other rules: "If the provisions of any title conflict with or contravene the provisions of another title, the provisions of each title must prevail as to all matters and questions arising out of the subject-matter of such title." In the case at bar the conflict is not between the provisions of different chapters in the same title, or of different articles in the same chapter, or of different sections in the same chapter or article, but it occurs between provisions of different titles. It seems to us, therefore, that the rule prescribed by section 4481 must prevail in determining which of these sections shall stand as the law in this case. The provision of the Code is so clear that no other rule of construction can be applied. Article 1 deals almost exclusively with the election and appointment of officers, terms of office, the compensation and manner of removal, while article 6 is devoted largely to the construction and management of public ways. In article 1 nearly every state officer is referred to, and, where the term of office and mode of appointment is not given, the fact is stated that those matters have been elsewhere legislated on. In fact, the officers named in section 368 are about the only officers whose appointment and terms of office are regulated without reference to some other provision in the Code. The manner in which the election, appointment, term of office, etc., of the various offices, were prescribed by the legislature in that article, indicates grave consideration and deliberation. While it is true that "the subject-matter of a title does not depend so much upon the head-note as upon the contents of the title," still we think that the appointment of pilot commissioners, among other officers, is more naturally dealt with in that portion of the Code which provides specifically and only for the appointment, election, term of service, etc., of public officers of the state than in that portion of the Code which is devoted to the construction and maintenance of highways, etc. Title

1 deals with public officers to the exclusion of all other subjects. The object of all rules for the construction of statutes is to ascertain the intention of the law-maker. The rule prescribed by section 4481 is not only clear and applicable, but is founded in reason. It is intended to ascertain which of the conflicting provisions is the one to which the attention of the legislature was probably called. The appointment of the officers of the state was mere incidental matter in the establishment of the rules for the government of public ways. Any member of the legislature, desiring to review, change, or amend the law with respect to the appointment or term of office of any public officer, would naturally look first at that title which relates exclusively to such matters. We think that the court below erred in its decision that the governor had not the right of appointment.

It is claimed that the governor did not in fact remove the respondent; that the statement in the commission, "*vice* A. C. Freese, removed," the demand of the relator to be let into possession of the office, and the refusal of the defendant to comply therewith, do not show the removal, and therefore there was no vacancy to be filled. We think, however, that the appointment of a successor in office when an officer is removable at pleasure is a sufficient act of removal. "The mere appointment of a successor would, *per se*, be a removal of the prior incumbent." *Ex parte Hennen*, 13 Pet. 261; *Blake v. U. S.*, 103 U. S. 237; *Keenan v. Perry*, 24 Tex. 253.

PEOPLE v. BULGER. (No. 12, 542.)

(Supreme Court of California. June 21, 1883.)

In bank. Appeal from superior court, city and county of San Francisco: W. T. WALLACE, Judge.

PER CURIAM. The judgment of the court below is affirmed, upon authority of *People v. Freese*, ante, 812, this day filed.

77 Cal. 12

PEOPLE v. AH BEAN. (No. 20,361.)

(Supreme Court of California. June 23, 1883.)

PERJURY—INDICTMENT.

An information for perjury, charging that defendant was duly sworn in a certain case "then and there at issue, to-wit, the case of *The People v. Martine*," and setting out defendant's testimony therein, with an averment of its materiality, sufficiently "sets forth the substance of the controversy in respect to which the offense was committed," as required by Pen. Code Cal. § 966.

In bank. Appeal from superior court, San Bernardino county; JAMES A. GIBSON, Judge.

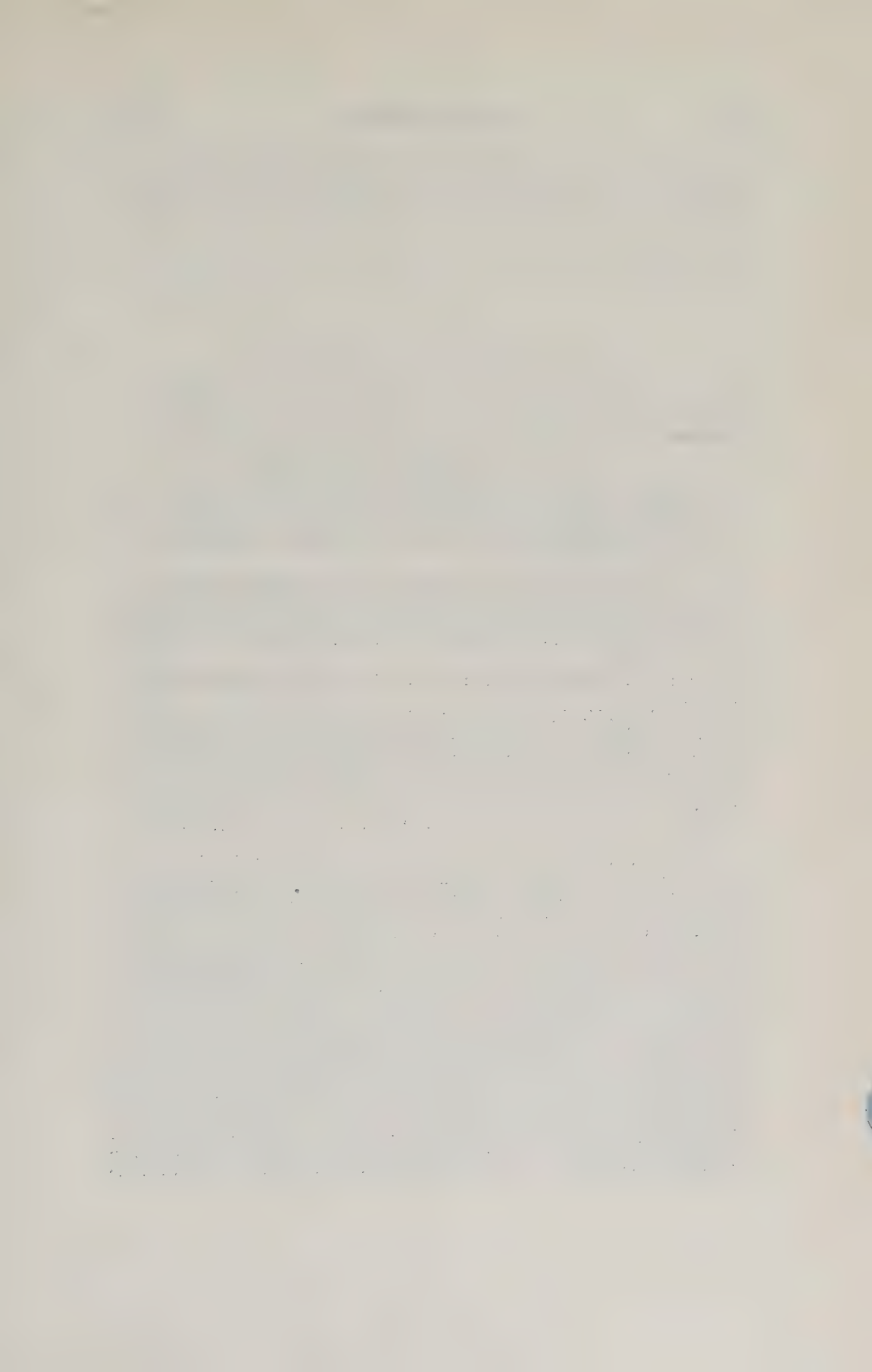
Information for perjury against Ah Bean. Defendant appeals from a judgment of conviction.

Wallace Leach and Harris & Gregg, for appellant. George A. Johnson, Atty. Gen., for the People.

SEARLS, C. J. Defendant was informed against for perjury, charged to have been committed on the 21st day of May, 1887, at the county of San Bernardino. The appeal is from a judgment of conviction. Defendant demurred to the information, which demurrer was overruled, and this action is assigned as error. The information, so far as essential to the present inquiry, is as follows: "The said Ah Bean, on the 21st day of May, A. D. 1887, at the said county of San Bernardino, state of California, having taken an oath before the superior court of the aforesaid county, Hon. H. M. WILLIS, Judge, presiding, that he would testify truly in said court, in a case then and there at issue, to-wit, the case of *The People v. Martine*, a Chinaman, said oath being and having been administered by George L. Hisom, the clerk of said superior

court, who then and there had authority to administer such oath, did, in a matter material to such issue, he, the said Ah Bean, defendant, having taken such oath as aforesaid, willfully, corruptly, falsely, and feloniously state, declare, and testify the truth to be that Martine, the defendant in the above-mentioned case, was at his, the defendant's, house for supper on the evening or February 18, 1887, and from 8 o'clock of that evening all night; and that said Martine did not leave his, defendant's, house,—all of which was false, the defendant well knowing such statement to be false." The contention of the defendant is that the information fails to set forth the substance of the controversy in respect to which the offense was committed as required by the Penal Code. Section 966 is in the following language: "In an indictment or information for perjury, or subornation of perjury, it is sufficient to set forth the substance of the controversy or matter in respect to which the offense was committed, and in what court and before whom the oath alleged to be false was taken, and that the court or the person before whom it was taken, had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned; but the indictment or information need not set forth the pleadings, record, or proceedings with which the oath is connected, nor the commission or authority of the court or person before whom the perjury was committed." The controversy, in respect of which the offense was committed, in this case was the case of *People v. Martine*. At common law it was necessary, in a case like the present, to set out in the indictment for perjury the pleadings in law or equity in the case in which the perjury is alleged to have been committed. The prolixity and technicality required in an indictment of this kind led to frequent failures of justice, by reason of mere formal defects; and to obviate the difficulty the statute of 14 & 15 Vict. was enacted by section 20 of chapter C, of which it was provided that only the substance of the offense charged upon the defendant need be set forth. Our statute is practically to the same effect. The information here shows the pendency of an action, to-wit, the case of *People v. Martine*, in the superior court, which case was then and there at issue; that defendant was sworn by the clerk, who was authorized to administer oaths; and that, in a matter material to such issue he willfully, corruptly, and feloniously testified as in the information specified. There are two modes by which the materiality of the alleged false statement may be shown in criminal pleading: *First*, by setting forth the nature of the issue, and the evidence given thereon, so that, as a matter of law, it may be said the testimony upon which the perjury is assigned is material to the issue; *second*, by showing an action at issue in a court of competent jurisdiction, the testimony given, its willful and felonious falsity, coupled with the averment that it was material to the issue. The difference in the two methods consists in showing the materiality of the testimony in the one case and merely averring it in the other. In *People v. Kelly*, 59 Cal. 372, it was held the materiality of the evidence need not be expressly averred, where it appears from facts stated; and in *People v. Brilliant*, 58 Cal. 214, it was held that an express averment of materiality is sufficient, unless the contrary appears from other averments. The information being certain and specific as to time and place, as to the court and person by whom the oath was administered, together with his authority to administer such oath, having shown the cause, and that it was at issue, the evidence given and its known falsity, as well as an averment of its materiality, the information was sufficient in law, and the demurrer and motion in arrest of judgment were properly overruled. The judgment and order are affirmed.

We concur: MCKINSTRY, J.; PATERSON, J.; SHARPSTEIN, J.; MCFARLAND, J.



76 Cal. 646

FURNISH v. MULLAN et al. (No. 12,432.)

(Supreme Court of California. June 21, 1888.)

1. WRIT—SUMMONS—PUBLICATION—AFFIDAVIT.

An affidavit for publication of summons sufficiently shows the non-residence of the defendant in stating that "the person on whom service is to be made formerly resided in this state, but has departed from this state, and now resides in the city of Washington, D. C."

2. SAME.

An affidavit for publication of summons is sufficient, under Code Civil Proc. Cal. § 412, which provides that summons may be served by publication when the person to be served resides out of the state, or cannot, after due diligence, be found within the state, when it shows that the person on whom service is to be made resides out of the state, without also showing acts constituting due diligence to find him in the state.

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Action by G. N. Furnish against John Mullan, J. M. Johnson, and two defendants whose names were not known to plaintiff. Defendant Mullan appeals. Code Civil Proc. Cal. § 412, provides that summons may be served by publication when the person to be served "resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state."

Frederick S. Stratton, for appellant. *Chas. G. Lamberson*, for respondent.

PATERSON, J. The affidavit upon which the order of publication of summons was made, states that "said defendant John Mullan is a proper and necessary party to the action; * * * that the person on whom the service is to be made formerly resided at the city and county of San Francisco, in this state, but has departed from this state, and now resides in the city of Washington, D. C." The order for publication of summons states, "And it further appearing that the residence of said defendant John Mullan is at the city of Washington, in the District of Columbia, it is ordered and directed that a copy of the summons and complaint in this suit be forthwith deposited in the United States post-office, postpaid, directed to said defendant at his said place of residence." The motion to set aside the judgment in the court below was based upon the ground—*First*, that the affidavit for publication did not disclose the residence of defendant Mullan, or that he was a non-resident; and, *second*, that the affidavit for publication did not show that due diligence had been used to find defendant Mullan in this state, or that he could not, after due diligence, be found within this state. It was sufficient, under section 412, Code Civil Proc., to show that the person on whom the service was to be made resided out of the state. This was done. The further statement, made

in the affidavit, "that affiant has made diligent inquiry to find said defendant, but cannot after due diligence find him within this state, and personal service of summons cannot be made on the defendant in this state," was immaterial, and it was not necessary for the plaintiff to show acts constituting "due diligence." Order affirmed.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; MCKINSTRY, J.; THORNTON, J.

76 Cal. 649

HOLLISTER *et al.* v. CORDERO *et al.* (No. 12,519.)

(Supreme Court of California. June 22, 1888.)

1. EVIDENCE—PRESUMPTION—SURVIVORSHIP.

Husband and wife were both murdered, and their house, in which their bodies were left, set on fire, and burned, and there was no proof as to which had actually expired first. *Held*, that Code Civil Proc. Cal. § 1963, subd. 40, providing that where two persons of different sex perish in the same calamity, both being over 15 and under 60 years of age, (as in this case,) the male will be presumed to have survived, is applicable, and the trial court properly adjudged that the entire community property belonged to the heirs of the husband.

2. SAME—HEARSAY—VERDICT OF CORONER'S JURY.

Where husband and wife were murdered on the same occasion, and their bodies placed in their dwelling, and burned, the verdict of the coroner's jury, not purporting to contain a statement of any facts as to the time or manner of their death, is inadmissible on the question of survivorship. It is mere hearsay.

In bank. Appeal from superior court, Santa Barbara county; B. T. WILLIAMS, Judge of Superior Court of Ventura County, presiding.

Action by Hannah A. Hollister, W. W. Hollister, and Ellwood Cooper, executors and trustees of the estate of William W. Hollister, deceased, against Estanislao S. Cordero, Ella A. Corliss-French, and others, for partition of the Rancho Los Cruces, situate in the county of Santa Barbara, and to adjudicate the claims of the several defendants to various shares and interests therein. Plaintiffs, among other interests, claimed an undivided one-ninth thereof, formerly owned and held by George W. Corliss and Lucretia A. Corliss, his wife, as community property, through an administrator's sale and grant from the heirs at law of Lucretia, the wife. Defendant Ella A. Corliss-French claimed the same interest by grant from the heirs of George W. Corliss. From that part of the decree adjudging said interest to Ella A. Corliss plaintiffs appeal.

Fernald, Cope & Boyce, for appellants. *W. C. Stratton, Paul R. Wright*, and *Hall & Taggart*, for respondents.

PATERSON, J. On January 9, 1864, G. W. Corliss and Lucretia, his wife, were murdered at their home on the Los Cruces *rancho*, in the county of Santa Barbara, and the house in which their bodies were left was set on fire, and burned, by the parties who killed them. The land in controversy, and sought to be partitioned herein, was the community property of said G. W. and Lucretia Corliss, and the rights of the parties depend entirely upon the question which one of the spouses died first, George W. or Lucretia? The law then provided—as it does now—that upon the death of the husband one-half of the community property should go to the wife, and upon the death of the wife the entire community property to the husband. Plaintiffs claim that the wife, Lucretia, survived her husband, and inherited one-half of the property. The court below found that George W. survived his wife, and gave judgment for defendant. The evidence is without conflict. The witnesses testify that they arrived at the scene of the murder on the morning after the killing. The body of the woman lay near the door. The hoops of her crinoline lay over her head, showing that she had been dragged into the house by the feet. There were small foot-tracks around a large rock a few yards from the house, and

blood upon the rock. There was a mark upon the ground indicating that the body of the woman had been dragged from the rock to the house, and there was the blood-mark of a small hand on the stone door-step, showing that she had clutched the door-step as she was being dragged into the house. The body of George W. lay in the middle of the floor near the fire-place, with several large wounds upon it. Both bodies were badly burned. The remains of the servant,—a shepherd,—were found several days later in the bottom of a stream several rods from the house. This is substantially all of the testimony upon the issue of survivorship. We cannot agree with counsel for appellant in saying that the evidence "points clearly and unmistakably to the conclusion that the husband was first slain within their dwelling on the ranch, and that the wife was afterwards pursued, seized outside of their habitation, murdered, and dragged by the feet over the threshold of the door, and the building then set on fire." It may be that such was the fact, but there is nothing to show which one expired first. The husband may have been wounded, and left on the floor of the house while they were pursuing the wife, and may have been alive when the latter was dragged into the house. No one can say from the evidence which one died first. Both may have been living while the house was burning. The court below, we think, properly indulged the presumption authorized by subdivision 40, § 1963, Code Civ'l Proc., which reads as follows: "When two persons perish in the same calamity, such as a wreck, a battle, or a conflagration, and it is not shown who died first, and there are no particular circumstances from which it can be inferred, survivorship is presumed, from the probabilities resulting from the strength, age, and sex, according to the following rules: * * * If both be over fifteen and under sixty, and the sexes be different, the male is presumed to have survived. If the sexes be the same, then the elder." Both were between the ages of 15 and 60. Both perished in the same calamity. The murder, perpetrated as it was, was a calamity, within the meaning of section 1963, *supra*,—as much so as would be a shipwreck or a battle; and the court found that there were no particular circumstances from which it could infer who died first. We think the decision of the court upon this issue was right.

The court did not err in striking out portions of the testimony. They were mere matters of opinion. All of the facts were fully stated by the witnesses.

There was no error in excluding the verdict of the coroner's jury. It does not purport to contain a statement of any facts within the knowledge of the coroner, or any juror, as to the time or manner of the death of Corliss and his wife. It is a matter of mere opinion and hearsay. Judgment and order affirmed.

We concur: SEARLS, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; MCKINSTRY, J.

77 Cal. 30

PEOPLE v. O'LEARY. (No. 20,358.)

(*Supreme Court of California.* June 26, 1888.)

1. CRIMINAL LAW—PLEAS—FORM.

Pen. Code Cal. § 1017, provides that every plea must be oral, and entered upon the minutes of the court; that a plea of former conviction or acquittal should be entered in substantially the following form: "The defendant pleads that he has already been convicted (or acquitted) of the offense charged by the judgment of the court of —;," and that a plea of former jeopardy should be substantially: "The defendant pleads that he has been once in jeopardy for the offense charged, (specifying the time, place, and court.)" The pleas as actually entered on the minutes of the court were as follows: "*First*, defendant pleads not guilty of the offense charged; *second*, a former acquittal; *third*, once in jeopardy." *Held*, that these pleas of former jeopardy and acquittal were not in the form required by the Code, and the defect could not be supplied by reference to written pleas filed at the time the pleas were entered by the clerk.

2. SAME—TRIAL—VERDICT ON DEFECTIVE PLEAS.

It is not necessary for the jury to find upon pleas of acquittal and former jeopardy which are not entered upon the minutes of the court in the form required by the Code.

3. SAME—JUDGMENT ON DEMURRER.

Pen. Code Cal. § 1008, provides that, if a demurrer to an indictment or information is allowed, the judgment is final, and a bar to another prosecution, unless the court, being of the opinion that the objection on which the demurrer is allowed may be avoided in a new indictment or information, directs the case to be submitted to a new grand jury, or directs a new information to be filed. *Held*, that it is not necessary for the judge to render an opinion that the objection to the information can be overcome by filing another, but it is sufficient if he directs a new information to be filed.

In bank. Appeal from superior court, Yolo county; C. H. GAROUFFE, Judge.

On rehearing. For former opinion, see 16 Pac. Rep. 884. Pen. Code Cal. § 1008, referred to in the opinion, provides: "If the demurrer is allowed, the judgment is final upon the indictment or information demurred to, and a bar to another prosecution for the same offense, unless the court, being of opinion that the objection on which the demurrer is allowed may be avoided in a new indictment or information, directs the case to be submitted to another grand jury, or directs a new information to be filed."

R. Clark, for appellant. Geo. A. Johnson, Atty. Gen., for the People.

PATERSON, J. The defendant was charged in the information with having practiced medicine without having first obtained a certificate authorizing him to do so, as required by the "Act to regulate the practice of medicine in the state of California." Deer. Pen. Code, 625-629. The language of the information is sufficiently full and explicit in charging the offense, and we think that the court did not err in overruling the demurrer. The appeal is from the judgment only. The bill of exceptions contains none of the evidence. We cannot say, therefore, that the court erred in refusing certain instructions referred to in appellant's brief.

In the former decision filed herein, (16 Pac. Rep. 884,) it was held that "the pleas of former acquittal and once in jeopardy, as the defendant asked to have them entered, were in substantially the form required by the Code." In support of this proposition, there was quoted in the opinion a portion of the contents of a written plea offered by defendant's counsel, and it was said: "If the clerk failed to make the entry as full as he ought to have done, the defendant cannot be made to suffer for that failure." The pleas actually entered upon the minutes of the court were as follows: "*First*, defendant pleads not guilty of the offense charged; *second*, a former acquittal; *third*, once in jeopardy." The jury found the defendant guilty, but did not find on the issues of former acquittal and once in jeopardy. The pleas, as entered upon the minutes, were insufficient. Section 1017, Pen. Code, prescribes the form for such pleas. If the defendant plead a former conviction or acquittal, the form is as follows: "The defendant pleads that he has already been convicted (or acquitted) of the offense charged, by the judgment of the court of — (naming it,) rendered at —, (naming the place,) on the — day of —." If he plead once in jeopardy, the form is as follows: "The defendant pleads that he has been once in jeopardy for the offense charged, (specifying the time, place, and court.)" The object of these forms is plain. The people should be informed of the circumstances as to time, place, and court. None of these circumstances are named in the plea actually entered upon the minutes of the court below; and we cannot resort to the written document, which it is claimed was filed at the time the plea was entered, in aid of the plea actually entered. Section 1017, *supra*, provides that "every plea must be oral, and entered upon the minutes of the court in substantially the following form." The bill of exceptions in the record before us was prepared for and used only upon the

motion in arrest of judgment. The bill of exceptions does not purport to be a bill prepared to present exceptions to the rulings of the court upon any other matter than that of the motion in arrest of judgment. The written plea referred to is not properly in the bill of exceptions. Section 1185, Pen. Code, prescribes the grounds upon which a motion in arrest of judgment may be made. It is "founded on any defects in the indictment or information mentioned in section 1004." There was no error in the ruling of the court below upon the defendant's motion in arrest of judgment, and, the pleas referred to not being in the form required by the Code, it was not necessary for the jury to find on them.

We see no merit in the contention that the defendant should have been discharged from custody because the court below failed to render an opinion that the objection to the information to which the demurrer had been sustained, could be overcome by filing another. The court directed the district attorney to file a new information, and this was a sufficient compliance with section 1008 of the Penal Code. It was not said in *People v. Jordan*, 63 Cal. 219, that the court must, in addition to directing the district attorney to file a new information, render an opinion that the objection to the information could be overcome by filing another. Judgment and order affirmed.

We concur: SEARLS, C. J.; MCFARLAND, J.; THORNTON, J.

77 Cal. 34

JOHNSON v. REICHAET, Surveyor General. (No. 12,715.)

(Supreme Court of California. June 26, 1888.)

MANDAMUS—COURTS—JURISDICTION.

An application for a writ of mandate to the surveyor general should be made in the superior court.

In bank. Original proceedings in *mandamus*.

Matt F. Johnson, for petitioner. *Geo. A. Johnson*, Atty. Gen., for respondent.

PER CURIAM. The application for a writ of mandate in the above-entitled cause is hereby denied, for the reason that the application should be made in the superior court.

77 Cal. 38

MALONE v. CRESCENT CITY M. & T. Co. (No. 11,121.)

(Supreme Court of California. June 27, 1888.)

1. CORPORATIONS—ACTIONS—PLEADING CONTRACT.

A complaint which alleges a contract made by defendant, a corporation, which contract is set out *in hæc verba*, and purports to be signed by the president of the company, need not aver the authority of the president to make the contract, as want of such authority is matter of defense.

2. CONTRACT—INTERPRETATION—NOVATION.

Plaintiff, a creditor of M., and defendant, a corporation engaged in the lumbering business, entered into a contract whereby defendant, which was getting logs of M., agreed to pay plaintiff \$100 on his debt on every run of logs M. delivered to defendant out of the amount due him on such run, which sum was to have preference over any other order or indebtedness on the amount due M. on each run. *Held*, that this contract bound defendant to pay plaintiff the sum of \$100 on each run of logs, if it amounted to so much, whether defendant owed M. anything or not.

3. SAME.

Said contract is not a continuing guaranty, and so liable to be revoked by defendant, but an absolute promise to pay plaintiff the sum of \$100 upon the delivery of each raft, and defendant cannot continue to receive the logs, and at the same time revoke or rescind the contract.

4. SAME—CONSIDERATION.

The delivery of logs from time to time by M. under said contract was a sufficient consideration for the promise of defendant to plaintiff, and plaintiff could maintain an action thereon.

Department 1. Appeal from superior court, Del Norte county; JAMES E. MURPHY, Judge.

This was an action by John Malone against the Crescent City Mill & Transportation Company and Charles F. Murray, to recover the sum of \$600. The action was brought on the following contract: "CRESCENT CITY, December 19, 1883. Whereas, C. F. Murray, of Del Norte county, Cal., is indebted to John Malone, of the same place, in the sum of one thousand dollars, and is desirous of paying the same; and whereas, he, Murray, is engaged in running logs for the Crescent City Mill and Transportation Company, of said county, to their mill on Lake Earl: Now, said Murray agrees to pay said Malone the sum of \$100 on each raft of logs run by him for said company until the above sum of \$1,000 is fully paid; and the said Crescent City Mill and Transportation Company are hereby requested to pay the said sum of \$100 to said Malone on each run of logs made by him for them, out of the amount due him on said run; and the Crescent City Mill and Transportation Company, in consideration of the premises, hereby agrees to retain out of the amount due or to be due said Murray on each run of logs, as aforesaid, \$100, and pay the same to said Malone, until the said sum of \$1,000 is fully paid; and it is further understood and agreed between the parties hereto that the orders contained herein by said Murray to said C. C. Mill and T. Co. shall have precedence, to the extent thereof, on amt. due said Murray by said company, on each run of said logs, over any other order or indebtedness whatsoever. CHAS. F. MURRAY. THE CRESCENT CITY MILL AND TRANSPORTATION COMPANY, By J. WENGER, President." The complaint alleged that, after the contract was made, Murray made nine runs of logs, and delivered them to the company, which had paid plaintiff \$300. A trial by jury resulted in a verdict for plaintiff of \$600, from the judgment on which verdict the defendant corporation appealed.

L. F. Coburn and Sawyer & Burnett, for appellant. *R. G. Knox, Wm. H. H. Hart, and Aylett R. Cotton*, for respondent.

PATERSON, J. The demurrer was properly overruled. The complaint alleges that the defendant (by its president, J. Wenger) made and entered into the agreement set forth therein. The contract is signed, "THE CRESCENT CITY MILL AND TRANSPORTATION COMPANY, By J. WENGER, President." If the president, as such, had no authority to enter into the contract, it was a matter of defense. The allegation that the defendant made the contract is sufficient, certainly, as against a general demurrer. In other respects we think the complaint was sufficient. A copy of the contract is set forth therein. It is assumed by the terms of the contract that there would be at least \$100 due Murray on each run of logs. Under the peculiar language used, if it be conceded that there was not an absolute promise to pay \$100 on each run of logs, the burden was upon the defendant to show that there was less than \$100 due Murray on any raft.

There are no assignments of error in the record. The only points made as to the insufficiency of the evidence are: *First*, there is no evidence to show that there is or was anything due from the defendant corporation to the defendant Murray, or to the plaintiff, since the payment of the said \$300; *second*, that the evidence is undisputed and uncontradicted that there was no consideration for the said agreement; and, *third*, that the agreement was revoked prior to the delivery of the fourth raft. The contract provides that the payments of \$100 on each run of logs "shall have precedence, to the extent thereof, on amount due said Murray by said company on each run of said logs, over any other order or indebtedness whatsoever." The evidence showed that the smallest raft contained 189,447 feet of lumber, and that the price to be paid Murray by the defendant corporation was \$4 per 1,000 feet. The amount to be paid Murray for the smallest raft, therefore, was nearly \$800. The evi-

dence does not show what expenses were to be deducted from that amount, if any, and the contract, as before stated, expressly provides that the \$100 to be paid the plaintiff on each raft should have precedence over any other order or indebtedness whatsoever. The fact that there was nothing due Murray from the defendant corporation when the rafts were delivered does not alone determine the liability of the defendant in this action. If the defendant chose to pay Murray in full for each raft in cash, or by filling orders in advance of the delivery of the rafts, it did so at its peril, for the contract expressly stipulated against such a contingency.

The written instrument imports a consideration, and there was, in fact, a consideration passing from Murray to the defendant. He continued to deliver logs to it at the prices agreed upon. This was sufficient. In *McLaren v. Hutchinson*, 18 Cal. 80, it was held that where A. owes B., and B. owes C., and A. and B., without consulting C., agree that A. shall pay to C. the amount which A. owes B., an action could not be maintained by C. against A., for want of privity; but this decision was practically overruled in *Lewis v. Couvillaud*, 21 Cal. 178, and *McLaren v. Hutchinson*, 22 Cal. 190. Such a promise, although the party for whose benefit it was made was not cognizant of it when made, is, if adopted by him, deemed to have been made to him, and he may sue upon the promise thus made without a consideration passing from him to the promisor, (*Lawrence v. Fox*, 20 N. Y. 268; *Anthony v. Herman*, 14 Kan. 497; *Kollock v. Parcher*, 52 Wis. 393, 9 N.W. Rep. 67; Pom. Rem. & Rem. Rights, § 139;) and it is no objection to the maintenance of a suit by him for whose benefit the promise is made that an action might be brought also against the one to whom the promise was made. *Mason v. Hall*, 30 Ala. 601.

The contract was not revoked or rescinded as claimed by appellant. It was not a contract of guaranty, continuing or otherwise. By its agreement and its acceptance of the rafts from Murray, the defendant corporation became indebted to the plaintiff in the sum of \$100 for each raft, unless, perhaps, it could show that there was not that amount due Murray on any raft after deducting whatever expense the defendant was entitled to deduct from the price to be paid Murray therefor, and without giving precedence to "any other order or indebtedness." The defendant could not continue to receive logs from Murray and at the same time repudiate the payment of \$100 on each run. So long as the defendant continued to receive the runs of logs, it continued to receive the consideration passing from Murray to it, and could not, under such circumstances revoke the agreement.

No exceptions were taken to any of the instructions given to the jury, and, as stated before, there are no specifications of errors in the bill of exceptions. Judgment and order affirmed.

We concur: SEARLS, C. J.; TEMPLE, J.

77 Cal. 36

CAMPBELL v. HAYES. (No. 11,063.)

(Supreme Court of California. June 27, 1883.)

1. APPEAL—REVIEW—PRESUMPTION.

Where the objection is first raised in the appellate court that the action being an equitable one, the verdict of the jury cannot support the judgment because there were no written findings by the court, in the absence of a bill of exceptions, statement, or other method whereby the question is presented on the record, such findings, if necessary, will be deemed to have been waived, and the certificate of the clerk that they were not waived cannot be considered.

2. SAME—SUFFICIENCY OF EVIDENCE.

Where there is some evidence on every point necessary to support the verdict, the judgment will not be disturbed on appeal, although the evidence is not entirely satisfactory.

3. SCHOOL LAND—ACTION BETWEEN APPLICANTS TO PURCHASE.

The action to try the question as to which of two applicants is entitled to purchase school lands, provided for in Pol. Code Cal. § 3495, is strictly statutory, and involves no equitable doctrine.

Department 1. Appeal from superior court, Del Norte county; JAMES E. MURPHY, Judge.

L. F. Cooper and *Sawyer & Burnett*, for appellant. *R. W. Miller, Wm. H. H. Hart*, and *Aylett R. Cotton*, for respondent.

SEARLS, C. J. Plaintiff and defendant were both applicants to purchase from the state of California the E. $\frac{1}{2}$ of section 16, in township 18 N., of range 1 E., Humboldt meridian. A contest having arisen in the office of the surveyor general of the state as to which of the applicants was entitled to purchase the land, that officer referred the matter to the court for adjudication, and this action was brought to determine the question. The case was tried by a jury, and resulted in a verdict in favor of plaintiff, upon which judgment was entered. Defendant, Hayes, appeals from the judgment, and from an order denying a new trial. The first point made by appellant is that the judgment should be reversed for want of findings by the court. This contention proceeds upon the theory that the case at bar is on the equity side of the court, and therefore the verdict of the jury is insufficient to support a judgment without some affirmative action approving it, and without written findings.

1. Both plaintiff and defendant were applicants for the purchase of the land in question under section 3495 of the Political Code, it being school land. The action provided for upon a reference by the surveyor general to the courts is a statutory action. It does not involve the title to the land, for that is in the state, but the right to purchase and procure such title. This right depends upon the establishment of the facts essential, under the statute, to give the right, and the application of the law thereto. It involves no equitable doctrine. The frigid rules of the statute are to be applied, and form the basis upon which the parties must stand or fall.

2. The objection does not seem to have been made in the court below, but is raised here for the first time, and is not supported by any bill of exceptions or statement. Where written findings are necessary, and do not appear in the record, they will be deemed to have been waived; and, if they were not, the error must be shown by a bill of exceptions, statement, or other appropriate method whereby the record presents the question. *Mulcahy v. Glazier*, 51 Cal. 626; *Reynolds v. Brumagin*, 54 Cal. 254; *Glenn v. Arnold*, 56 Cal. 631. The certificate of the clerk that written findings were not waived, forms no part of the record which we can notice. It forms no part of the judgment roll, and has no more verity than would the testimony of witnesses given at the trial, certified in like manner. Except as to matters made a part of the record by statute, the verification of the judge is essential to give validity to the proceedings. The office of a bill of exceptions or statement is to make a record of that without which it would not constitute a record. For these reasons we are of opinion the error is not well assigned.

The evidence in favor of plaintiff at the trial was not altogether satisfactory; but, as there seems to have been some evidence upon every point necessary to support the verdict, we are not warranted in disturbing the judgment. The judgment and order appealed from are affirmed.

We concur: PATERSON, J.; TEMPLE, J.

3 Cal. Unrep. 5

PEOPLE v. McCARTHY. (No. 20,396.)

(Supreme Court of California. June 30, 1888.)

EMBEZZLEMENT—DEFENDANT AS WITNESS—CROSS-EXAMINATION.

On trial for embezzling \$550 received by defendant on a certain state warrant, it is not error to cross-examine him as to whether he had received money on other state warrants. MCFARLAND, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

John W. McCarthy was indicted for embezzling \$550, received by him on warrant No. 7,999 while clerk of the supreme court of California. Having testified in his own behalf, he was cross-examined as follows: "Did you receive that warrant from the treasurer,—No, 8,706? Is that your signature on the back of that warrant?" The defendant objected to the question on the ground that it was not proper cross-examination, it is not the warrant of the state, and it is irrelevant and immaterial. The court overruled the objection, and allowed the question, to which ruling the defendant then and there excepted; and, the question being repeated, the defendant declined to answer on the ground that the answer would tend to convict him of a felony, under instructions of his counsel, and his statement that if witness answered the question he would leave the case. The court permitted the witness to decline to answer on the grounds given, and on no other grounds. The district attorney, subject to the same objection, ruling, and exception, and the further objection that it is improper to ask a question lumping all the warrants together, asked the following question: "Did you receive the money on each one of these warrants, 1,692, 3,181, 1,233, 4,000, and 4,727?" The witness declined to answer, for the same reason given above. "*Question by District Attorney.* How much money did you owe to Mr. Hellman, of Los Angeles? How is it that you did not pay them all? *Mr. Baggett, for Defendant.* You can take the benefit of the instruction given you by counsel, and not answer that 'question.' *The Court.* I will allow the question. *By Mr. Graves, Dist. Atty.* You decline to answer the question? *A.* Yes, sir. *Q.* On the ground that it would tend to criminate you? *A.* Yes, sir; of another crime. *Q.* I notice that in the month of October, 1885, here, which corresponds to the voucher here, you have got eleven of them marked 'Paid,' and fourteen, 'Unpaid.' What did you do with the balance of that money? *Mr. Ferral.* We object, as not being cross-examination at all. *The Court.* I think it comes under the line of cross-examination. The objection is overruled. *Mr. Ferral.* Note an exception. *Q.* Where did you get that money? *Mr. Ferral.* That is the same thing. This is not cross-examination, but in furtherance of their own examination."

W. T. Baggett, W. W. Foote, and T. C. Coogan, for appellant. Geo. A. Johnson, Atty. Gen., for the People.

PER CURIAM. The court is of opinion that the cross-examination of defendant was without error. We find no error in the record, and the judgment and order are affirmed.

MCFARLAND, J., dissenting.

76 Cal. 590

REQUA et al. v. SNOW. (No. 12,524.)

(Supreme Court of California. June 16, 1888.)

SPECIFIC PERFORMANCE—LACHES.

Where the vendee, in an agreement for the sale of land, tenders the purchase money, more than three years after maturity of the note given for the land, and

more than two years after the last payment of interest, the latter being payable monthly, in advance, without any excuse for the delay, the land having in the mean time increased in value, equity will not decree specific performance.¹

In bank. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

Action by J. L. Requa and Helen Requa against S. P. Snow, to enforce specific performance of a contract for the sale of land. Judgment for defendant on cross-complaint, and plaintiffs appeal.

W. C. Stratton, for appellants. *B. F. Thomas*, for respondent.

SHARPSTEIN, J. This action was brought to enforce the specific performance of a contract for the sale of real estate. Defendant filed a cross-complaint praying affirmative relief, and judgment was rendered for him for possession of the property and cancellation of the contract. Plaintiffs appeal from the judgment, and insist that it is not supported by the findings. The findings are that on the 17th day of July, 1882, the defendant made to plaintiff J. L. Requa an offer in writing in the following words and figures: "I will take Requa's note for eighteen hundred dollars for one year from the 20th day of September next for the part of my block 88 on which Judge E. B. Hall now resides, on the corner of Sala and Garden streets, in the city and county of Santa Barbara, Cal.; I to execute a good and sufficient deed for it on the payment of said note; possession August prox.; the said Requa to pay me for the rent, and the interest on the said note, and house and lot; Requa to have until the 20th inst., all day, to inform acceptance or not of the foregoing proposition, at his office. [Signed] S. P. SNOW. July 17, 1882." The plaintiff J. L. Requa accepted the above offer in the following words and figures: "I hereby accept the foregoing offer, and execute herewith my promissory note accordingly: SANTA BARBARA, September 20, 1882. \$1,800. One year after date, for value received in house and lot, as aforesaid, I promise to pay \$1,800, with interest,—\$12 per month for each and every month, in advance. J. L. REQUA." The acceptance and promise to pay was delivered to defendant, and accepted by him. At or about the same time plaintiffs went into possession of the premises, and have ever since remained in possession thereof. Plaintiff J. L. Requa paid the interest or rent specified in said contract up to and including June 20, 1884, but no other or further payment has been made on said contract, either of principal, interest, or rent. On the 20th of September, 1882, plaintiff J. L. Requa assigned said contract to the plaintiff Helen Requa, of which defendant was not aware before the commencement of this action. "On the 13th day of September, 1886, plaintiff Helen Requa wrote to the defendant that she desired to know the amount due on the land, and the defendant replied that he did not and had not for a long time considered that anything was due him upon said land and house." The last-above finding, and the following, are copied in full from the transcript: "That in the month of December, 1884, the plaintiffs thinking they had found a purchaser for said parcel of land at an advance, and the defendant wanting his money to buy a ranch in Carpinteria, directed the defendant to make out a deed for said land, leaving the name of the grantee blank until it should be ascertained if the deed should be made in the name of the vendee or his wife; that the defendant did on the ——— day of December, 1884, sign a deed conveying said land, the name of the grantee being left blank, and the defendant placed said deed in the hands of his agent, with instructions that when the

¹As to what is such lapse of time as will preclude equitable relief, and what are circumstances sufficient to rebut the imputation of laches, see *Hoffert v. Miller*, (Ky.) 6 S. W. Rep. 447, and note; *Bausman v. Kelley*, (Minn.) 36 N. W. Rep. 333; *Waterman v. Manufacturing Co.*, (Conn.) 12 Atl. Rep. 240; *Jones v. Slauson*, 33 Fed. Rep. 632; *Mallagh v. Mallagh*, (Cal.) 16 Pac. Rep. 535; *Land Co. v. Macauley's Adm'r*, (Va.) 6 S. E. Rep. 697; *Northrup v. Stevens*, (Minn.) 39 N. W. Rep. —.

name of the grantee should be ascertained said agent should insert the same, and, upon payment of the money due on said contract, deliver said deed. Said money was not paid or tendered, and the defendant resumed the control of said deed. No certificate of acknowledgment was attached to said deed." On the 20th day of February, 1887, plaintiffs tendered the amount due under said contract, and demanded a deed of said premises. Defendant refused to accept said tender, or to execute a deed. By the terms of the agreement, of which specific performance is prayed, the plaintiff J. L. Requa promised to pay the sum specified for the premises on the 20th of September, 1883. No part of that sum was paid or tendered until the 20th day of February, 1887, and the interest or rent which plaintiff agreed to pay monthly in advance was paid up to and including June, 1884, and not after that date. The tender was made more than three years after the maturity of the note, and no interest or rent was paid for more than two years before the tender was made and a deed demanded.

It is well settled in this state that delay to comply with his agreement to pay for such a length of time, without rendering a reasonable excuse for it, is an insuperable objection to enforcing, in his favor, a specific performance of the contract to convey land. In *Green v. Covillaud*, 10 Cal. 317, the court says: "Will a court of equity enforce a specific performance of an agreement to convey lands when the plaintiff shows no compliance or offer of compliance on his part with the agreement, nor any excuse therefor, for the period of 21 or 22 months from the time he bound himself to perform? And this question, too, is decided in effect by *Brown v. Covillaud*, 6 Cal. 568, from which opinion the negative of the proposition results as a logical necessity." Here the court finds that between the 1st day of March, 1886, and the commencement of this action, the land in controversy enhanced in value, so as to be worth \$5,000 when the action was commenced. This is more than double the sum which plaintiff agreed to pay for it. The rental value for the two years next preceding the trial of the action is found to have been from \$20 to \$25 per month, and \$15 per month from the date of the contract up to two years before the commencement of this action. The equities appear to us to be wholly on the side of the defendant, and we think the relief awarded him in the judgment appealed from not in excess of what he is justly entitled to upon the findings before us. Judgment affirmed.

We concur: SEARLS, C. J.; MCFARLAND, J.; PATERSON, J.; THORNTON, J.

76 Cal. 395

BURRIS *et ux.* v. FITCH *et al.* (No. 11,077.)

(*Supreme Court of California.* June 5, 1888.)

BOUNDARIES—ACQUESCENCE IN BOUNDARY LINE—ESTOPPEL TO DENY.

Plaintiff, having allowed defendant, who owned the adjoining tract of land, to build a fence between the two, and to occupy, improve, and cultivate the land up to such fence, without any objection, for a period of 16 or more years, cannot contend that such fence is not the true boundary line.¹

Department 2. Appeal from superior court, Sonoma county; JOHN G. PRESSLEY, Judge.

Action of ejectment by William and Elizabeth Burris against Mary A. Fitch and Wallace B. Fitch. Judgment for plaintiffs, and defendants appeal.

R. B. Tappan and *Van Duzer & Teake*, for appellants. *George Pearce*, for respondents.

SHARPSTEIN, J. This appeal is from a judgment recovered by the plaintiffs against the defendants in an action of ejectment. The contention of appellants here is that the findings of fact do not justify the conclusion of

¹See *Koopman v. Blodgett*, (Mich.) 38 N. W. Rep. 649, and note.

law or the judgment. The controversy is as to the boundary line between two tracts of land, one of which is owned by plaintiffs, and the other by defendants. The plaintiffs settled upon the tract claimed by them in the year 1851, and procured a conveyance of it in 1858. Defendants' grantors procured a conveyance of the tract claimed by them in 1851. Both conveyances are from the town or city of Sonoma. The lot conveyed to defendants' grantors is described as lot No. 554, which is bounded on the east by a line known as the "Trancas Line," an indeterminate line, run by O'Farrell and Hudspeth in 1847. Defendants' grantors, Lyon & Sneed, to whom said town or city of Sonoma conveyed said lot 554, inclosed with it a small strip of land east of said Trancas line, on which they had previously hauled a small dwelling-house. Between 1855 and 1858, Lyon built a small barn to the eastward of his dwelling, and east of the fence built by him and Sneed, and inclosed about half an acre, on which the barn stood. In January, 1868, one Stanley purchased said lot No. 554, and built a fence on the easterly line of the demanded premises, and occupied said premises from the date of his purchase until 1873, but never claimed eastward beyond the Trancas line. Stanley built the fence at his own expense, without saying anything to the plaintiffs on the subject. After completing the fence, he requested plaintiffs to convey to him (Stanley) the demanded premises, which they refused to do. In 1873, Stanley, when about to sell lot No. 554 to one Yates, pointed out to Yates the situation as he (Stanley) understood it, but told Yates that he (Stanley) did not know where the true east line of lot No. 554 was; but he supposed, from what he had been told, that it ran between the dwelling-house and the barn; that none of the deeds of conveyance to the defendants or their grantors purport on their face to convey any land except lot No. 554. In 1860, plaintiffs filed a declaration of homestead, covering the entire tract conveyed to them by the city or town of Sonoma. The following findings are copied literally from the transcript: "(9) That valuable permanent improvements were put on the strip of land in controversy after the division fence was built, in 1868, consisting of an addition to the dwelling-house, (which was made after the issue of the United States patent for said pueblo lands,) the planting of fruit trees, grape-vines, and the building of outhouses. (10) That said Lyon tract, lot No. 554, has been owned, possessed, and occupied by five or six different persons since the construction of the division fence built by Stanley, and the land in dispute has been occupied by said claimants and owners of lot No. 554. (11) That neither of said plaintiffs ever made any objections to the construction or continuance of said fence built by Stanley, and never claimed or intimated to any one of the numerous successive owners and occupants, except J. J. and A. G. Lyon, and also except Stanley, when he held the land, that they, or either of them, had any claim or right to any part of the land embraced in said Lyon tract as inclosed until about the 1st of January, 1884, and after the said defendant, Mary A. Fitch, had become the purchaser thereof. (12) That plaintiffs frequently visited the Lyon tract during a period of sixteen or eighteen years before the commencement of this action, and witnessed the progress of the improvements that were made,—the addition to the dwelling-house, the planting of grape-vines and fruit trees in and upon the strip of land in controversy; and permitted said improvements to be made without objection. (13) That the defendant, Mary A. Fitch, purchased said premises, as inclosed, in good faith, and without any actual knowledge of any claim of the plaintiffs to any part of said tract of land in controversy. (14) That a portion of the present dwelling-house on the tract of land in controversy was built more than thirty years before the commencement of this action, and that a barn has been on said land for a like period." The salient facts found are that in 1868 the owners of lot No. 554 constructed a fence which inclosed the demanded premises with said lot, and that said owners of said lot 554 occupied, cultivated, and improved said demanded premises, as a

part of said lot, for a period of 16 or 18 years, with the knowledge of the plaintiffs, who made no objection to such occupancy, cultivation, and improvement of said demanded premises up to the time of bringing this action.

We think this shows an acquiescence by plaintiffs, for a period of at least 16 years, in the location of that fence as the division line between the lots of the plaintiffs and defendants. There was a silent assent or submission, with apparent consent, as distinguished from avowed consent and from opposition or open discontent. In *Columbet v. Pacheco*, 48 Cal. 395, it was laid down that acquiescence in the location of a fence as a dividing line between two lots for a period of 16 years estopped the defendants from controverting the correctness of the location. In *Sneed v. Osborn*, 25 Cal. 619, the court said: "The authorities are abundant to the point that when the owners of adjoining lands have acquiesced for a considerable time in the location of a division line between their lands, although it may not be the true line according to the calls in their deeds, they are thereafter precluded from saying it is not the true line. The better opinion is that the considerable time mentioned in the cases must at least equal the length of time prescribed by the statute of limitations to bar a right of entry." We have nowhere seen the doctrine of all the cases more clearly stated than it was by Senator MAISON in the late court for the correction of errors of the state of New York. He said: "To deprive a man of his absolute right to the unquestioned fee of his land, according to the doctrine of the courts, regardless of or according to the construction which they have given to the statute for the prevention of frauds and perjuries, it should appear most clear and distinct, without the shadow of a doubt, and by testimony the most convincing and satisfactory, that there was an express agreement made between the owners of the adjoining lands, deliberately settling the exact, precise line or boundary or location between them, and an acquiescence therein for a considerable length of time; or, in the absence of proof of such agreement, it should be as clearly, distinctly, and satisfactorily shown that the party claiming has had possession of the lands claimed, up to a certain, visible, known line, with the express knowledge and assent of the owner of the adjoining land, and his acquiescence in such possession, adverse to and in defiance of his right; and this for a considerable time." *Adams v. Rockwell*, 16 Wend. 285. The findings here are of the probative rather than of the ultimate facts. In that respect they are unsatisfactory; and, while they manifestly do not justify the judgment, we are not satisfied that they would justify a judgment for the defendants. Instead, therefore, of reversing the judgment, and directing that one be entered for the defendants, we have concluded to reverse the judgment and order a new trial. In this way we think a more satisfactory result may be reached. Judgment reversed, and cause remanded for a new trial.

We concur: THORNTON, J.; McFARLAND, J.

91 Cal. 405

LUCO v. TORO. (No. 12,566.)

(Supreme Court of California, June 27, 1888)

1. LIMITATION OF ACTIONS—RUNNING OF THE STATUTE—VENDOR AND VENDEE.

Where the owner of an interest in a tract of land covenanted to convey a part thereof to another if the latter would procure a patent for the lands from the United States, and a patent was obtained on September 1, 1876, an action to enforce the contract, begun August 8, 1882, the executor of the covenantor having refused to execute a conveyance more than four years before the commencement of the action, and denied the plaintiff's right, is barred by Code Civil Proc. Cal. § 337, limiting actions upon contracts founded upon instruments in writing to four years, and by the general limitation of four years of section 343 for all actions not otherwise provided for; there being no trust relation between the parties to the contract, since plaintiff never was in possession of the land.

2. TRIAL BY COURT—FINDINGS—STATUTE OF LIMITATIONS.

Where the answer avers that the cause of action stated in the complaint is barred by the provisions of Code Civil Proc. Cal. §§ 337, 343, a finding by the court that the cause of action was barred by those sections before the commencement of the action is not insufficient on the ground that it states mere conclusions of law.

In bank. Appeal from superior court, San Diego county; THOMAS H. BUSH, Judge.

Action for partition by Juan M. Luco against Juan De Toro. The court gave judgment for defendant, Toro; and plaintiff, Luco, appeals. Finding 5, referred to in the opinion, is as follows: "That, immediately after the execution of the agreement between Agustin Olvera and Isaac Hartman, said Hartman entered upon the performance of the stipulations in said agreement contained on his part to be performed; and after his sale to plaintiff, Luco, as found in finding 2, said Luco and Hartman continued in the performance of said stipulations, and did so continue by themselves, or their agents and attorneys, to prosecute to a final conclusion the agreements and stipulations in said agreement contained on the part of said Hartman to be performed; that owing to a quarrel between Hartman and Olvera, about the year 1874. Olvera became dissatisfied with Hartman, and on behalf of himself and the heirs of Santiago Arguello, the confirmee of said Ex-Mission *rancho*, employed one A. St. Clair Denver, an attorney at law, of Washington city, D. C., to prosecute the claims of said heirs, and of the interest of said Agustin Olvera, in and to the Rancho Ex-Mission of San Diego, before the proper department at Washington city aforesaid, and thereafter, by the joint exertions of said A. St. Clair Denver and the Honorable Cornelius Cole, acting as attorney for Hartman and Luco, a patent was duly obtained, as alleged in the complaint, on the 1st day of September, 1876; that, owing to the death of the principal parties to the said agreement, to-wit, Hartman and Olvera, the great lapse of time, and uncertainty of recollection of surviving witnesses, under the evidence in this case it is impossible to determine and measure the extent of performance of plaintiff or his vendor, Hartman, under the agreement aforesaid; and the court finds only that, up to the time of the issuance of the patent aforesaid, there had not been a full and complete or substantial performance of said agreement on the part of Hartman or Luco as vendee, but only a partial performance thereof." Code Civil Proc. Cal. § 337 provides that "an action upon any contract, obligation, or liability founded upon an instrument in writing executed in this state," must be begun within four years; and section 343 provides that "an action for relief not hereinbefore provided for must be commenced within four years after the cause of action accrued."

Lee & Scott, for appellant. *Henry M. Smith* and *Harry L. Titus*, for respondent.

MCFARLAND, J. This is an action for the partition of the Rancho Mission (or Ex-Mission) of San Diego. There were originally a great many parties, both plaintiff and defendant, to the action; but as the interlocutory decree was satisfactory to all the parties except the plaintiff, Luco, and the defendant, Toro, it was stipulated that a final decree should be entered, with permission to said Luco and Toro to further litigate between themselves. The case was thus ended as to all the other parties; the only question left being whether Luco or Toro was entitled to a certain specific segregated tract of 5,053 acres of the *rancho*. This tract was set apart to Luco upon the theory that a commissioner's deed to him, in pursuance of a decree of the superior court of San Francisco, passed the legal title. This decree was in an action brought by Luco against one Carlos Olvera, as executor of the estate of Augustin Olvera, deceased, to compel the execution of a deed for the land in controversy according to the terms of a certain contract made between said Augustin Olvera, deceased, and one Isaac Hartman. In that action, Carlos Olvera made de-

fault; but, upon appeal, in the case at bar, this court reversed that part of the decree which awarded the land to Luco, upon the ground that Carlos Olvera was not the executor of said estate when said action was commenced, or during its pendency. *Luco v. Bank*, 70 Cal. 339, 11 Pac. Rep. 650. Upon the return of the cause to the court below, Luco filed an amendment to the complaint, in which he set up for the first time the said contract between said Augustin Olvera, deceased, and said Hartman, and the conveyance by Hartman of his interest, under said contract, to Luco, and claimed an equitable interest in the land. The court gave judgment for defendant, Toro; and the plaintiff, Luco, appeals. The amendment to the complaint was filed December 13, 1886, and the original complaint was filed August 8, 1882. On the 3d day of February, 1869, Agustin Olvera was the owner and in possession of an undivided interest of more than one-half of said Rancho of the Ex-Mission of San Diego. On that day he entered into a written contract with Isaac Hartman, who was an attorney at law, by which Hartman undertook and agreed "to procure a patent from the United States for the lands of the Ex-Mission of San Diego, county of San Diego," etc.; and Olvera agreed to pay certain moneys for expenses, and also, when the patent had been obtained, to convey to Hartman a certain undivided interest in said lands. On the 23d day of March, 1879, Hartman assigned and conveyed all his right which he obtained under said contract, to said lands, to the plaintiff herein, Juan M. Luco. The patent was issued by the United States on the 1st day of September, 1876; and if plaintiff, Luco, by virtue of said contract, and said conveyance from Hartman, is entitled to any interest in said lands, he is entitled to the quantity first set apart to him by the court below. Neither Hartman nor Luco was ever in possession of any part of said *rancho* under said contract. Leaving minor matters out of view, there are two main questions in this case; and the correct decision of either of them in favor of the respondent must be followed by an affirmance of the judgment. And these questions are: *First*, did Hartman and his assignee, Luco, comply with their agreement in said contract to procure a patent for said lands? and, *second*, if they did, then was appellant's cause of action under said contract barred by the statute of limitations?

1. It is contended by appellant that finding 5 is to the effect that the contract was complied with; and respondent contends that in said finding the court finds that the contract was not complied with. If we were compelled to decide this point, we would probably have to hold that the finding is contradictory and insufficient; but, with our view of the second main question in the case, it is unnecessary to determine the character and effect of said finding 5.

2. The court found, and found correctly, that appellant's cause of action was barred by the statute of limitations. The contention of appellant that the findings of the court on the subject of limitation are insufficient, because mere conclusions of law, cannot be maintained. The averments of the answer are that the cause of action stated in the complaint is barred by the provisions of section 337 and also by the provisions of section 343 of the Code of Civil Procedure; and the finding of the court is that said cause of action was barred, by the provisions of said sections, before the commencement of the action. The finding "is as broad and specific as the plea," and is therefore sufficient. *Gas Co. v. Dameron*, 67 Cal. 663, 8 Pac. Rep. 595; *Duff v. Duff*, 71 Cal. 513, 12 Pac. Rep. 570. And we think that the finding is sustained by the evidence and correct in law. Assuming that the right set up by appellant can be considered and adjudicated in an action for the partition of real property, still it is, in its nature and essence, only a right to enforce the specific performance of a naked agreement to convey land. We do not see how the contract between Olvera and Hartman established these continuing—and, we might say, eternal—trust relations so strenuously contended for by

counsel for appellant. By that contract no special trust was placed by one of the parties in the other. The property of one was not given to the other to be used by the latter for the benefit of the former. It was a mere covenant by Olvera that, if Hartman would perform certain services, he (Olvera) would, in consideration of such services, convey to Hartman a certain interest in certain lands. If, therefore, there was ever a performance of the services by Hartman, (or his grantee, Luco,) he had a right to the conveyance at the time of that performance; and at that time his cause of action accrued. But, if he performed those services at all, (that is, if he procured a patent for the *rancho*,) he must have done so on or prior to the 1st day of September, 1876; for on that day the patent for the *rancho* was issued. His cause of action, therefore, accrued on September 1, 1876; and this action was not commenced until August 8, 1882, nearly six years afterwards. But the action was barred in four years under either section 337 or section 343 of the Code. Moreover, if a demand for a conveyance had been necessary,—and no such demand was necessary,—it is found that on November 5, 1877, appellant demanded of the executor of Agustin Olvera, deceased, that he convey to appellant the said interest in said lands claimed under said contract, and that said executor refused to do so. That was more than four years before the commencement of this action. (And it may be remarked that appellant's cause of action, founded upon his alleged equitable interest in the land, was not set up until the time of the amendment to the complaint, which was December 13, 1886.) And, again, if the relation between Olvera and Hartman could be considered in any sense a trust, the court finds, and we think upon sufficient evidence, that from the year 1874 said "Agustin Olvera in his life-time, and his representatives after his death, always repudiated any obligation under said contract to Hartman or his assignee, Luco, and claimed to have and hold the whole of the interest to which he (Olvera) held the legal title when he died, adversely to Hartman or his assignee, free from any claim on the part of either under said contract." The cases relied on by appellant are cases where the vendee was in possession, and where it was held that the statute does not run so long as the vendee remains in possession with the acquiescence of the vendor. Such was the case of *Love v. Watkins*, 40 Cal. 548, and others cited. But in these cases a very different principle came into play. In the case at bar neither Hartman nor Luco was in possession of any land under the contract; and there was nothing for respondent or his decedent to acquiesce in. Judgment and order denying a new trial affirmed.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; THORNTON, J.

77 Cal. 45

PEOPLE v. OTTO *et al.* (No. 11,202.)

(*Supreme Court of California.* June 27, 1888.)

1. SHERIFFS—LIABILITY FOR ACT OF DEPUTY—PLEADING.

Pol. Code Cal. § 4114, provides that "whenever the official name of any principal officer is used in any law conferring power, imposing duties or liabilities, it includes his deputies." Section 865 provides that, "in all cases not otherwise provided for, each deputy possesses the powers, and may perform the duties, attached by law to the office of his principal." *Held*, in an action on the bond of a sheriff in a county where he was by law *ex officio* tax collector, for failure to pay over a certain amount of taxes collected, where the answer of defendants denies generally all the material allegations of the complaint "except such as are hereinafter admitted," a subsequent allegation that a third person, "acting as under-sheriff," collected the amount of taxes charged, is an admission qualifying the general denials of the answer, and rendering defendants liable, where their answer, though denying that their principal has collected and withheld the sum charged, does not aver that he paid over, or deny that he withheld, the amount collected by the party acting as under-sheriff,—a person acting as a public officer being presumed to have been regularly appointed, and official duty being presumed to have been regularly performed, under Code Civil Proc. Cal. § 1963, subds. 14, 15, and an under-sheriff being a general deputy; and

it is immaterial that the answer also alleges that the person acting as under-sheriff receipted for the taxes collected by him in the name of the sheriff by himself as "under-sheriff," "without right or authority of law so to do."

2. PRINCIPAL AND SURETY—OFFICIAL BONDS—DISCHARGE OF SURETY.

Under Pol. Code Cal. § 977, providing that the "discharge * * * of a surety on any official bond does not affect the bond as to the remaining sureties thereon," it is no defense to an action against the sureties on the official bond of a tax collector that a co-surety has been discharged therefrom on his own application, as provided by statute, without notice to the other sureties, though at that time the principal was not indebted as tax collector, and by such discharge the official bond was reduced to a less amount than that required by law, and the clerk failed to publish notice of the co-surety's withdrawal, or of the filing of a supplemental bond, as required in such cases by Pol. Code Cal. § 979, although there was a newspaper published in the county.

Department 1. Appeal from superior court, Del Norte county; JAMES E. MURPHY, Judge.

Pol. Code Cal. § 979, referred to in the opinion, provides that, after the withdrawal of a surety from an official bond, and the filing and approving of a supplemental bond, "the officer with whom the bond is filed * * * must give ten days' notice, by publication in some paper published in the county, * * * of the fact of the filing of the bond," etc.

Wm. H. H. Hart and Aylett R. Cotton, for appellants. *L. F. Coburn and L. F. Cooper*, for the People.

SEARLS, C. J. This is an appeal by the defendants, William M. Waggle, J. L. Lake, and James K. Johnson, sureties on the bond of William H. Otto, sheriff and *ex officio* tax collector of the county of Del Norte, from a judgment against them for \$1,769.31 on account of taxes collected by said Otto for the fiscal year ending July 1, 1885. Judgment was rendered upon the findings as to the appellants, and upon the default of defendant Otto. The complaint is not verified. The answer sets out by denying generally all the material allegations of the complaint "except such allegations as are herein-after admitted, stated, or qualified." It is admitted that Otto was tax collector, and that defendants executed jointly and severally with one Hamilton the bond in question. A material part of the answer is in the following language: "(14) Defendants allege that they are informed and believe, and therefore aver the same to be true, that subsequent to the 15th day of November, 1884, and prior to the 2d day of January, 1885, one Robert Jenkins, acting as under-sheriff of said county, did collect a large amount of state and county taxes from divers persons, tax-payers in said county, for the fiscal year ending July 1, 1885, to-wit, the amount of \$1,769.31, and receipted for the same by signing the name of William H. Otto, tax collector, 'by ROBERT JENKINS, Under-Sheriff,' without right or authority of law so to do." As Robert Jenkins is averred to have acted as under-sheriff, and there being no allegation that he wrongfully acted as such, it may properly be inferred that he was *de jure* as well as *de facto* the under-sheriff of defendant Otto. "That a person acting as a public officer was regularly appointed to it" is one of the presumptions of law established by Code Civil Proc. § 1963, subd. 15. "That official duty has been regularly performed" is another presumption established by subdivision 14 of the same section. The question, then, is, had Jenkins, as under-sheriff, authority to collect the taxes in question, and receipt for the same in the name of Otto, the tax collector, so as to bind the latter and his bondsmen. Sections 4176 to 4192 of the Political Code enumerate many of the duties of sheriffs. Section 4173 provides that "the sheriff must perform such other duties as are required by law." In Del Norte county the sheriff is *ex officio* tax collector, and all the duties of that office devolve upon him by law, and must be performed by him. "Whenever the official name of any principal officer is used in any law conferring power, imposing duties or liabilities, it includes his deputies." Pol. Code, § 4114. "In all cases not

otherwise provided for, each deputy possesses the powers, and may perform the duties, attached by law to the office of his principal." Id. § 865. All county officers except judges, supervisors, and justices of the peace may appoint deputies at pleasure, and without limitation as to number. Id. § 4112.

The under-sheriff is a general deputy. He performs all the duties of a deputy, has like powers and authority, and his principal is bound by his acts in like manner as by those of other parties. In addition to this, the under-sheriff has certain powers, in case of the absence or sickness of his principal, not possessed by an ordinary deputy. He may be termed a vice-sheriff, who acts in certain contingencies in place of the sheriff, and who, in addition, performs the duties of a deputy. Under such circumstances, and in view of the various provisions of the law, the tax collector is liable for his acts in collecting taxes, and, he being liable, the sureties on his official bond as such tax collector are equally liable. It is true, the clause of the answer set out *supra* avers that Jenkins collected and receipted for the taxes "without right or authority of law so to do;" but this is the statement of a mere conclusion of law. His authority depended upon the fact of his being the under-sheriff, which is not denied. We find nothing in the answer altering or modifying the effect of the admission under consideration. There is no denial of all the allegations of the complaint, but, as before stated, a denial of all the allegations "except such allegations as are hereinafter admitted, stated, or qualified." The statement that Jenkins acted as under-sheriff, and collected \$1,769.31, is an admission which qualifies the general denials of the answer. The answer further specifically denies that Otto, the tax collector, has collected and withheld from the treasury of the county the sum of \$1,769.31, but does not aver that he paid over, or deny that he withheld, the money collected by Jenkins. Again, in the thirteenth subdivision of the answer, defendants aver that Otto, as tax collector, collected \$20,711.85, and that he paid it over, etc., "and that he did not withhold from the said treasury of said county the sum of \$1,769.31, taxes collected by him," etc., or any other sum or sums whatever, as wrongfully alleged in plaintiff's complaint. There is nothing in these denials upon which perjury could be assigned, upon a showing that a sum of \$1,769.31 was collected by Jenkins, and never paid over by Otto. The only other denials are of conclusions of law, which need not be noticed.

The further defense cannot be maintained. It is founded upon the statement that Hamilton, one of the sureties on the official bond, was, upon his own application, discharged therefrom as provided by statute, but without any notice to the other sureties, or any notice that, at the date of such release, Otto was not indebted as tax collector, that, by the release of Hamilton, the official bond of Otto was reduced in amount to a sum less than that required by law; that the clerk has neglected and refused to publish notice of the withdrawal of Hamilton from the bond, or of the filing of a supplemental bond, etc., although there is and was a newspaper published in the county, etc. Pol. Code, §§ 972-980, both inclusive, provide the manner in which sureties may be released from official bonds, additional sureties obtained, and the effect thereof. Section 977 expressly provides that "the release, discharge, voluntary withdrawal, or incompetency of a surety on any official bond does not affect the bond as to the remaining sureties thereon, or alter or change their liability in any respect." Official bonds in this state are joint and several, and the discharge of one or more of the sureties under our law does not operate as a discharge of the others. *Supervisors v. Bird*, 31 Cal. 67. The questions presented in the answer are in the main the same as those raised by the demurrer, which was properly overruled. The judgment is affirmed.

We concur: PATERSON, J.; MCKINSTRY, J.; TEMPLE, J.

77 Cal. 50

PEOPLE v. OTTO *et al.* (No. 11,269.)

(Supreme Court of California. June 27, 1888.)

APPEAL—REVIEW—MATTERS NOT APPARENT ON RECORD.

Where plaintiffs moved, "upon all the papers on file in this action," to strike out defendants' answer, and give judgment as by default upon the pleadings, and it does not appear that any order striking out the answer was made, but judgment was rendered for plaintiffs for a certain amount, *held*, on appeal from such judgment by plaintiffs, who claim a larger amount, where the record contains only the judgment roll, but there is sufficient in the papers on file to warrant judgment for the amount specified, that such judgment should be affirmed.

Department 1. Appeal from superior court, Del Norte county; JAMES E. MURPHY, Judge.

Geo. A. Johnson, Atty. Gen., L. F. Coburn, and L. F. Cooper, (Sawyer & Burnett, of counsel,) for the People. R. W. Miller and R. G. Knox, for respondents.

SEARLS, C. J. This is an appeal by the people from a judgment in their favor for \$1,769.31, and interest and costs. In the complaint, plaintiffs demand judgment for a further sum of \$632.62, making an aggregate of \$2,401.93. After the answer of defendants was filed, plaintiffs moved, "upon all the papers on file in this action," to strike out, as sham and irrelevant, the answer of defendants, and for judgment as by default on the pleadings in said action. No order seems to have been made striking out the answer, but judgment was rendered in favor of the people, and against defendants, as above stated. The case comes before us on an appeal from the judgment. There is no statement or bill of exceptions. As the motion was based on all the papers on file in the case, and as the record contains only the judgment roll, *non constat* but there was something in the papers on file, and which are not a part of the judgment roll, which warranted the court in awarding judgment for the amount specified in such judgment. The judgment is affirmed.

We concur. MCKINSTRY, J.; PATERSON, J.; TEMPLE, J.

78 Cal. 454

LEARNED *et al.* v. CASTLE *et al.* (No. 12,244.)

(Supreme Court of California. June 28, 1888.)

1. JUDGMENT—EFFECT—RES ADJUDICATA.

The decision of the supreme court on a former appeal, to the effect that the action which was to prevent, abate, and recover damages for a nuisance to land, was a case in equity, is conclusive that the complaint shows a right in plaintiffs to resort to a court of equity for relief.

2. NUISANCE—WHAT CONSTITUTES—FLOODING LAND.

A complaint averred a nuisance to land by cutting a levee constructed across a canal, and by creating and maintaining an obstruction to certain natural sloughs which drained the canal, whereby plaintiffs' land was submerged by water from the canal. The facts found were that plaintiffs constructed, and defendants soon after removed, the levee, and that defendants obstructed and still maintain an obstruction in the slough, but that the levee would not have prevented the overflow, nor would it have been avoided had the slough been clear; that waters from the canal did, with other waters, flow over plaintiffs' land, but did not materially affect it, and did not damage it as charged in the complaint, nor to any extent greater than one dollar,—the other waters being the proximate cause of the injury. *Held*, that the facts did not show a nuisance to plaintiffs' land, as charged in the complaint.

3. APPEAL—REVIEW—HARMLESS ERROR.

In such case, the court having correctly found that there was no nuisance, it becomes immaterial whether the grantor of plaintiffs acquiesced in the acts through which the alleged nuisance was committed.

Department 2. Appeal from superior court, San Joaquin county; A. VAN R. PATTERSON, Judge.

Action by James M. Learned and Sabin Harris against C. C. Castle, Charles Christian, and Elnathan Williams, to restrain and abate a nuisance to real estate.

Judgment for defendants, and plaintiffs appealed. The jury found that Yoland, plaintiffs' grantor, acquiesced in the acts of defendants for which the action was brought. For opinion on former appeal, see 7 Pac. Rep. 34.

W. L. Dudley, D. S. Terry, and Garber, Thornton & Bishop, for appellants. *J. B. Hall, J. C. Campbell, and A. P. Catlin*, for respondents.

THORNTON, J. This action was brought to recover damage alleged to have been caused by defendants to plaintiffs' grain crops, and for the abatement of nuisances averred to have been produced and maintained by defendants. The plaintiffs aver, in their complaint, that they are the owners of certain lands situate in the county of San Joaquin, (describing them,) and that there is to the north-east of these lands a stream or slough known as "Stone Slough," or "Bear Creek," which carries in the rainy season a large body of water running in a south-westerly direction; that this stream, at a point easterly from said land, connects with a canal or ditch which was constructed by defendant Christian and others; that the canal carries the waters of Stone slough, or Bear creek, in a westerly direction, to certain natural sloughs on the south side of the canal, which are of sufficient size, if unobstructed, to take and carry the waters running down this canal off and away from the lands of plaintiffs, or that this canal runs past and by the natural sloughs above mentioned, westerly, to a point known as the "Davis Road," at which place there was, in April, 1876, thrown across the canal a levee or embankment, in part built by the plaintiffs and was sufficient to protect all of plaintiffs' lands, described in the complaint, from overflow by the waters of Stone slough, or Bear creek, and did protect them until it was cut away, and the natural sloughs aforementioned, connecting with the canal, were obstructed by the acts of defendants. It is then averred that the defendants, without right and against the protest of plaintiffs, cut away the embankment, and filled up and obstructed the sloughs above mentioned on the south side of the canal. In consequence of the removal of the embankment, and the obstructions put in in the months of January and February, 1878, the waters of Stone slough came down the canal, flowed over and submerged plaintiffs' lands, remained there a long space of time, and completely drowned out, rotted, and destroyed the grain growing on the lands, and otherwise injured them. It is further averred that the obstructions above referred to were kept up and maintained by defendants, and that the embankment was never rebuilt after its destruction. It is further averred that the obstructions above referred to, so kept up and maintained by defendants, in the natural sloughs mentioned, are an obstruction to the free use and enjoyment of plaintiffs' property, and are a nuisance; that the removal of the embankment prevents plaintiffs from the free use and enjoyment of their property, and is a nuisance. The findings of the court cover all the issues; and, as a conclusion of law, the court holds that the matters complained of were not nuisances, and rendered judgment for defendants.

It is urged now, on behalf of respondents, that the judgment ought not to be disturbed, for the reason that the demurrer to the complaint should have been sustained. It is said that the suit is a bill in equity to abate the alleged nuisances by mandatory injunction, to which the statute (section 731, Code Civil Proc.) annexes as an incident the right to recover damages; and that the matters averred in the complaint are not sufficient to show a right in the plaintiffs to resort to a court of equity for relief. Without entering into the particular reasons urged by respondents why the demurrer should have been sustained, we think it enough to say that, in our opinion, this question was determined adversely to their contention when this cause was here on a former appeal. See 67 Cal. 41, 7 Pac. Rep. 34. It was there held that this was a case in equity. This conclusion could not have been reached without holding the facts averred in the complaint to have been sufficient to give a court of equity jurisdiction; and where, on an appeal to this court, the judgment announced

could not have been rendered without expressly or impliedly deciding the questions presented on a second appeal, the judgment will be conclusive; and such questions will not be again considered. *Forgerson v. Smith*, 3 N. E. Rep. 866. The conclusion thus reached constitutes the law of the case in all its stages.

It is contended by appellants that the findings do not support the judgment. The court found that the obstruction in the natural sloughs is not an obstruction to the free use of plaintiffs' property, and does not interfere with the enjoyment thereof; and that the removal of the embankment across the canal in the Davis road did not prevent the free use and enjoyment by plaintiffs of their property. It also found, as conclusions of law, that the acts complained of are not nuisances. The principal question in the case is whether the facts found show any nuisance done, committed, or maintained by the defendants. The following facts are found: That in the month of April, 1876, the plaintiffs filled the canal with the embankment mentioned, which was in the following December cut away and removed by the defendants; that the defendant Christian, long prior to December, 1876, obstructed the natural sloughs on the south side of the canal, and maintained and kept them in place until the commencement of this action; that the embankment in the canal at the Davis road did not protect, and would not have protected if it had remained in place, all or any part of lands of plaintiffs from overflow by the waters of Stone slough in the months of January or February, 1878, and it would not have protected such lands from overflow from these waters although the obstruction to the natural sloughs to the east of the embankment on Christian's land had not existed during the months aforesaid. It is further found that in the months of January and February, 1878, some of the waters of Stone slough reached the head of the canal at its junction with the slough, (referring to the slough on the south side of the canal,) and a part of those waters flowed down the canal, and of the waters so flowing down a part flowed upon the lands of the plaintiffs; that in the months aforesaid the lands of the plaintiffs were submerged, but the waters of Stone slough, which at that time came down said canal, did not materially contribute to said submersion, or materially contribute to the injury, damage, and loss which the plaintiffs and their property sustained by reason of this submersion, and the plaintiffs were not damaged by the waters then diverted by this canal in any way or manner stated in the complaint, or to any extent greater than the sum of one dollar; that none of the waters diverted by the canal would have flowed upon the plaintiffs' lands if allowed, without interruption, to take their natural south-west course to the river, and the embankments on the south side of the canal on Christian's and other lands cause waters to flow upon plaintiffs' lands which would not flow there if the embankments were removed; that, except to the immaterial extent stated above, the overflow of the lands of plaintiffs in January and February, 1878, and the damage therefrom, were caused by waters which did not come down the canal, but which came from other sources, and were the predominant and proximate cause of said overflow, and the damage sustained by plaintiffs at the time; that, at the commencement of this action, the obstruction in the natural sloughs mentioned above was not maintained or kept up by the defendants Castle and Williams, or either of them. We conclude, from the facts found as above, that the removal of the embankment across the canal did not prevent the plaintiffs from the free use and enjoyment of their property, as the court below came to the conclusion and found that this embankment did not protect, and would not have protected if it had remained in place, all or any part of the lands of plaintiffs from overflow in January or February, 1878, and it would have afforded no protection from overflow though there had been at that time no obstructions to the sloughs on Christian's lands. We cannot perceive how its removal prevented the free use and enjoyment by the plaintiffs of their property. The facts found do, in our opinion, sustain the conclusion that the removal of the embankment was not and produced no nui-

sance. As to the obstructions to the sloughs on Christian's land, it appears, as set forth above, that some of the waters which came down the canal did contribute to the submersion of the lands of plaintiffs; that obstructions or embankments to the sloughs erected by Christian on the south side of the canal, with other embankments on other lands, did cause water to flow upon plaintiffs' lands which would not flow there if the embankments were removed; and that none of the water diverted by the canal would have flowed on plaintiffs' lands if allowed, without interruption, to take their natural south-west course to the river. The court does also find that the water which came from Stone slough through the canal did not materially contribute to the submersion, or materially contribute to the damage or loss to plaintiffs' property sustained by the submersion, and that plaintiffs were not damaged by the waters diverted in any manner stated in the complaint, or to any extent greater than in the sum of one dollar. There is in fact no finding that the land has been damaged, within the issue made by the complaint, at all. The damage is plainly negatived in the finding that plaintiffs were not damaged in any way or manner stated in the complaint. The finding of one dollar damage we regard as something outside of the case. The court having already disposed of the issue of damage raised by the pleadings, and having held that there was no such damage, anything additional on such issue must be looked on as something outside of it, and therefore to be disregarded. Or, if we regard it as a finding that the land was damaged to the extent of one dollar, it must be that the court below looked on it as a damage resulting from unforeseen causes, as from an extraordinary flood which could not be anticipated, for which there would be no responsibility by Christian,—at any rate no such responsibility as would render him liable to an injunction. For the foregoing reasons we cannot concur in the contention that the judgment is not supported by the findings.

The court is of opinion that the acquiescence of Yolland did not constitute a defense to the action of plaintiffs for an injunction, if they were otherwise entitled to one, and that the findings as to such acquiescence, in the view this court takes of the cause, are immaterial. On an examination of the evidence the court is of opinion that the findings are justified by it. The judgment and order must be affirmed. So ordered.

We concur: McFARLAND, J.; SHARPSTEIN, J.

77 Cal. 73

CLEVELAND v. CHOATE *et al.* (No. 12,549.

(Supreme Court of California. June 29, 1888.)

DEEDS—DESCRIPTION—PAROL EVIDENCE.

Where the description in a title deed refers to a map, and also describes the property by metes and bounds, starting from a certain stake, and it is shown that the map is inaccurate, that it was not made from an actual survey, that it has no scale or starting point, and cannot be made to represent the territory which it purports to include, parol evidence may be introduced to show the true location of the land which the grantor intended to convey and the grantee to purchase; the reference to the map being treated as surplusage.

In bank. Appeal from superior court, San Diego county; THOMAS H. BUSH, Judge.

Action by Daniel Cleveland against Daniel Choate *et al.* to quiet title to certain property situate in the city of San Diego. Judgment for plaintiff. Defendants appeal.

M. A. Luce and Levi Chase, for appellants. *Chapman & Hendricks and Works & Titus*, for respondent.

PER CURIAM. This is an action to quiet title to certain property situate in the city of San Diego. The principal question involved, relates to the ad-

missibility of parol testimony. There was evidence to show that the Poole map was inaccurate; that it had no scale or starting point; and that a surveyor could not, by using the map, locate any of the pueblo lots. The map cannot be made to represent the territory which it purports to include. It was intended to cover all pueblo lands. Afterwards one Pascoe made a survey which demonstrated that there was a strip of land half a mile wide between New San Diego and Mission Valley, which was not shown on the Poole map. Poole's map did not show his starting point, and the witnesses at the trial could not agree as to what was the proper starting point. Poole's map was not made from an actual survey, but was compiled from other maps. The land is described in the deed as follows: "Being that lot of land, and west half of lot 1123, bounded as follows: Commencing at a stake being the south-west corner of said lot No. 1123, running thence north forty chains, to a stake; thence east twenty chains, to a stake; thence south forty chains, to a stake, thence west twenty chains, to the place of beginning,—containing eighty acres of land according to the official map of said city made by Charles H. Poole, A. D. 1856." The evidence shows that the city required the purchasers to survey the land before deeds were made. The lands in controversy were surveyed, and trees planted thereon by the grantees. The surveys were returned to the city trustees before any deeds were executed. These surveys were before the board of trustees when the deeds were made. One of the trustees, who signed all the deeds in controversy, went upon the lands before the deeds were executed, and procured lot 1132 to be surveyed, took possession of the same, and planted trees thereon. The applications of Cleveland and Cassidy for lot 1123, and of Searl and Estiñillo for lot 1132, were granted by the same resolution. The same surveyor acted for all parties, and the surveys were made at the same time, and all included in one set of field-notes. The surveyor, Wheeler, filed his field-notes and diagram for the city trustees, and upon these the city trustees acted in making the deeds. The parties, respectively, took possession of their lands as surveyed, and planted trees upon the same. The stake named in the description in the deed as the beginning point of the survey was fully identified by the surveyor who made the survey. In July, 1868, a public park was laid out, and marked with stakes. The tract thus laid out as a park has been maintained as such to this time, and has been well known, and designated upon all the maps as the "City Park." At the time Wheeler made his survey there was a stake at the north-west corner of the park, marked "North-West Corner of Pueblo Lot 1131," the north-east corner of lot 1132, and the south-east corner of lot 1123, and south-west corner of lot 1134. Lot 1123 was located so that the south-east corner thereof was identical with the north-west corner of the park. The surveyor located lot 1132 at the same time he located lot 1123, and he made the north-east corner of 1132 identical with the north-west corner of the park. According to the Poole map, lot 1132 lies directly west of lot 1131; the west line of 1131 corresponding with the east line of 1132. According to the same map, lot 1123 lies immediately adjoining 1132 on the north; the southern line of 1123 being the northern boundary line of 1132. The north-west corner of lot 1131, therefore, is identical with the south-east corner of lot 1123 according to the Poole map.

In view of the fact that the Poole map is inaccurate, that it is not a map made from an actual survey, that the country which it purports to map was really one-half mile longer from north to south than the surveyor believed it to be, and the fact that the map represents no starting point and no place of commencement for an actual survey,—being simply a compilation,—we think the court did not err in admitting parol testimony to prove the location of the tract of land which the city intended to sell, and which Cleveland intended to buy, and to prove that that tract of land had been staked off and definitely located. *Widbur v. Washburn*, 47 Cal. 67. There is in the deed a descrip-

tion by reference to a stake set in a certain place, and the location of that stake is made certain by the person who placed it, and made the survey. By commencing at this stake, named as the starting point of the survey, and by following the courses and distances named in the deed, the lot is located with certainty. The reference to the Poole map, we think, may be treated as surplusage. It is only where a map can be used in aid of a description that it is taken as a part of the deed; and, where there is a conflict between the map and the survey, the survey controls. *O'Farrel v. Harney*, 51 Cal. 125. Of course, the reference in the deed to a stake as the beginning point of the survey cannot be taken to mean a stake set by Poole, and according to the official map made by Poole, because Poole made no survey and set no stakes. The stakes were set by Wheeler at the time he made the survey, which was returned to the board of trustees. In the deed from Horton to Choate and others, under which they claim in this action, the property is described as lot 1123, according to the official map made by Pascoe in May, 1870, and excepts from its operation a portion of the same lot previously conveyed, and described according to the Poole map. There was, therefore, some evidence showing that lot 1123 by the Poole map had been regarded by the parties as the identical lot described in the Pascoe map as lot 1123. Judgment and order affirmed.

76 Cal. 589

VAN EMON *et al.* v. SUPERIOR COURT OF TULARE COUNTY. (No. 12,622.)

(*Supreme Court of California.* June 16, 1888.)

EXECUTORS AND ADMINISTRATORS—PAYMENT OF FUNERAL EXPENSES—TOMBSTONE.

Expenses of erection of a monument at the grave of a deceased person are funeral expenses, within the meaning of a statute of California authorizing payment of funeral expenses out of the estates of deceased persons.

In bank. Original proceedings on application for writ of review.

Brown & Daggett, for petitioners. *Frederick & Stratton* and *N. O. Bradley*, for respondent.

SHARPSTEIN, J. This is an application for a writ of review. The respondent in a probate proceeding made an order authorizing Robert Baker, administrator of the estate of John W. Miller, deceased, to cause a monument to be erected at the grave of deceased at an expense not exceeding \$1,500. Petitioners, who are heirs of deceased, asked to have said order annulled on the ground of want of jurisdiction in the court to make it. The contention of petitioners is that the jurisdiction of superior courts in matters of probate is defined by statute, and that the statute does not authorize the erection of monuments at the graves of deceased persons at the expense of their estates. It authorizes the payment of funeral expenses; but petitioners insist that the cost of the erection of a monument is not any part of the funeral expenses. The answer to this is that courts and law writers have so treated it. In case of *Appeal of McGlinsey*, 14 Serg. & R. 64, the orphans' court struck out a credit claimed for funeral expenses of the deceased. The appellate court said: "A handsome tombstone was erected over the vault in which the body was interred, and this was the principal article of expense." The court held that that should have been allowed. In *Bendall v. Bendall*, 24 Ala. 295, the court said: "They [the vouchers] all relate to a box tomb of marble, lettered and inscribed, which the administrator caused to be erected over the grave of the deceased. * * * This may well be classed under the head of funeral expenses." In *Ferrin v. Myrick*, 41 N. Y. 325, the court, after saying it was the duty of the executor to pay funeral expenses, added: "And it has been well held that suitable grave-stones are a part of such expenses." In *Fairman's Appeal*, 30 Conn. 209, the court said that the sums paid for tombstones "should be considered a part of the funeral expenses." We think the court

had jurisdiction to authorize the erection of a monument, and that is the only question which we can consider on the application for a writ of review. The demurrer to the petition is sustained, and the proceeding dismissed.

We concur: SEARLS, C. J.; MCFARLAND, J.; PATERSON, J.; THORNTON, J.

77 Cal. 52

IRVING v. CUNNINGHAM *et al.* (No. 11,067.)

(Supreme Court of California. June 27, 1883.)

EJECTMENT—DELIVERY OF POSSESSION.

Persons who entered into possession of premises after the institution of an action of ejectment, but were not in privity with the defendants therein, and did not enter under them, either in good faith or collusively, and were not parties to the action, cannot be turned out of possession under the judgment obtained in that suit, whether their title be good or worthless.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

Henry P. Irving, having obtained a judgment in ejectment, was proceeding to the execution thereof by a writ of possession, when John Long, B. Van Wyman, and Lewis Hellans moved the court for an order restraining the sheriff from so executing the writ as to remove them from certain portions of the premises, which order was granted, and this appeal taken by Irving.

Moore & Reed, for appellant. *Ayleth R. Cotton, W. H. H. Hart, W. W. Allen*, for respondents.

FOOTE, C. This is an appeal from an order restraining the sheriff of Alameda county from executing a writ of possession for certain lands, so as to remove therefrom John Long, B. Van Wyman, and Lewis Hellans. It appears that on the 26th day of June, 1883, Henry P. Irving obtained a judgment in ejectment for the lands occupied by the moving parties herein, but it is claimed that they were not parties to the action in which the judgment was obtained, and did not claim title thereto under the defendants therein, either in good faith or collusively; that the possession of the moving parties was adverse to the whole world. The claim of title set up by them is based upon a tax deed to one J. P. Dameron. The evidence is clear that those in whose favor the restraining order was made, were not parties to the action in which the judgment in ejectment was obtained; and that they did not enter under the defendants, either in good faith or collusively. The court was warranted, we think, in holding that their possession was adverse to that of all the parties to the action. These facts existing, it made no difference whether the moving parties entered before or after suit brought, or whether the adverse title which they claimed to have was worthless or good. They could not be removed from the possession of premises under a writ of ejectment in a suit to which they were in no manner privy, and where their title could not have been determined. To grant the appellant's contention would be to say that one who enters, after suit brought, under claim of title, must not only show that he is not in privity with the defendant who has lost in an action of ejectment, is not in collusion with him, and is not a party to the suit, but he must further show that the possession of which it is sought to deprive him is under a title paramount to that of the plaintiff in the action where recovery is had; thus trying a second action of ejectment between the same plaintiff and another defendant, under a motion to restrain the execution of a writ of *habere facias* issuing under the judgment obtained in the first action. The *lis pendens* filed could not affect the rights of the moving parties here. They were not compelled, for that cause, to become parties to an action where they were not sued. Not being parties, they could not be affected except to the ex-

tent that they might be unable to acquire title to the property in dispute through the defendants, which they were attempting to do. Persons not parties to an action of ejectment cannot be put out of possession of the premises involved, unless they entered under the defendant either in good faith or collusively. *Tevis v. Ellis*, 25 Cal. 516; *Watson v. Dowling*, 26 Cal. 127; *Le Roy v. Rogers*, 30 Cal. 234; *Long v. Neville*, 36 Cal. 459; *Ford v. Doyle*, 37 Cal. 348. In *Mayo v. Sprout*, 45 Cal. 100, it was said: "The authorities of the city were turned out of possession of the premises by means of a writ of *habere facias* issued in this action, to which they were not parties. It is true, they had entered only after the action of *Mayo v. Sprout* had been commenced, but it is clearly shown that they did not go in under Sprout, or by collusion with him. Under such circumstances, it was an abuse of the process of the court to disturb them." If it was an abuse of the process of the court to disturb a possession held in that case, the court in this case did not commit error in issuing the restraining order, and we advise that it be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

77 Cal. 66

GOULD v. STAFFORD. (No. 12,524.)

(Supreme Court of California. June 28, 1888.)

1. RIPARIAN RIGHTS—TAKING WATER FROM STREAM—INJUNCTION—EVIDENCE.

In an action to enjoin an upper riparian proprietor from diverting water from a creek, evidence that persons other than defendant have also diverted water from the stream is admissible only on the issue as to the amount of damages.

2. SAME—IRRIGATION—EXTENT OF RIGHT.

An upper riparian proprietor may use a reasonable amount of the water of a natural stream to irrigate his riparian land, but cannot use all of it for that purpose, nor can he use any of the water for the purpose of irrigating land not riparian.

3. SAME—RETURNING WATER AFTER USE.

An upper riparian owner must return to the stream all surplus of water after use.

4. APPEAL—REVIEW—FINDINGS.

Where the findings of the court are insufficient, contradictory, and not specific on the issue presented, and some are in conflict with the admissions of the pleadings, the judgment will be reversed.

In bank. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

Action by Frederic S. Gould to enjoin O. A. Stafford, an upper riparian proprietor, from diverting water from a creek. Injunction denied, and plaintiff appeals.

John J. Boyce, for appellant. *B. F. Thomas*, for respondent.

MCCARLAND, J. The judgment will have to be reversed because the findings are insufficient. They are not pointed and specific on the issues presented, some of them are contradictory of each other, and some of them are in conflict with the admissions of the pleadings. As there will probably be another trial of the case, it is proper to notice some of the questions which the court below will again have to consider. Plaintiff is the owner of land on a natural stream of water called "Montecito Creek," and this action is brought to enjoin defendant, an upper riparian proprietor, from diverting water from a main branch of said creek, called "Cold Spring Branch," at a point a short distance above plaintiff's land, and to recover damages for the diversion.

1. Evidence that persons other than defendant also diverted water from the stream was admissible only on the issue as to the amount of damages. If de-

defendant's diversion of water was wrongful, he could have no defense, as against the injunction, in the fact that others were guilty of a similar wrong; and evidence offered to prove the latter fact would be irrelevant and inadmissible. And, as plaintiff waived all claim to damages, (except nominal,) we think that it was error to admit evidence of diversions of water by third parties.

2. Assuming that in this state an upper riparian proprietor has the right to use a reasonable amount of the water of a natural stream running through his premises for irrigating his riparian land, still he has not the right, for that purpose, to take all the water which flows in the stream at the point where he diverts it; and, if the defendant did (as the evidence tends to show) thus take all the water flowing at the point where it was diverted, his act in so doing was wrongful. What would be a reasonable amount of water for irrigation is a question that must depend upon the particular circumstances of each case in which it arises, and it is a question which will often be of difficult solution; but it is clear that in no case can he, for that purpose, as against a lower proprietor, use all the water of the stream. That could be done, if at all, only where the whole of the water was absolutely necessary for strictly domestic purposes, and to furnish drink for man and beast.

3. Whatever may be the right of an upper proprietor to use a part of the water of the stream to irrigate his riparian land, he has no right to take any of it away to other lands not riparian, which seems to have been done by defendant in this case. Moreover, he must see to it that the surplus after use be returned to the stream, which it appears was not done in this case.

4. Defendant by his answer admits most of the averments of the complaint, except the wrongfulness of the diversion, the amount diverted, etc., and assumes the responsibility of the diversion, and justifies under his own right. Many of the findings, therefore,—as, for instance, the agreement between defendant and one Gutierrez, and the acts of certain Chinamen, which tend to take the responsibility away from defendant,—were irrelevant, erroneous, and against the admissions of the answer. The findings and the evidence should be confined to the issues made by the pleadings. The judgment and order denying a new trial are reversed, and the cause is remanded for a new trial.

We concur: SEARLS, C. J.; THORNTON, J.; SHARPSTEIN, J.; MCKINSTRY, J.

PATERSON, J. I concur in the judgment.

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SOUTHERN PAC. R. CO. v. PURSELL. (No. 12,548.)*(Supreme Court of California. June 28, 1888.)***1. EJECTMENT—EVIDENCE—PATENT—CONDITIONS PRECEDENT.**

Where, in ejectment, plaintiff shows title by patent from the United States issued in pursuance of a legislative grant, it is not necessary to show that the preliminary conditions necessary to a valid patent had been fulfilled. That will be presumed.

2. SAME—DEFENSES—FORMER RECOVERY.

The fact that plaintiff had recovered a judgment in ejectment for the same land against the same defendant several years before the institution of the present action is no defense; the first judgment not having been obeyed, and the rents and profits claimed as damages in the two actions being for different periods.

3. SAME—OBJECTIONS TO PLAINTIFF'S RIGHT TO SUE—PLEADING.

In ejectment by a railroad company, an objection that plaintiff had not filed a copy of its articles of incorporation in the county where the land is situate, without which, under Civil Code Cal. § 299, it can "not maintain or defend any action or pro-

¹Where the court renders such a judgment on the record as the law demands, and, on taking the whole record together, in investigating a proceeding on *habeas corpus*, and where a defective indictment is the point in controversy, is satisfied that enough appears, although the indictment is clearly defective, and so much so that a demurrer to it would be sustained, to retain the accused in custody until another term of court, it will not discharge the prisoner.

ceeding in relation to such property," should be raised by the answer; and, unless specifically set up therein, want of proof of that fact is not fatal to a verdict for plaintiff.

4. PUBLIC LANDS—RAILROAD GRANTS—EXCEPTIONS—HOMESTEAD—EVIDENCE.

Where a legislative grant to a railroad company excepts from its operation lands to which pre-emption or homestead claims were attached "at the time the line of said road is definitely fixed," and defendant shows that he settled on and improved certain land within the grant, with the intention of homesteading it, and was in possession thereof at the time stated, and afterwards applied to the register of the land-office to make claim of homestead entry thereon, but was not allowed to do so, this does not show that a "homestead claim" had attached, as it did not appear that he offered to pay the register's fees, and to make the necessary affidavit required by law.

5. APPEAL—REVIEW—HARMLESS ERROR.

Defendant is not prejudiced by the refusal of the trial court to permit an amendment to the answer, where the record shows that evidence was introduced by both parties just as if the answer was perfect in the particulars as to which the amendment was desired.

Commissioners' decision. In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Ejectment by Southern Pacific Railroad Company against John D. Pursell. Judgment for plaintiff. Defendant appeals.

Jacobs & Burns, for appellant. *P. D. Wigginton*, for respondent.

HAYNE, C. Ejectment. The court below gave judgment for the plaintiff, and the defendant appeals.

1. The plaintiff introduced a patent from the United States made in pursuance of a legislative grant. The defendant made a series of objections, all of which were based upon the ground that certain matters necessary to the validity of the patent had not been shown, and these objections are urged as reasons for the reversal of the judgment. The objections are not well taken. A patent, whether conclusive or not, is at least *prima facie* valid, and is presumptive evidence that all preliminary conditions had been fulfilled. *Minster v. Crommelin*, 18 How. 88; *Leviston v. Ryan*, 17 Pac. Rep. 239; *Whitney v. Morrow*, 112 U. S. 695, 5 Sup. Ct. Rep. 333.

2. The legislative grant excepts from its operation, among other things, lands to which pre-emption or homestead claims were attached "at the time the line of said road is definitely fixed;" and the defendant contends that he is within the exception. The basis for this contention is that he gave evidence showing that he was in possession before and at the time the line of the road was fixed; that he was a citizen of the United States, over 21 years, and had made no homestead entry; that he settled upon the land for the purpose and with the intention of homesteading it; and that he "went to the land-office at Visalia, and asked the register of the office to be allowed to file a homestead entry for this land." He further testified: "The offer of filing was rejected. I was not allowed to file homestead entry on the land." This did not bring him within the exception. Nothing is said about his paying, or offering to pay, the register's fees, or about his making or tendering the necessary affidavit. Rev. St. § 2290. It may be that the register refused to allow his entry because these conditions were not fulfilled. If such was not the fact, the defendant should have proved it, as the burden in this regard was clearly upon him. So far as is shown, he appears not to have taken any further step. He, therefore, did not show that a "homestead claim" had attached to the land, and therefore did not bring himself within the terms of the exception. So far as is shown by the record, he was a mere occupant of the land; and it is well settled that mere occupancy of public land does not, of itself, give the occupant any right to the land, or prevent the government from disposing of it as it pleases. *Yosemite Valley Case*, 15 Wall. 86; *Sparks v. Pierce*, 115 U. S. 408, 6 Sup. Ct. Rep. 102.

3. The defendant pleaded a former recovery by the company against him

for the same land. The proof was that an action of ejectment to recover the same property, and damages for its detention, had been commenced by the plaintiff herein against the defendant herein in the circuit court of the United States, and that judgment was entered for the plaintiff in January, 1880. So far as the damages are concerned, the cause of action is different; for the judgment in the present case is for "rents and profits of said premises from May 1, 1882." With reference to the title to the land, it would seem to have been the same as that adjudicated in the former suit; and we do not see why it could not have been relied upon by plaintiff here as an estoppel against defendant. It most certainly does not aid the defendant in any way. The counsel asks: "Are the courts to be called upon to render two judgments for the same cause of action?" We do not see why not, if the first judgment has not been obeyed. If the second action had been commenced while the first was pending, the pendency of another action might have been a defense. But, as the first suit resulted in a judgment several years before the second was commenced, we are at a loss to see how it can avail defendant in any way.

4. It is contended that the evidence shows title in defendant by adverse possession. The evidence as to possession, however, is vague, and we cannot say that the finding of the court, which, as we take it, is that there was no adverse possession, is not supported by the evidence.

5. It is objected that there was no proof that the plaintiff had filed a copy of its articles of incorporation in the county where the property is situated. The statute provides that unless it is so filed the corporation "shall not maintain or defend any action or proceeding in relation to such property." Civil Code, § 299. An analogous provision is made with reference to certain partnerships, (*Id.* § 2468;) and the construction which the latter has received is that the want of a certificate must be set up in the answer, (see *Phillips v. Goldtree*, 15 Pac. Rep. 451, 13 Pac. Rep. 313.) And upon the same reasoning we think that the want of the filing of a copy of the articles of incorporation in the county where the property is situated should have been set up by the answer. Neither the answer nor the proposed amended answer sets up this. The latter denies the existence of the corporation. But this is a different matter. If the plaintiff was not a corporation, there was no grantee, and the grant from the government was void. But the patent recites that the plaintiff was "a corporation existing under the laws of the state;" and this, we think, was sufficient proof, in the absence of countervailing circumstances, to show that the plaintiff had capacity to take the property.

6. It is urged that the defendant should have been allowed to amend his answer. There were defects in the answer on file which we think the defendant should have been allowed to remedy. For example, the answer failed to deny the allegation that the plaintiff was the owner of the property. And, except for the reason stated below, we should be inclined to advise that the judgment be reversed for an abuse of discretion in refusing to allow the amendment. But the record shows that both parties introduced evidence just as if the answer were perfect in the particulars in which it was sought to be amended. We have considered the case, and the objections urged by the appellant, as if the proposed amended answer had been allowed to be filed; and, so treating the case, we think the points made are not well taken. The appellant, therefore, was not injured by the refusal to allow the amendment. The other matters do not require special notice. We therefore advise that the judgment be affirmed.

I concur: FOOTE, C.

BELCHER, C. C., took no part in this opinion.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

SOUTHERN PAC. R. CO. v. HACKETT. (No. 12,526.)

(*Supreme Court of California*. June 27, 1888.)

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.
Jacobs & Burns, for appellant. *P. D. Wigginton*, for respondent.

PER CURIAM. Judgment affirmed on the authority of *Railroad Co. v. Pursell*, ante, 886, (No. 12,548, this day decided.)

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CARTER v. PAIGE. (No. 12,637.)

(*Supreme Court of California.* June 27, 1888.)

1. APPEAL—DISMISSAL—FAILURE TO FILE TRANSCRIPT.

Under rule 3, Sup. Ct. Cal., providing that, if a transcript be on file at the time notice was given of a motion to dismiss an appeal because the transcript was not

filed within the required time, such fact shall be a sufficient answer to the motion, failure to have the transcript on file at the time the notice was given will not preclude appellant from answering the motion, but he may set up matters excusing his default.

2. SAME—FAILURE TO FILE TRANSCRIPT—WHAT IS SUFFICIENT EXCUSE.

On the hearing of a motion to dismiss an appeal for failure of appellant's attorney to file a transcript within the required time, it appeared that such failure was caused by such attorney relying on the statement of another that the latter had caused two copies of the printed transcript to be left at the office of respondent's attorney, which statement was erroneous; such copies, by mistake, never having been delivered. *Held*, that such circumstances were sufficient to excuse the default.

In bank. Appeal from superior court, Stanislaus county; CHARLES H. MARKS, Judge. On motion to dismiss.

The appeal in this case was perfected March 4, 1888, by filing an undertaking on appeal, the notice having been filed and served on the 5th. Afterwards appellant's attorney applied to the clerk of the court for a transcript, which he secured on March 28th. The transcript was printed at Stockton, which was the residence of the attorney for plaintiff and respondent. It was completed on the 12th of April, 1888, and was delivered by the printer to P. W. Bennett, Esq., who had been requested by the attorney for appellant, who resided in Fresno, over a hundred miles from Stockton, to procure the certificate of respondent's attorney, and who had promised to do so. On the 12th of April, Mr. Bennett wrote to appellant's attorney that he had caused two copies of the printed transcript to be left at the office of S. L. Carter, respondent's attorney, with his law partner, F. H. Smith, who had informed the person leaving them that Mr. Carter was then absent from Stockton; that he (Smith) was not concerned in the case, and could not certify to the transcript, but would, as soon as Mr. Carter returned, call his attention to them. This letter was received in due course of mail by appellant's attorney at Fresno, his place of residence, and at the same time he received a number of copies of the printed transcript. Subsequently it appeared that Mr. Bennett was mistaken as to the fact that copies of the printed transcript had been left at Mr. Carter's office on the 12th of April. He had requested a student in his office to deliver the copies of transcript to Mr. Carter; and the student, instead of going to the office, communicated with it by telephone, and reported to Mr. Bennett the conversation which he had with Mr. Smith. Mr. Bennett thought that the copies had been delivered, and the conversation had at the office of Messrs. Carter & Smith, and so wrote to Terry.

D. S. Terry, for appellant. *Stanton L. Carter*, for respondent.

PER CURIAM. Rule 3 of this court provides simply that, if a transcript be on file at the time the notice of motion was given, that fact shall be sufficient answer to the motion to dismiss; but it does not follow that no answer can be made at any subsequent time. The mere fact that the transcript is on file at the time the notice of motion was given is all the showing the appellant is required to make to defeat the motion to dismiss; but, if the transcript be not filed until after the notice of motion has been given, something more is required. The filing of the transcript does not cure the default, or bar the relief sought by the motion. Circumstances going to excuse the appellant's default may be shown by the appellant by affidavit, the sufficiency of which must be determined by the court. The rule was thus construed in *Welch v. Kenney*, 47 Cal. 414. On the 17th of April, 1883, respondent's counsel served upon counsel for appellant a notice that he would, on Friday, the 4th day of May, 1888, or as soon thereafter as he could be heard, move this court to dismiss the appeal herein. At the time said motion to dismiss was heard, the transcript was on file herein, together with affidavits on behalf of respondent and appellant. The circumstances shown, we think, are sufficient to excuse the default of counsel for appellant in preparing and serving and filing the transcript on appeal, as required by the rules of this court. The transcript

was left with Mr. Bennett in time to be served, and the statement of the latter undoubtedly misled counsel for appellant, who believed that the transcript had been left at the office of counsel for respondent for his certificate of its correctness. Motion to dismiss appeal denied.

PATERSON, J., did not participate in the decision of the motion.

2 Cal. Unrep. 7

GAGE *et al.* v. DOWNEY *et al.* (No. 12,377)

(*Supreme Court of California.* August 20, 1888.)

1. JUDGMENT—EFFECT—RES ADJUDICATA.

Plaintiff alleged, in an action against her husband's administrator for certain land, that her husband, who owned no property, acquired title to the land in question under a mortgage which he took to secure a loan of her money. It appeared that he acquired title to part of the land under the mortgage, and to the remainder by deed. *Held*, that a decree in plaintiff's favor for the entire tract is conclusive of her right thereto as against her husband's estate.

2. JUDGE—DISQUALIFICATION—REMOVAL OF CAUSE—VALIDITY OF JUDGMENT.

Where a case is transferred, because of the disqualification of the judge, to an adjoining judicial district, such court acquires jurisdiction, the judge having had authority under the statute to make the transfer, though the county was not the nearest one to which the case might have been transferred; and its judgment cannot be collaterally attacked.

3. EJECTMENT—DEFENSES—AGREEMENT TO CONVEY PART OF LAND TO ATTORNEY.

An agreement by plaintiff to transfer part of the land sued for, when recovered, to his attorneys, for their services, is not a defense to such action, even if within the prohibition of the statute forbidding attorneys to buy any thing in action.

4. APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW.

Where it is not objected, at the time a motion for a new trial was passed on, that notice of motion was not given, it will be presumed on appeal that the notice was given.

In bank. Appeal from superior court, San Diego county; W. T. McNEALY, Judge.

Action by Henry T. Gage and Cornelia Rains de Foley against John G. Downey and the Merchants' Exchange Bank of San Francisco to recover certain land. There was a judgment for defendants, and plaintiffs appeal. The contract between plaintiffs and Glassell, Smith & Patton, referred to in the opinion, was that plaintiffs should convey a portion of the lands sued for, when recovered, to said Glassell, Smith & Patton for their services as attorneys in the action. Pen. Code, § 161, forbids any attorney to buy or be interested in buying any evidence of debt or thing in action.

Glassell, Smith & Patton and *Henry T. Gage*, for appellants. *Levi Chase, Bicknell & White*, and *O'Brien & Morrisson*, for respondents.

THORNTON, J. We see no ground to dismiss the appeals herein or either of them. Admitting that the notice of intention to move for a new trial is no part of the record, because not made such by bill of exceptions or statement, still it is evident that the motion was submitted and denied by the court, at which time the respondents (defendants in the court below) were represented by their attorney, Levi Chase, Esq. This is shown by the order denying the motion for a new trial, entered in the minutes of the court on the 29th of August, 1887, which is as follows: "The defendants being present by L. Chase, Esq., their attorney, the plaintiff's motion for a new trial being now submitted is at this time denied by the court." The record shows no objection to the submission of this motion on the ground that no notice so to move was served and filed in time. Under these circumstances, it would be manifestly unjust to hold that the court below did not acquire jurisdiction of the motion, or to dismiss the appeal from the order denying the motion for a new trial. Every intendment sustains the action of the court. The failure to object, and the action of the court in passing on the motion and not dismissing it, afford an irresistible presumption that all things were regularly done; that the proper notice of intention had been given, and the statement regularly prepared. It follows from the foregoing that the motion to dismiss either appeal must be denied.

The plaintiffs in this cause are Henry T. Gage and Cornelia Rains de Foley, and the defendants are John G. Downey and the Merchants' Exchange Bank of San Francisco. The action is ejectment to recover possession of an undi-

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vided one-half of a tract of land situate in San Diego county, known as the "Rancho Valle de San José," for which a patent was issued by the United States on the 10th of January, 1880, to Sylvestre de la Portilla, and also an undivided twelve twenty-fifths of a tract of land situate in the same county, known as the "Rancho Valle de San José," for which a patent was, on January 16, 1880, issued by the United States to J. J. Warner. Judgment was rendered for the defendants. The plaintiffs moved for a new trial, which was denied. The latter prosecute the appeals herein from the judgment and order denying a new trial.

On the 16th of April, 1836, a grant was made to Sylvestre de la Portilla by N. Guiterrez, political chief, of the place called "Valle de San José," containing four square leagues. On the 8th day of June, 1840, a grant was made to José Antonio Pico by Juan B. Alvarado, governor of California, of the place called "Agua Caliente," to the extent mentioned in the plan accompanying the *expediente*. On the 28th day of November, 1841, a grant was made to J. J. Warner by Manuel Micheltorena, governor of California, of the place called "Valle de San José," containing six square leagues, more or less. The grants to Portilla and Warner were confirmed, and patents were issued to them severally, as above set forth. The grant to Pico was rejected. On the 6th of November, 1858, Portilla conveyed all his interest in the rancho to one Vicente S. de Carillo. Some time prior to 1856, say in 1854, J. J. Warner mortgaged his rancho Valley of San José to J. Mora Moss. Suit was brought to foreclose this mortgage in the district court for San Diego county. In this action a homestead was set apart by the court to Warner and wife. This place called tract is described in the decree, and is a portion of the south-western part of the ranch, a tract said to be a league, and was directed to be sold under this decree to satisfy Moss' mortgage. This latter tract is described in the decree. It does not appear that the league was ever sold. This decree seems to have been entered in 1856. Surely, in the absence of proof, it may be conclusively presumed that Moss' debt was paid to Warner, and that this league was never sold. The homestead set apart included the whole of Warner's ranch except the league above mentioned. This is manifest from the report of the commissioners who set apart the homestead, and the order of the court confirming it. Surely, if the homestead did not include the whole ranch except the Moss league, the part ordered to be sold would have exceeded one league. On the 20th of November, 1858, the above-named Warner and his wife, Anita Warner, executed a mortgage to John Rains of all their interest in the land granted to him. The description of the land included in this mortgage is as follows: "All the right, title, and interest of the parties of the first part of, in, and to that certain tract of land lying, being, and situate in the county of San Diego, Cal., known as the 'Valley of San José and Agua Caliente,' and being the lands granted to Jose Antonio Pico by Juan B. Alvarado, governor of the department of the Californias, by deed of grant of date of June 8, 1840, and to Juan J. Warner by Manuel Micheltorena, governor as aforesaid, by deed of grant of date of November 28, 1844, reference being had for a more particular description to the several grants, *expedientes*, maps, and other papers on file in the office of the surveyor general of the United States for California, in the city of San Francisco, and in the office of the clerk of the district court of the United States for the Southern district of California, in the city of Los Angeles, forming the record of case No. 254 on the docket of the United States land commission, and of case No. 218 on the land docket of said district court; together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining." On the 5th of July, 1861, the above-named Carillo conveyed to John Rains the undivided one-half of the (Portilla) rancho, previously conveyed to him by Portilla. The mortgage of Warner and wife to Rains was subsequently foreclosed, and the mortgaged premises sold under the decree of foreclosure by George Lyons, sheriff of the

county of San Diego, to Rains; and on the 18th of November, 1861, the sheriff aforesaid, in pursuance of the decree and sale to Rains, executed to him a deed of the mortgaged premises above mentioned. The description in the sheriff's deed of the property conveyed is as follows: "All the right, title, and interest of said defendants of, in, and to that certain tract of land lying and being situate in the county of San Diego, state of California, known as the 'Valle de San José and Agua Caliente,' and being the land granted to José Antonio Pico by Juan B. Alvarado, governor of department of the Californias, by deed of grant of date January 8, 1840, and to John J. Warner by Manuel Micheltorena, governor as aforesaid, by deed of grant of date November 28, 1844; reference being had for a more particular description to the several grants, *expedientes*, maps, and other papers on file in the office of the surveyor general of the United States for California, in the city of San Francisco, and in the office of the clerk of the district court of the United States for the Southern district of California, in the city of Los Angeles, forming the record of case No. 254 on the docket of the late United States land commission, and of case No. 218 on the land docket of said district court; together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging. * * *

The mortgage of Warner and wife to Rains included the whole ranch granted to Warner; and Rains, under the decree of foreclosure, acquired title to the whole of it, and of this we have no doubt. The decree directed the whole to be sold and conveyed by the sheriff. The description in the mortgage and sheriff's deed are given above. The Moss league also passed to him under this mortgage, decree, and deed. At the time of the making of the foregoing documents, the Moss league had not been sold, and Rains took the title to Warner's ranch, presumably incumbered as to this league. As this was paid off he took title to the whole of Warner's ranch. By the deed from Carillo and wife he was invested with the title to the undivided one-half of the Portilla ranch, and the legal title to Warner's ranch and the above one-half of the Portilla grant was in him when he died, in November, 1862. These interests descended to his wife and children, unless the latter were divested of them by proceedings which will be hereafter referred to.

Before Rains took the mortgage above mentioned from Warner and wife, he had, on the 16th of September, 1856, intermarried with Maria Merced de Williams. He died on the 17th of November, 1862, leaving surviving him his wife above named, and five children, named Cornelia, (who is one of the plaintiffs,) Isaac, Robert, John, and Francisca, the latter born after the death of her father. Isaac died in 1877 intestate, unmarried, and without issue. On the 21st of February, 1863, Maria Merced, the above-named widow of John Rains, commenced an action in the district court of the county of San Bernardino against E. K. Dunlap, administrator of John Rains, deceased, and her children above named and others, in which she set forth her marriage with John Rains on the 16th of September, 1856; that Rains then had but an inconsiderable amount of property, which he afterwards expended; that Rains acquired money by the sale of her separate property; that on the 29th of November, 1858, he lent to J. J. Warner the sum of \$1,800, to secure the payment of which he received from Warner and his wife a mortgage of certain property, describing it as follows: "All their right, title, and interest in and to that certain tract of land lying and being situate in the county of San Diego, Cal., known as the 'Valle de San José and Agua Caliente,' and being the lands granted to José Antonio Pico by Juan B. Alvarado, governor of the department of the Californias, by deed of grant of June 8, 1840, and to John J. Warner by Manuel Micheltorena, governor as aforesaid, by deed of grant of date November 28, 1844;" the property and right included in said mortgage being all that part of said rancho "Valle de San José and Agua Caliente," lying to the north and east of the east and west and north and south lines drawn from the tree marked "W," mentioned in the complaint, instead of

the one square league lying to the south and west of said two lines. The line referred to marked "W" is described as an oak, standing on the east and in contact with the rocks, forming the first rocky point on the south side of the meadow valley, which extends eastwardly from the rocky hill at San José Indian village to Buena Vista. (The above description is combined from the original and amended complaint, in accordance with what appears in the transcript.) Other property is mentioned in the complaints which it is not necessary to describe. The complaint further avers that Rains proceeded in due course of law to foreclose this mortgage against Warner and the heirs of his wife, then deceased; that at the sale under the decree of foreclosure Rains became the purchaser, and thereafter in due time received the sheriff's deed for such premises. It was further averred that the money lent by Rains to Warner, and for which the mortgage was taken from Warner and wife, was the separate property of the then plaintiff, Maria M. Williams de Rains; that Rains paid no money for the property purchased at the sheriff's sale above mentioned; and that the amount paid was the amount found by the court due on the mortgage foreclosed; that no part of this money had ever been given to Rains by the plaintiff, his then widow, or did it belong to him in any way; that she was informed by Rains that the sheriff's deed for the mortgaged property aforesaid had been executed to her as grantee. She avers that the property became her separate property, and asks that the court decree the property included in the aforesaid deed of the sheriff of San Diego county to be hers, as against the defendants, with the common general prayer for all other and further relief to which she may be entitled. The district court for San Bernardino county found the facts as alleged by plaintiff in regard to this property, and decreed it to be her separate property. And it was further adjudged by same decree that defendant E. K. Dunlap, administrator of John Rains, deceased, execute and deliver to the plaintiff all necessary deeds, etc., to carry the decree into full effect. This decree was entered and filed on the 13th of March, 1863. On the next day the deed of the property described in the complaint was executed to plaintiff Maria Merced, by the administrator, as required by the decree. On the 14th of March, 1863, the above-named Maria Merced conveyed to her children, Cornelia, Isaac, Robert, John Scott, and Francisca Rains, by deed, all of the estate above mentioned, conveyed to her by deed of Dunlap, administrator, just above set forth. On the 2d of April, 1864, the aforesaid Maria Merced, widow of John Rains, commenced an action in the district court for the county of Los Angeles against Dunlap, in his individual capacity, and also as administrator of John Rains, deceased, Robert S. Carlisle, individually and as trustee, Cornelia Rains, Isaac Rains, Robert Rains, John Scott Rains, Francisca V. Rains, and others as defendants. On the 26th day of November, 1864, on the affidavit of plaintiff's attorney that the judge of the district court for the First judicial district, of which the county of Los Angeles formed a part, was disqualified from acting in the case by reason of consanguinity, on motion of said attorney the cause was removed for trial to the district court of the Third judicial district for Santa Clara county. No objection was made to this order. The papers in the cause were thereafter transmitted to the district court for the county last-named, and filed therein on the 4th of January, 1865. No motion was made to remand this cause to the district court for Los Angeles county, and it remained for trial, and was tried in the court to which it had been by the order transferred. On the 9th of May, 1865, an amended complaint was filed by the plaintiff, who had, since the commencement of the action, intermarried with José C. Carillo. The object of this suit was to have set aside the conveyance to her children as having been procured from her by fraud and undue influence, and also to set aside a power of attorney, executed to Robert S. Carlisle, which she had revoked, and for an account from Carlisle, etc., and for general relief. The property averred to have been conveyed by the deed

sought to be set aside by this suit is set forth in the complaint, and is described in full. It consists—*First*, of the Cucamonga ranch, situate in the county of San Bernardino; *second*, the Bella Union Hotel, situate in the city of Los Angeles; *third*, a lot in the city just mentioned, which was conveyed to Rains by Alice Flashner by deed dated August 11, 1862; and, *fourth*, (we here insert the description in same words as in complaint,) “all that certain tract of land situate in the county of San Diego, state aforesaid, known as ‘San José del Valle and Agua Caliente,’ same set apart as a homestead for Jonathan J. Warner and wife, by decree of the district court of San Diego county on September 24, 1856, and known also as ‘Warner’s Rancho;’” *fifth*, certain personal property. The above is alleged in the complaint to have been decreed to be her separate property by the decree in the San Bernardino action. Dunlap, Carlisle, and the infant children of said plaintiff, by their guardian *ad litem*, all answered the complaint. The case was tried, and on the 27th day of May, 1867, a decree was made and entered setting aside the deed above mentioned made by plaintiff to her children as having been obtained by fraud, and it was ordered that the same should be delivered up and canceled, also setting aside the power of attorney to Carlisle. The decree then proceeds to distribute the property in the action between the plaintiff and her children, defendants above named. Certain property is distributed to the children, and adjudged to belong to them, and certain other property to the plaintiff as hers. The respective interests are clearly designated and described in the decree, and possession is awarded to each of the parcels so decreed to them. Among other parcels of land awarded to the plaintiff is one designated in the decree in words following: “*Second*. And also all that tract of land situate in the county of San Diego, state of California, and known as the ‘Rancho San José del Valle’ (or ‘Warner’s Ranch,’) being the same rancho finally confirmed to J. J. Warner, and surveyed under instructions from the United States surveyor general of California by John C. Hayes, in July, 1859, and said survey was approved March 3, 1860, by T. W. Manderville, United States surveyor general of California.” On the 3d of December, 1868, Maria Merced Williams de Carillo executed to C. V. Howard, P. Beaudry, M. F. Coronel, J. S. Downey, and J. S. Garcia, a deed of “all that certain tract of land or rancho situate in the county of San Diego, state of California, known by the name of ‘San José del Valle,’ or ‘Warner Ranch,’ and also known by the name of ‘San José o Tagui,’ and being the same tract of land or rancho confirmed by the United States land commission and United States district court to J. J. Warner, in the case of *J. J. Warner vs. The United States*, to the papers in which case reference is hereby made for a more particular description.”

It is admitted that defendants succeeded to an undivided half of the Portilla grant by deed of V. S. de Carillo, executed on the 20th of February, 1869, to C. V. Howard *et al.*, and is not involved in this suit. Of the children of Maria M. W. de Rains above mentioned, Isaac died in 1877, intestate, unmarried, and without issue. It is said by counsel for plaintiffs that the interests of Robert, John, and Francisca, who married the plaintiff Gage, if any they had, became vested before the beginning of this action in the plaintiff just above named. Defendants claim title under the decrees above set forth, rendered in the San Bernardino and Santa Clara cases, and conveyances subsequently made.

It is averred by plaintiffs that the title under the Portilla grant was not embraced in the San Bernardino case. In this contention we cannot concur. The claim preferred by Mrs. Rains in this suit was for the whole of the Warner ranch, except the Moss league, which league, in the final survey, was not awarded to Warner. The reference to the grant to Warner and the homestead set off to him in the action of *Moss v. Warner and Wife* was mere matter of description, to identify the land which she claimed. There was no in-

tention to do what is most unusual and entirely unnecessary to deraign and set forth her chain of title in the complaint. The complaint means that John Rains bought this land with money which was part of plaintiff's separate estate; that it belonged to her in fee, and should be conveyed to her. It states that the property included in the mortgage to John Rains is a certain part, viz., that set off as a homestead in the action of *Moss v. Warner*. That is the tract claimed by her in the action and so declared in the complaint. The word "right," connected with "property," in the complaint, does not give a different meaning to what is claimed by the complaint. The language used amounts to stating that the right involved and claimed here is the right to the tract set apart as a homestead, described in the pleading. The decree of the court, and the deed of Dunlap, administrator, accord with this view, as will be seen by the reference to them. The complaint intended to challenge John Rain's right and title to this land, and to bring them to judicature, and this we think was done by the pleader. So that the parties claiming under Rains might deny by their answer her right to the land, and offer in evidence any title, whether derived from Portilla or any one else, to the land, which would show the land to be a part of his estate. The title to the land was in controversy in this suit as between the personal representative and the children of John Rains on the one hand, and his widow on the other, and it was determined in favor of the widow, (plaintiff.) John Rains acquired his interest in the Portilla grant after his foreclosure at the sheriff's sale under the decree of foreclosure in the action to foreclose his mortgage taken from Warner and wife; and if, after Mrs. Rains obtained the deed of the administrator under the decree in the San Bernardino case, she had brought an action against John Rains to recover the land embraced in the decree, and he had set up against her his Portilla title, she might have defeated it, if not by the decree just above mentioned, by showing that the Portilla interest was acquired by him with money belonging to her as her separate estate; and we are of opinion that the defendants could, in this action, do the same against the plaintiffs to defeat their right to any portion of the land included in the Warner patent. In our judgment the decree under consideration conclusively determined that the land embraced in it belonged to Mrs. Rains, and that the estate of Rains had no title to it acquired from any source, whether Portilla, or Pico, or any one else. Under this decree in Mrs. Rains' favor, she executed the deed to her children, under which plaintiffs herein claim.

It is contended on their part that the judgment in the case tried in Santa Clara, setting aside this deed, is void for want of jurisdiction in the district court of Santa Clara county. This contention we propose now to consider. The objection made to the jurisdiction of the court is put on the ground that the judge had transferred the cause to the district court of a county—Santa Clara—which court was not the nearest court to Los Angeles county, where the like cause or objection for making the order did not exist. The same cause and objection here existed as to every county in the First judicial district; therefore it would have been error to transfer it to a court in a county in that district. The judge then had to select a court of a county not of the First district. The nearest district courts then were in the Third judicial district, at that time composed of the counties of Monterey, Santa Cruz, Santa Clara, and Alameda. Conceding that the county-seats of Monterey and Santa Cruz were nearer to Los Angeles county in a straight course than that of Santa Clara county, still, as the county-seat of the latter was nearer by the usually traveled route, or more accessible, might it not be reasonably concluded that the district court of Santa Clara was the nearest? But waiving this, we are of opinion that, conceding that the county-seat of Monterey or Santa Cruz was nearer than that of Santa Clara to Los Angeles county, that the order sending it to the district court of the latter county was only error. We cannot see how it can be law that a judgment can be impeached collater-

ally and held void, because a judge has made an inconsiderable mistake in computing distances, or had selected a county-seat more readily accessible than the others in coming from Los Angeles, and holding it to be really the nearer on that account. The judge had jurisdiction to make this order, under the statute then in force. He must determine what is the nearest court in administering the law. This determination was undoubtedly within his power, (St. May 6, 1854; St. 1864, p. 153; Hitt. Gen. Laws, par. 5600;) and if he sent it to a county some distance further than another by error of a miscalculation of distances, it would be nothing more than an error, and should not render the judgment void. Conceding that this judgment might have been reversed on appeal, still it would not be void on collateral attack. The cases cited by the counsel for plaintiffs, (appellants here,) *Burton v. Covarrubias*, decided at the April term, 1865, (not reported;) *People v. De la Guerra*, 24 Cal. 73; *Livermore v. Brundage*, 64 Cal. 299; and *People v. McGarvey*, 56 Cal. 327,—are not at all in point. They are all on appeal or direct attack. No collateral attack was attempted in either case, and in every case except *People v. McGarvey* they were orders not of transfer, but orders in the cause, involving judicial action of different kind than that of transfer, which the judge was expressly forbidden by statute from making. *People v. McGarvey* related to a criminal case transferred under a state of facts not allowed by the statute relating to such cases,—a statute entirely different from the act under which the judge proceeded in this case, as is apparent from the opinion in the case. There was no appeal in the Santa Clara case. In fact, the adverse parties therein did not object to the order, did not move to vacate it, nor to remand the cause in the Santa Clara court, but acquiesced in the judgment. We do not think the contention of the appellants is sustainable. The judgment is not open to attack for the reason urged by them.

The plaintiff in the case tried in Santa Clara county relied on the judgment recovered in the San Bernardino case, which, as we have seen, determined that the whole of the Warner ranch, except the Moss league, was hers, as against any title derived from any source or any one else, and the decree in the Santa Clara case set aside the deed to her children and determined certain land to belong in fee to the plaintiff therein, Mrs. Carillo, formerly Rains. It makes no difference that the decree assumed the form of a partition of the property involved in the cause between the plaintiff and her children. It set aside the deed to the children, and, conceding that the decree in other respects was void, it was not void so far as it set aside this deed. The Warner ranch, except the Moss league, then remained in her under the San Bernardino decree, and the administrator's deed made in pursuance thereof. We do not think that it is averred in the complaint in the Santa Clara cause that the judgment in the San Bernardino cause was obtained and entered by collusion of any kind. The arrangement between Scott and Dunlap had relation to the deed executed after the judgment in the San Bernardino case to Mrs. Rains' children and the power of attorney to Carlisle, and not to the judgment. The findings in the Santa Clara case, if there were any, are not in the transcript, and the judgment therein makes no reference to any agreement between Scott and Dunlap. The point that this was averred to have been a collusive judgment is not well taken. The defendants acquired, before the commencement of the action, the title to an undivided one-half of the land patented to Portilla. This does not include the half conveyed to John Rains by Carillo and wife, by deed dated July 5, 1861. The above appears by stipulation. It was admitted on the trial that there is a league (the Moss league) of the land patented to Portilla which is not included in the patent to Warner. All the other land included in the patent to Portilla is included in the patent to Warner. As to the land included in the Warner patent, the defendants are entitled to recover it. This follows from what has been stated above.

The question as to that part of the land sued for outside of the patent to

Warner, and embraced in the Portilla patent, demands further consideration. The Moss league, it is admitted by stipulation, is not included in the patent to Warner. Such is the meaning of the stipulation on page 362 of the transcript. We do not know that the defendants ever acquired more than the above half of the league. The other half passed to John Rains, and he died intestate as to it. This half was acquired during the coverture with his wife, Maria Merced, and was, therefore, community property, and on his death passed, subject to the payment of debts of the community, one-half to Maria M., his relict, and the other half to his descendants, (children.) See act of May 8, 1861, (St. 1861, p. 310.) Rains left four children, one of whom, Isaac, died in 1877, intestate, unmarried, and without issue. His portion, an undivided one-fifth, descended to his mother, Maria Merced. The other four-fifths descended to the other children. The title to one-fifth of this half, or one-twentieth, of the Moss league, was in Mrs. Foley when the action was brought, and she is entitled to recover it. Isaac's interest in this land passed by descent to Mrs. Rains or Carillo on his dying intestate in 1877, unmarried and without issue. The portions of Robert, John, and Victoria of this league remained in them when the action was commenced. The record does not show that they were ever conveyed to the plaintiffs, or either of them. Nor does it show that Mrs. Carillo ever conveyed her interest in this league to the plaintiff Foley or Gage. We have searched the record with the greatest care, and can find in it no deed to plaintiff Gage from any one, and the only deed to the plaintiff Foley is that executed by her mother (Mrs. Rains) to her children on the 14th of March, 1863, which was set aside. As the record shows no conveyance of any kind to plaintiff Gage, it is free from error as to him. We have said nothing as to the interest which appears to have been acquired by Mrs. Rains or Carillo from Mrs. Carlisle by the deed of the latter. So far as it affects the land in the Warner patent, it inured, under the Howard deed, to the benefit of the defendants. As to any interest in the Portilla, it still remains in her, and can cut no figure in this suit, as she is not a party seeking any relief.

Conceding that the contracts between Glassell, Smith & Patton and the plaintiffs (which are found by the court) are void, they are of no material significance in this action. If they were void, they cannot and have no effect on the title of plaintiffs. The plaintiffs may set them up against Glassell, Smith & Patton, if they should so elect, when the former make any claim against them. We cannot see that defendant's rights are in any way enlarged by these contracts. If such contracts are void, they are no more than so much blank paper between the parties. They take away nothing from the plaintiffs, and add nothing to the rights of defendants. The contention of defendants on this point need not be further considered. It is dismissed from further notice as untenable.

As this action is brought to recover lands embraced in the Portilla and Warner patents, and as it clearly appears that the plaintiff, Mrs. Foley, is entitled to recover a portion of the lands embraced in the Portilla patent, viz., one-twentieth of the Moss league, and of any portion of the Portilla patent not included in the Warner patent, as to her there must be a new trial. The order denying a new trial to plaintiff Gage is without error. The judgment and order are reversed as to plaintiff Foley, and the cause remanded for a new trial as to her. As to the plaintiff Gage, the judgment and order must be affirmed. So ordered.

We concur: SEARLS, C.J.; PATERSON, J.; SHARPSTEIN, J.; MCKINSTRY, J.; MCFARLAND, J.

3 Cal. Unrep. 7

PEOPLE v. AH JAKE. (No. 20,404.)

(*Supreme Court of California.* June 18, 1888.)

In bank. Appeal from superior court, Sierra county; F. D. SOWARD, Judge.

Bert Schlessinger and *A. J. Howe*, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

PER CURIAM. We have examined all the points made by counsel for appellant in this cause and cannot perceive that the court below committed any error in its rulings herein. Judgment and order affirmed.

3 Cal. Unrep. 21

BATES v. SCHROEDER. (No. 12,712.)

(*Supreme Court of California.* August 20, 1888.)

APPEAL—REQUISITES—FAILURE TO FILE TRANSCRIPT.

A clerk of appellant's attorney, during the illness of his employer and against his directions, took the appeal, but failed to file a transcript. Appellant's attorney was first apprised that appeal had been taken by respondent's notice of motion to dismiss, when he served and filed a transcript. *Held*, that the appeal would not be dismissed.

In bank. Appeal from superior court, San Mateo county; E. F. HEAD, Judge.

Motion to dismiss appeal, on the ground that no transcript was filed in time. The affidavit of appellant's attorney, heard upon the motion, alleged that appellant, defendant below, interposed a demurrer to the complaint, which was overruled, and judgment rendered for plaintiff; that within 10 days after rendition of the judgment deponent was taken sick, and confined to his bed and room for about a month, being unable to attend to any business; that, while so confined, he was informed that defendant had requested one of deponent's clerks to take an appeal in the cause, but that he had directed the clerk not to take the appeal, and supposed his directions had been obeyed; that he was first apprised that appeal had been taken by respondent's notice of motion to dismiss; that, upon receiving such notice, he caused a transcript on appeal to be made out, served, and filed in this court, and that it was his intention in good faith to prosecute the appeal; that the judgment appealed from is, in his opinion, manifestly erroneous.

D. M. Delmas, for appellant. *J. C. Bates*, for respondent.

PER CURIAM. On an examination of the papers herein the court is of opinion that the appeal should not be dismissed, and the motion must be denied.

76 Cal. 328

PEOPLE v. GOLDENSON. (No. 20,349.)

(Supreme Court of California. May 25, 1888.)

1. CRIMINAL LAW—VENUE—CHANGE—POPULAR EXCITEMENT.

On a motion for a change of venue on the ground of popular prejudice against defendant, where the occurrences showing "popular excitement," on which affidavits for defendant base their belief that a fair and impartial trial could not be had, transpired within a few days after the crime, and the counter-affidavits show that the excitement had actually subsided, and had not prevailed for three weeks prior to the application, it is no abuse of discretion for the trial court to deny the motion.¹

¹As to when a change of venue should be granted on a trial for murder, on the ground of popular excitement and prejudice, see *Seams v. State*, (Ala.) 4 South. Rep. 521.

2. SAME—DENIAL OF MOTION TEMPORARILY.

Where such motion is denied temporarily, with permission to renew the application, it is the duty of the defendant to renew the application, if a change of venue is desired.

3. SAME—CONTINUANCE—TO OBTAIN RETURN OF DEPOSITION.

A motion for a continuance, in order to obtain the return of certain depositions, is properly denied, where the interrogatories relate solely to facts which are not denied.

4. SAME—ABSENCE OF COUNSEL—ATTENDANCE ON OTHER COURT.

Defendant's plea of not guilty was entered on November 23, 1886, and the case set for trial December 6th, and continued to February 14, 1887, at the request of defendant's counsel, to enable him to prepare for trial. On December 17, 1886, the professional services of defendant's senior counsel were engaged in a civil case, the trial of which was begun on January 18, 1887, and was in progress February 14, 1887, when defendant's case was called for trial. *Held*, that it was not error to refuse a continuance until defendant's counsel had concluded his engagement in the civil suit, there being no certainty when that case would be concluded.

5. SAME—ATTENDANCE ON LEGISLATURE.

Code Civil Proc. Cal. § 595, providing that a trial shall be postponed when it appears that the attorney of record is attending on the legislature as a member thereof, refers only to those who become attorneys before the commencement of the session of the legislature; and a defendant in a criminal case is not entitled to a continuance because his junior counsel is a member of the legislature, when it does not appear from the record that he was engaged in the defense when the session began.

6. SAME—APPOINTING ATTORNEY TO REPRESENT DEFENDANT.

After overruling defendant's motion for a continuance to suit the convenience of the attorney whom he had employed, the court appointed attorneys to defend him, although he neither desired nor was he unable to pay for another attorney. *Held* no error, the question being who should represent the defendant, who was represented by the defense as insane, and relied upon insanity as his defense.

7. SAME—FORMATION OF GRAND JURY—WAIVER OF DEFECTS.

Irregularities in the formation of a grand jury cannot be considered on motion to set aside the indictment. Such motion can be addressed only to the proceedings of a grand jury.

8. SAME—COMMITMENT—SETTING ASIDE INDICTMENT.

The provision of Pen. Code Cal. § 995, that an information may be set aside when the defendant has not been legally committed by a magistrate before the filing thereof, does not apply in cases of indictment.

9. SAME—RIGHT OF DEFENDANT TO BE HEARD BEFORE GRAND JURY.

The defendant is not entitled to notice that the grand jury is investigating a charge against him, nor is he entitled to be heard or have witnesses sworn and examined by that body, unless the jury calls for the same.

10. SAME—JURY—CHALLENGES—BIAS AGAINST CAPITAL PUNISHMENT.

Under Pen. Code Cal. § 1074, providing for challenges of jurors for implied bias in a trial for murder, when the court becomes satisfied that a juror entertains conscientious scruples against convictions when the penalty is death, it is the court's duty to excuse him, and it is not error to refuse to allow further examination by the defendant.

11. SAME—BIAS OF JUROR—REVIEW.

The decision of the court, upon a challenge to a juror for actual bias, is final.

12. SAME—HARMLESS ERROR.

Where it appears that defendant had the benefit of all the peremptory challenges to which he was entitled, the omission of the court to inform the defendant that, if he intends to challenge a juror, he must do so when the juror appears, and before he is sworn, as required by Pen. Code, § 1066, is not prejudicial error.

13. SAME—RETRIAL OF CHALLENGES.

It is not error for the court to deny defendant's motion for a retrial of certain challenges, after the jury has been completed and sworn.

14. SAME—ARRAIGNMENT—COPY OF INDICTMENT.

When defendant on arraignment is given a copy of the indictment, it is not error to refuse a second copy to counsel appointed to defend him, as it is the defendant who is entitled to a copy, and not all who are his counsel.

15. SAME—TRIAL—COMPELLING DEFENDANT TO STAND UP FOR IDENTIFICATION.

To order the defendant to stand up during the trial for identification by one of the witnesses, is not compelling him to become a witness against himself, within the meaning of the constitutional provision that "no person shall be compelled, in any criminal case, to be a witness against himself."

16. **SAME—OPENING STATEMENT BY COUNSEL—COMMENTS.**
It is not error for the trial judge to stop defendant's counsel from commenting to the jury on the action of the court in matters of law, and it is not error to refuse to allow counsel in his opening statement to refer to other cases or to read law in illustration of his argument.
17. **SAME—OPENING STATEMENT—EXTENT.**
It is not error to require counsel for the defendant in his opening statement to confine himself to a statement of facts, and his conclusions therefrom, without any argument upon the evidence introduced by the state.
18. **SAME—NUMBER OF OPENING STATEMENTS.**
It is within the discretion of the trial court to refuse to allow both of the attorneys for the defendant to make opening statements to the jury, under Pen. Code, § 1093, providing that "counsel may open the defense."
19. **SAME—EVIDENCE—MEDICAL TREATISES.**
Medical treatises are not admissible in evidence, except to discredit a witness who bases his testimony upon them; and on a trial for murder, the defense being insanity, when an expert is asked to name the circumstances of the cases he had read when violence accompanied hysterical mania, the question is properly overruled, it being an attempt to introduce medical works in evidence.¹
20. **SAME—CHARACTER OF DEFENDANT—BIASED WITNESS.**
In a trial for murder, when the mother of deceased testifies, on her cross-examination: "I heard the Goldensons [the family of defendant] were of such a character that I did not wish my daughter to go to their house,"—it is not error to disallow a question by defendant as to the nature of the character referred to. The testimony of the witness showed that she was prejudiced against defendant's family, and the reason therefor was immaterial.
21. **SAME—WITNESS—LEADING QUESTIONS.**
It is within the discretion of the trial court to allow the prosecuting attorney to ask leading questions of the state witnesses.
22. **SAME—EVIDENCE—CONFESSIONS.**
The confession of defendant is admissible, when freely and voluntarily given, without inducements or threats.²
23. **SAME—CONFESSION—PRELIMINARY PROOF.**
In a trial for murder, when a detective, referring to a confession made by defendant, testifies: "He made it freely; no inducements held out to him, or promise or expectation; no threats made,"—it is not error to refuse to strike out the testimony as a conclusion of law; the court thereupon informing the defendant's counsel: "You have the privilege now of examining the witness upon the question or whether or not it was a free and voluntary statement."³
24. **SAME—DEPOSITIONS—HEARSAY.**
It is not error for the court on its own motion, and with or without an objection from the prosecution, to exclude portions of depositions, on behalf of the defense, which are hearsay.
25. **SAME—EXPERT WITNESS—HYPOTHETICAL QUESTION.**
It is not error to refuse to permit all the testimony given in the case to be read as a hypothetical question to a medical expert, when defendant's counsel are informed by the court that they might assume certain facts, and put the usual hypothetical question.³
26. **SAME—COMMENTS OF COUNSEL.**
It is not error to prevent counsel for defendant from commenting upon the actions of juries in other local homicide cases, and to state that the case before the court should be tried upon the evidence given in court, and the law applicable thereto.
27. **SAME—BILLS OF EXCEPTION—SETTLING DURING TRIAL.**
It is not error for the trial court to refuse to settle bills of exceptions during the trial. It is within the court's discretion to delay such settlement beyond the statutory time, and it is its duty to see that the record is correct, whether any objections are made by the prosecuting attorney to the proposed bill of exceptions or not.

¹That medical and scientific works are not admissible in evidence, except for the purpose of impeaching expert witnesses who have cited them, see *People v. Vanderhoof*, (Mich.) 39 N. W. Rep. 28, and note.

²As to when confessions are admissible in evidence, and the preliminary proof required, see *Mitchell v. State*, (Ga.) 5 S. E. Rep. 130, and note; *State v. Lewis*, (La.) 3 South. Rep. 343, and note; *People v. Yeaton*, (Cal.) 17 Pac. Rep. 544, and note; *Banks v. State*, (Ala.) 4 South. Rep. 382, and note; *Wilson v. State*, Id. 383.

³Concerning what should properly be included in hypothetical questions, see *People v. Vanderhoof*, (Mich.) 39 N. W. Rep. 28, and note.

28. SAME—NECESSARY CONTENTS—EXAMINATION OF JUROR.

The trial court certified that, in the examination of proposed jurors, no question as to their competency was disallowed, no evidence rejected, no objection to the admission or rejection of any testimony sustained, and no objection or exception to the allowing or disallowing of any question, evidence, or testimony on said examination was made or saved, except as herein set forth. *Held*, upon an intimation that the court, in settling the bill of exceptions, had eliminated material matters, that the court properly declined to incorporate into the bill the testimony of the jurors in their examination on their *voir dire*.

29. SAME—MISCONDUCT OF JURY—AFFIDAVITS OF JURY.

When a new trial is asked on the ground of the misconduct of the jury in disobeying the admonition of the court about reading newspapers, the affidavits of the jurors, denying the charges of misconduct, are allowable, and are conclusive.¹

30. SAME—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

A new trial will not be granted on the ground of newly-discovered evidence, where such evidence is merely impeaching and cumulative in character.²

31. SAME—CONDUCT OF TRIAL JUDGE.

Where the language of the court, as used in his rulings and questions and remarks, and set out in the record, does not show anything from which it can be said the jurors were prejudiced, an exception, based on the ground that the jurors were prejudiced by the conduct of the judge, cannot be sustained.

In bank. Appeal from superior court, city and county of San Francisco;
D. J. MURPHY, Judge.

Eugene N. Deuprey and *Wm. H. Jordan*, for appellant. *Atty. Gen. Geo. A. Johnson*, for the People.

PATERSON, J. The defendant is under sentence of death for having willfully, unlawfully, and of his malice aforethought killed one Mary Elizabeth Kelly, in the city and county of San Francisco, on the 10th day of November, 1886. It appears that Goldenson and the deceased—who was only fourteen years of age—had been acquainted for two or three years, and during that time lived with their parents, in adjoining houses. The girl was returning home from school on the day of the homicide, when the defendant met her, and said, "Come here, Mamie, I want to see you." Leaving her school-mate—with whom she was walking—she joined the defendant, and had proceeded about half a block with him, when he suddenly turned towards her, and saying, "Take that and go," pointed a pistol at her, and shot her; killing her instantly. He then ran to the nearest police station, throwing his pistol away in his flight, and gave himself into the custody of the officers, saying, "I have shot my girl." On his way to the office of the chief of police, soon after he had delivered himself up to the officers, he stated that he had shot the deceased because she became an annoyance to him; that they had been "keeping company" and had corresponded clandestinely; that when he met her she had a letter in her hand which he had sent her that morning; and that she had called him "a damned Jew," whereupon he shot her. Upon his arrival at the office of the chief of police, at his own request, he was permitted to make a written statement about the homicide. The substance of this statement is that the deceased had been constantly annoying and following him; had been continually seeking his company against his wishes; and that just before he shot her she had called him "a damned Jew."

¹On the subject of the admissibility of jurors' affidavits, on a motion for a new trial, based on misconduct of the jury, see *Com. v. White*, (Mass.) 16 N. E. Rep. 707, and note; *Clark v. Manchester*, (N. H.) 13 Atl. Rep. 867; *State v. Rush*, (Mo.) 8 S. W. Rep. 221; *Griffin v. Harriman*, (Iowa,) 38 N. W. Rep. 139; *Grottkau v. State*, (Wis.) 36 N. W. Rep. 31.

²That a new trial will not be granted on the ground of newly-discovered evidence, merely impeaching and cumulative in its character, see *Hunt v. State*, (Ga.) 7 S. E. Rep. 142, and note; *Gilmore v. Brost*, (Minn.) 39 N. W. Rep. 139, and note.

There seems to be very little controversy about the facts of the case; the defense relying, so far as the merits go, apparently upon the insanity of the defendant, under his plea of not guilty. In support of their contention, that the judgment should be reversed, counsel for the defendant have filed elaborate briefs, in which more than a hundred points are made against the regularity of the proceedings in the court below.

The points which seem to be urged with the most zeal and confidence are that the court erred in denying the motions for a change of venue and for a continuance. In support of their motion for a change of venue, counsel for defendant made what appears to be a very strong showing. It appears from the affidavits that, "within a few days after the homicide had occurred, a crowd of people assembled in front of the house of said defendant, and some of them cried out, 'Close him up!' 'Make the Jew close up!' 'Hang him!' 'Lynch him!' That a guard of police was necessary at that time to protect the property of defendant's family. That for several days defendant's relatives feared to leave their home. That the shutters and windows of affiant's store were broken by some of the excited people gathered there, and that on the occasion of the attempted removal of defendant's family some of their property had been injured, and that for several days succeeding November 10, 1886, many people remained continuously in the vicinity of defendant's home, uttering threats of violence against defendant and his family. That the newspapers in said city and county were daily denouncing said defendant, and demanding his immediate execution, and that for the reasons given it was impossible for defendant to receive a fair and impartial trial in said city and county. Mrs. Goldenson, the mother of defendant, incorporated in her affidavit clippings from the newspapers describing a meeting which took place at Metropolitan Hall on November 12, 1886. It appears from said articles that said meeting was held for the purpose of raising money for the mother and grandmother of the deceased, and to engage counsel to assist in the prosecution of the defendant, but that many turbulent acts and threats of mob violence were indulged in by members of said meeting. That on the night of said meeting the sheriff and chief of police had the jail, where the defendant was confined, guarded by a large force of men, well armed, and precautions had been taken against any unlawful assault or attack. That about 8:30 o'clock of the night in question several thousand people assembled in front of said jail, and many appeals were made for immediate violence; and that finally the crowd was driven away and dispersed by a determined effort of a large force of police, but not until many blows had been given and interchanged." It further appears, from the affidavit first quoted, "that an attempt to remove their property on November 13th was frustrated by the offer of violence; that on November 16th, under the protection of the police, a removal was effected; that affiant had read highly inflammatory articles in the papers calling for the speedy trial and execution of defendant, and had heard many bitter and hostile expressions of opinion by citizens towards said defendant."

If this condition of affairs existed at the time of the trial, it must be admitted that the city of San Francisco was not a proper community from which to attempt to select a fair and impartial jury for the trial of the defendant. When the public mind is wrought into such frenzy, and the public press sustains enraged citizens, organized for avenging crime, in their unlawful attempts to overcome the duly-constituted officers of the law, and only the superior force of the latter prevents mob execution, no man whose blood is thus demanded can hope to secure the rights guaranteed to him by the constitution. It is impossible, under such conditions, to secure an equal, exact, and impartial interpretation and execution of the laws, which is not only the right of every person, but which is essential to the welfare of all and the conservation of good government. But, while the facts stated in the affidavits on

behalf of the defendant are admitted to be true substantially, there are two sufficient reasons why the order of the court below, denying the motion for change of venue, should not be disturbed: *First*. Because the principal occurrences upon which affiants for defendant based their belief that a fair and impartial trial could not be had, transpired within a few days after the homicide, and the counter-affidavits filed by the prosecution tended to show that the excitement which had been aroused by the homicide had entirely subsided, and had not prevailed for three weeks prior to the time of the application for a change of venue. We cannot say that, under the showings made by the respective parties, the court abused its discretion in denying the motion. Such applications are addressed to the sound discretion of the court, and, where error is assigned, a clear case should be shown by the record, or this court will not interfere. The court below was then in a better position to weigh the statements of the parties and to determine the truth than this court is now. *People v. Fisher*, 6 Cal. 155; *People v. Congleton*, 44 Cal. 92. In *People v. Yoakum*, 53 Cal. 570, upon which appellant relies, there was no counter-showing made by the prosecution, and, as stated by WALLACE, C. J., "so bitter, indeed, was the public feeling against the prisoner, that its manifestation could not be wholly repressed, even in the presence of the court, when the trial was about to commence." *Second*. The motion was denied temporarily only, and, although permission was given to renew the application, no effort was afterwards made to procure a change of venue. The motion was denied conditionally on December 7, 1886. The impanelment of the jury did not commence until February 21, 1887. At several sessions of the court, including that held on the last-named date, the defendant was represented by counsel of his own selection, and by those appointed by the court, all of whom made various motions, but none of whom renewed the application for change of venue. The order of the court was proper. Between the time of the application for a change of venue and the date of trial, when a jury is to be selected, great changes may occur in the opinions of the public touching the guilt of the defendant; and it was the duty of the defense, if a change of venue was desired, to renew the application at the time suggested by the court. *People v. Plummer*, 9 Cal. 309.

The motions for a continuance were made on February 14, 16, and 21, and on March 7, 1887. The grounds of the motions in each instance were: *First*, that certain commissions for the depositions of foreign witnesses had not been returned; *second*, that the senior counsel for defendant was engaged in the trial of a civil case in another department of the superior court; and, *third*, that the junior counsel was a member of the state legislature, then in session.

We are unable to see how the defendant could be prejudiced by the absence of the depositions referred to, conceding that the production of them was not waived by the stipulation of defendant's counsel at the time the commissions were issued, and conceding that the great lapse of time between the issuance of the commissions and the date of the trial did not operate as a legal excuse for going on with the trial without them; for it appears from the bill of exceptions that the interrogatories propounded to the witnesses named in the depositions related solely to the insanity of defendant's grandfather, and the fact that the grandfather was insane was not denied or in any way controverted. Witnesses on behalf of the defendant gave evidence of the fact; it was established by uncontroverted evidence; and the court would have been bound, at the defendant's request, to instruct the jury that the fact was so established, and must be taken as true.

The fact that one of defendant's counsel was engaged in a civil case in another department of the superior court was no ground for a continuance. The defendant's plea of not guilty was entered on November 23, 1886. The case was set for trial on December 6th, and by successive continuances it

went over until February 21, 1887, when the trial commenced. The case was continued from December 7th to February 14th at the request of defendant's counsel, and to enable him to prepare for trial. On December 17, 1886, the professional services of the senior counsel were engaged for the Tiffany will contest, the trial of which was begun on January 18, 1887, and was in progress on February 14th, the day defendant's case was set for trial. When defendant's case was called for trial his counsel were unable to say when the will contest would be concluded, but it was conceded that it would take several weeks. Was it error to refuse a postponement, under these circumstances, until counsel had concluded his other engagement? It seems to us that the facts stated are a sufficient answer to the proposition. There was no certainty that the will contest referred to would be concluded within months of time after the motion was made. To hold that a defendant charged with crime has an absolute right to counsel of his own selection, with unlimited right to insist upon continuances of his trial, and that the court, jury, and witnesses must await the convenience of his counsel in fulfilling other engagements, would be subversive of the prompt administration and execution of the laws,—upon which depends largely their effectiveness,—and subject the time and service of citizens serving the state gratuitously, as jurors and witnesses, to the wishes and interest of the attorney engaged in the defense. It is too apparent for argument that the court below must, in the nature of things, have some control over such matters; and, if it has any discretion, it is equally apparent that it was not abused in this particular instance. Pen. Code, § 1052, Deering's notes. The attorney for the defendant was bound to know whether the case, in which he became engaged after the defendant's case was set for trial, would be concluded in time to enable him to fill both engagements, and the responsibility for the loss or prejudice to defendant's cause, if any there was, by reason of the inability or refusal of his counsel to proceed with the defense of his client when his case was regularly called, was properly placed by the court below when he stated to the attorney, as he left the court-room, that it rested upon the latter alone.

The junior counsel was a member of the legislature and speaker of the assembly when the case was tried; but it does not appear that he was engaged in the defense herein when the session began, or before February 14, 1887. An inquiry was made by the court as to how long he had been engaged for the defense, but the senior counsel declined to inform the court further than by the affidavits, which did not show the time. The court was justified, therefore, in believing that the employment began not earlier than February 14th, when said counsel's name first appeared in the proceedings. Prior to that time he was not known in the case. Section 595 of the Code of Civil Procedure provides that "a trial shall be postponed when it appears to the court that the attorney of record, party, or principal witness is actually engaged in attendance upon a session of the legislature of this state as a member thereof." If this section of the Code of Civil Procedure applies to the Penal Code, (which is doubtful, in view of section 1052, Pen. Code,) it refers, we think, only to those who become attorneys of record before the commencement of the session of the legislature. The object of the statute was to protect clients whose attorneys, after employment, had been called to their legislative duties, and to secure lawyers in the legislature from loss to their private business which might be caused by attention to their public duties.

On February 16, 1887, when counsel for defendant withdrew, stating that he could not proceed with the trial, the court informed the defendant that he might name any attorney in the city to defend him, and he would be sent for and appointed, and that he would be given a reasonable time to prepare for trial. The offer was declined, whereupon the court appointed two members of the bar to defend him, and the cause was continued five days, to enable the defendant to prepare for trial. In his affidavit for continuance the senior

counsel for defendant set forth "that affiant in particular has prepared the defense of defendant with sedulous care, and has made a very thorough examination of the law governing the facts of said defense, and is thoroughly acquainted with all the facts of the defense." We must assume that said counsel, notwithstanding the fact that the court ruled against him and appointed other counsel to look after the interests of the defendant, gave to counsel actually engaged in the defense of the defendant all the information which he possessed, and which would in his opinion aid them in their unpaid effort to secure an acquittal of his client. No attorney, under the circumstances, would be likely to feel himself so fortified in his contention that the court had committed a fatal error as to risk a conviction upon his opinion rather than give those appointed by the court the information he possessed, when called upon by them to do so. That they made a vigilant, vigorous, and an able defense the record bears ample evidence, and there is nothing to show—except the presumption which may follow the fact of a longer employment—that the defense was less effective than it would have been if conducted by counsel of the defendant's own selection.

It is claimed by appellant that the court had no authority to appoint attorneys to defend the defendant, because he had already employed, and had acting for him, an attorney of his own choice, and because he neither desired nor was he unable to employ another; that it is only when the prisoner desires counsel, and is unable to employ one, that the court is authorized to appoint, and it is error if it does appoint one. But it was not a question whether he desired an attorney and had the means to employ one. The question was, who should represent him? He insisted upon having the case continued to suit the convenience of the attorney he had employed. This could not be done,—at least, that was the ruling, and all were bound to respect it. It was then and still is claimed in his defense, by his relatives and his retained attorneys, that he was insane. Whatever may be the right of a defendant, where there is no question of insanity, the court acted, we think, in accordance with every principle of law, justice, and humanity in this case in selecting attorneys to look after the interests of the prisoner, who at that time, by all the affidavits, was represented as demented and unable to know right from wrong. The spectacle of sending a prisoner charged with murder to trial without counsel, in a case where the defense is insanity,—and especially under our practice, allowing that issue to be tried under the plea of not guilty,—would be a singular one in the enlightened jurisprudence of this age, and in violation of the constitutional guaranty that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, * * * and to have the assistance of counsel for his defense." Const. U. S. Amend. 6; Const. Cal. art. 1, § 13.

The defendant moved to set aside the indictment under subdivisions 1 and 2 of section 995, and subdivisions 2 and 6 of section 896, Pen. Code. The defendant moved, also, to strike the said indictment from the files, upon the grounds that previous to its filing the defendant was not examined before any magistrate, and had no opportunity to send for any counsel; that he had no notice of the said investigation by the grand jury, and was not confronted by any witnesses; that the testimony of the witnesses examined against him was not reduced to writing, and he was not committed for trial by any magistrate; that the indictment was invalid and void, because found by a body of men calling themselves a "grand jury," who had not been selected according to the requirements of law; and for that reason the court had no jurisdiction of the alleged crime or of the defendant. We think that the proceedings had by the judges of the superior court for the selection of grand jurors, and the certificates thereof, were substantially in compliance with the provisions of the statute regulating the same; but, whether this be so or not, irregularities in the formation of a grand jury cannot be considered on motion to set aside an

indictment. Such motion can be addressed only to irregularities in the proceedings of a grand jury. *People v. Southwell*, 46 Cal. 142.

The defendant was not entitled to notice that the grand jury was investigating a charge against him, nor was he entitled to be heard or have witnesses sworn and examined by that body, unless it called for the same. *State v. Wolcott*, 21 Conn. 272; section 920, Pen. Code. The objection that no examination was held before a committing magistrate does not apply in cases of indictment, although good in case of an information. Section 995, Id. As to the other grounds of the motion to set aside and strike out, it is sufficient to say that the evidence introduced at the hearing of the motions was adverse to the defendant.

It was not error to direct the officers of the court to amend the return of service so as to conform to the facts. *Gavitt v. Doub*, 23 Cal. 81; *Hewell v. Lane*, 53 Cal. 217; *Rousset v. Boyle*, 45 Cal. 64; *People v. Murback*, 64 Cal. 370; 1 Bish. Crim. Proc. §§ 1298, 1341-1345.

The court disallowed a challenge to the first, second, and third panels of jurors specially summoned by the sheriff, under section 1064 of the Penal Code, on the ground of bias against the defendant by the sheriff and his deputies. The examinations of the officers showed that there was no foundation in fact for the charge.

There was no error in the refusal of the court to allow further examination of the jurors who stated that they entertained conscientious scruples against conviction where the penalty is death. When the court became satisfied that such opinions existed, it was its duty to excuse the jurors. Section 1074, Pen. Code. We cannot say that discretion was abused in refusing further examination.

A challenge to the entire panel of trial jurors was made by the attorneys for defendant, but we are unable to find in the transcript any evidence offered in support thereof. If the denial was error, it should be affirmatively shown in the record. *People v. Sing Lum*, 61 Cal. 539. Unless there were exceptions reserved to the rulings of the court, the judge properly refused to incorporate in the bill of exceptions the evidence given by the jurors when examined upon their *voir dire*. The decision of the court upon a challenge to a juror for actual bias is final. The bill of exceptions does not contain the rulings of the court on the challenges to the jurors for actual bias. *People v. Vasquez*, 49 Cal. 560; *People v. Cotta*, Id. 166.

The court refused to allow the defendant to exercise peremptory challenges after he had exhausted the 20 challenges allowed by statute. It is claimed that this was error, because of the failure of the court to comply with section 1066 of the Penal Code, which provides that "before a juror is called the defendant must be informed by the court or under its direction that, if he intends to challenge an individual juror, he must do so when the juror appears, and before he is sworn." It does not appear affirmatively whether the defendant was informed of his rights in this regard or not; but the defendant certainly had the full benefit of all the peremptory challenges to which he was entitled, and was not in any manner prejudiced by the error complained of. *People v. Mortier*, 58 Cal. 262.

It was not error for the court to deny defendant's motion for a retrial of certain challenges after the jury had been completed and sworn to try the case. Section 1068, Pen. Code.

The defendant on the arraignment was given a copy of the indictment. When the court appointed counsel to defend him, said counsel requested a copy of the indictment, which request was refused. The court was not bound to supply the defendant with a second copy of the indictment. It is the defendant who is entitled to a copy, and not all who are his counsel. Section 988, Id.

The contention is urged with much force that the court erred in ordering the defendant to stand up during the trial for identification by one of the wit-

nesses. The witness had stated that he went into the station-house, and there found this young man, (meaning the defendant.) It is claimed that this act was violative of the constitutional provision that "no person shall be compelled in any criminal case to be a witness against himself." The defendant was in court, and it was proper for the jury, in identifying the person whom the witness had seen, to know whom the witness meant by the expression "this young man." He was not compelled to exhibit any part of his person, which the jurors could not see as he walked in and out every day. It was not compelling the defendant to become a witness against himself in any respect, within the meaning of the constitutional provision above quoted. *State v. Ah Chuey*, 14 Nev. 79.

In his opening statement to the jury one of the counsel in effect accused the presiding judge of having crowded the case on to trial when the defendant was not ready. The court promptly and properly directed him to cease commenting or reflecting on the action of the court in that regard; saying that, if any error had been committed, the prisoner had the benefit of an exception. The court, furthermore, did not err in refusing to allow counsel in his opening statement to refer to other cases, or read law in illustration of his argument. *People v. Williams*, 43 Cal. 344.

It was insisted at the trial that both of the attorneys for the defendant were entitled to make opening statements to the jury. The court refused to allow more than one statement. In this there was no error. "Where the offense charged is punishable with death, two counsel on each side may argue the case to the jury," (section 1095, Pen. Code;) but section 1093 of the Penal Code provides simply that "counsel may open the defense." It was within the discretion of the court to limit the statement to one counsel.

Several assignments of error are made respecting the rulings of the court upon expert testimony offered, and the right to introduce medical works in rebuttal of the testimony of witnesses called on behalf of the people. It has been held here that medical treatises are not admissible in evidence, whether proved to be standard works or not, except to discredit a witness who based his testimony upon them. *Gallagher v. Railway Co.*, 67 Cal. 13, 6 Pac. Rep. 869. Dr. Woolsey, one of the experts called by the defense, was asked to name the circumstances of the cases he had read where violence accompanied hysterical mania, and the court sustained an objection to the question. If allowed, the examination would have been in effect the introduction of medical works in evidence, and therefore it was properly rejected. *People v. Wheeler*, 60 Cal. 581.

The court refused to allow counsel for defense to read in surrebuttal certain portions of a medical treatise by Dr. Maudsley, which were offered to discredit and contradict Dr. Clark, a witness for the people; but offered to allow any portion relevant to the testimony given by Dr. Clark, and which tended to contradict him, to be read in evidence. If the portions which were excluded had any tendency to discredit or contradict the witness upon any matter about which he had testified, they ought to have been incorporated into the bill of exceptions, so that we might determine whether they were pertinent. They are not in the bill. Furthermore, it does not appear that the witness predicated his opinion upon the authority of Dr. Maudsley's works. There was, therefor, no error in the ruling of the court in that matter.

The court did not err in requiring the counsel for the defendant in his opening statement to confine himself to a statement of the facts, the effect thereof, and his conclusions therefrom, without any argument upon the evidence introduced by the prosecution. *People v. Bezy*, 67 Cal. 223, 7 Pac. Rep. 643; *People v. Williams*, 43 Cal. 349; Pen. Code, § 1093, subds. 3, 5.

Mrs. Kelly, mother of the deceased, testified in her cross-examination: "I heard the Goldensons were of such a character that I did not wish my daughter to go to their house." Defendant's counsel then inquired: "What was

the character that you speak about?" An objection thereto was sustained on the ground that it was immaterial and irrelevant. We see no prejudicial error in this ruling. The testimony of the witness showed that she was prejudiced against the Goldenson's; the particular reason therefor is immaterial.

Several errors are assigned, based upon the rulings of the court in permitting the district attorney to put leading questions to his own witness. This is a matter within the discretion of the court. Section 2046, Code Civil Proc.; *People v. Ah Fook*, 64 Cal. 381, 1 Pac. Rep. 347.

There was no error in the admission of the declaration or confession of the defendant. The evidence in the transcript shows clearly that the statement was freely and voluntarily given, no inducements having been offered him or threats made. *People v. Rodundo*, 44 Cal. 538.

One of the detectives examined as a witness, referring to the statement made by the defendant, said: "He made it freely; no inducements held out to him, or promise, or expectation; no threats made." Counsel for defendant moved to strike out this testimony on the ground that it was a conclusion of law. The motion was denied, the court saying: "You have the privilege now of examining the witness upon the question whether or not it was a free and voluntary statement." There was no error here. *People v. Rodundo, supra*.

Portions of the deposition of one Louis Rosenthal, on behalf of the defendant, were excluded by the court of its own motion. The portions thus excluded appear to be clearly hearsay,—the relation of matters which occurred between third persons,—and it was not error, with or without an objection from the prosecution, to exclude the same.

The court did not err in refusing to permit all the testimony given in the case to be read as a hypothetical question to Dr. Simon. *Reg. v. Frances*, 4 Cox, Crim. Cas. 57. Counsel were told that they might assume certain facts, and put the usual hypothetical question, and this was finally done, and was proper. 2 Bish. Crim. Proc. § 685.

It was not error for the court to prevent counsel for the defendant from commenting upon the actions of the juries in the Gunn, Gardiner, and other homicide cases which had been tried in San Francisco, and in stating that the case before the court should be tried upon the evidence given in the court, and the law applicable thereto. *People v. Anderson*, 44 Cal. 70.

Many other errors are assigned which we do not deem it necessary to consider. Some of them are already covered by the propositions which we have discussed herein; others are too frivolous to be worthy of consideration, such as the following: That it was error to permit counsel for the defense to ask Dr. Hayne, "What is the first question that a doctor puts to his patient?" and that the court erred in refusing to hear one of the counsel for the defendant, immediately upon the conclusion of the statement to the jury, discuss before the court and the jury certain questions of law which he anticipated would arise during the trial.

No attempt has been made to point out any errors in the instructions. They seem to be fair and correct.

It was not error in the court to refuse to settle bills of exceptions during the trial. They are all included in the bill of exceptions before us, and the errors claimed have been reviewed. It was within the discretion of the court to delay the settlement of the bill of exceptions beyond the statutory time, and it was its duty to see that the record was correct, whether any objections were made by the district attorney to the proposed bill of exceptions or not. *People v. Sprague*, 53 Cal. 424; *People v. Lee*, 14 Cal. 510; Pen. Code, § 1175.

An intimation is made that the court, in settling the bill, eliminated certain material matters, to prevent the defendant from having the benefit of a full defense herein. But we must take the statement in the bill as one of ab-

solute verity. The judge certifies that, "in the examination of proposed jurors, no question as to their competency was disallowed, no evidence was rejected, no objection to the admission or rejection of any testimony sustained, and no objection or exception to the allowing or disallowing of any question, evidence, or testimony on said examination was made or saved, except as herein and now particularly set forth." Then follow three exceptions: Counsel for the people were permitted to put this question to a proposed juror: "I suppose what you mean to say is this, that you object to the abuse of the plea of insanity, and not to the plea of insanity itself." No objection was made to this question, except as to the form thereof. The second exception was taken to the refusal of the court to hear an argument from one of the counsel for the defense upon a challenge for actual bias after the trial thereof had been concluded. The third objection is that the court erred in allowing the district attorney to propound a certain question to a juror after he had been examined and passed by counsel for the defendant and for the people. It is clear that there was no error in any of these three rulings, and we think that the court properly declined to incorporate into the bill of exceptions the testimony of the jurors given in their examination on their *voir dire*.

One of the grounds upon which defendant asked for a new trial was that the jury had been guilty of misconduct, by which a fair consideration of the case had been prevented. The substance of the misconduct charged consisted in the jurors having disobeyed the admonition of the court about reading newspaper articles during the trial which reflected on the defendant. All of the jurors filed affidavits denying fully the charges of misconduct preferred, and insisting that no admonition of the court had been disobeyed, and that no newspaper articles or anything else, save the evidence and the charge, influenced them in finding their verdict. These affidavits were allowable, and are conclusive upon the point made. *People v. Hunt*, 59 Cal. 430; *People v. Dye*, 62 Cal. 523. Another ground of the motion for a new trial was that new evidence had been discovered material to the defendant; but it appears from the affidavits filed in respect thereto that the newly-discovered evidence was simply impeaching or cumulative in character. It was therefore insufficient to support the ground for a new trial. *Stoakes v. Monroe*, 36 Cal. 585; *People v. Anthony*, 56 Cal. 397.

Counsel for defendant in their briefs complain bitterly of the manner and conduct of the presiding judge during the trial, claiming that they were clearly indicative of a strong feeling of hostility against the defendant, and prejudice against his defense; that this feeling was repeatedly manifested in the many severe interruptions of counsel's arguments, and the interjection of questions and objections without any motion or desire therefor on the part of the prosecuting officers; and that such conduct of the judge must necessarily have prejudiced the minds of the jurors against the defendant and his cause, and contributed to his conviction. But, as we have intimated in other cases, these are matters which cannot be shown by the record, unless there is in the language used by the judge in his rulings, and questions and remarks, something from which this court can say the jurors were prejudiced. The trial judge holds a great trust and responsibility in this regard, which can be controlled only, except in cases of palpable abuse of the power, by his own conscience, and a desire to see equal and exact justice done between the people and the defendant. *People v. Lee Sare Bo*, 14 Pac. Rep. 310.

During the trial it appears that several inflammatory articles were published in some of the newspapers tending to prejudice the defendant's cause, and which may have been read by the jurors. While the affidavits of the jurors are, of course, taken as true, and it appears therefrom that no prejudice was created in any way in this case, yet the court below cannot be too careful in guarding itself and the jury from all suspicion of prejudice by refraining from making remarks which may appear adverse to either party; and should

see to it, by proceedings in contempt, if necessary, that no such newspaper articles reach the jury. Judgment and order affirmed.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; MCKINSTRY, J.; THORNTON, J.

74 Cal. 386

WEIDEKIND v. TUOLUMNE COUNTY WATER CO. (No. 12,149.)

(*Supreme Court of California.* December 23, 1887.)

ATTORNEY AND CLIENT—ATTORNEY FOR PLAINTIFF IN FORMER TRIAL ACTING FOR DEFENDANT—NEW TRIAL.

It is error to allow an attorney and counselor at law, who had formerly acted for the plaintiff in the trial of a cause, to appear and act on behalf of the defendant at a subsequent trial of the same cause; his avowed intention being to assist the defendant with all the knowledge and secrets he had gained from plaintiff.

Commissioners' decision. Department 1. Appeal from superior court, Tuolumne county; J. F. ROONEY, Judge.

Frank W. Street, for appellant. *Edwin A. Rodgers*, for appellee.

FOOTE, C. This is an action to recover damages alleged to have been done to the plaintiff's mining claim, as is asserted, by the negligence of the defendant, which eventuated in the breaking of a dam, and the overflow of the water which it had confined. The jury trying the cause returned a verdict for the defendant, upon which the court rendered judgment, from which and an order overruling a motion for a new trial the plaintiff has appealed.

The plaintiff assigns for error that the court, against his objection, allowed an attorney and counselor at law, who had formerly acted for the plaintiff in this very case, when it was previously tried, to appear and act on behalf of the defendant on the trial of the cause last had. That attorney made this statement regarding the matter in the presence of the court, while the trial was progressing: "As the court well knows, Mr. Weidekind, [the plaintiff] in the first trial of this case, did retain Mr. Dorsey and myself. I drew the complaint, and participated in the first trial of this case, in this court. My compensation was to depend upon my success. As soon as I had earned that by our success, this plaintiff saw fit to discharge me and retain other counsel. With that act of his I have never found fault. I have never been paid a cent by him for my services. An appeal was taken from the judgment in that trial entered. A new trial was granted by our supreme court. A new trial was had. Judgment was entered against plaintiff. An appeal was again taken, and another reversal followed. In each of these trials plaintiff has had other counsel than myself. I am here to assist Mr. Rodgers in the trial of this case, with all the knowledge I have gained in the three trials." Thereupon he did act as an attorney and counselor on the trial, sitting by and assisting the attorney of record, arguing disputed points before the court, and examining witnesses; the court having overruled the repeated objection of plaintiff's counsel. This action of the court is contended to be such an irregularity on its part as prevented the plaintiff from having a fair trial. It was within the power of the court, if satisfied that the attorney in question had acted on the plaintiff's side of the case on the former trial, to prohibit his acting on the other side in another trial. *Weeks, Attys.* § 120. There can be no doubt, from the statement of the attorney to the court, that he proposed to act, and it is also certain that he did act, as an attorney and counselor for the defendant in the trial of a cause where he had formerly acted for the plaintiff. The trial court had a right, and it was its duty, to have forbidden the attorney from changing sides in the same suit, though at different trials; for to do otherwise was "to defeat the very purpose for which courts were organized, viz., the administration of justice." *Wilson v. State*, 16 Ind. 392. The evidence in this case and the statement of the attorney himself was sufficient

to show the court that his intention was, for the benefit of the defendant, to use at that time all the knowledge and secrets he had gained from his former client in preparing for and conducting one trial, and observing and watching the developments of two others. This court, speaking to such a question, says: "We are of opinion that the court in that case would have restrained him, even had he been unjustly discharged, and he was allowed, as contended, to be employed by the adverse party. The law secures the client the privilege of objecting at all times and forever to an attorney, solicitor, or counselor from disclosing information in a cause confidentially given while the relation exists. The client alone can release the attorney, solicitor, or counsel from this obligation. The latter cannot discharge himself from the duty imposed on him by law." *In re Cowdery*, 69 Cal. 50, 10 Pac. Rep. 47. The attorney himself boldly avowed his intention so to act. The court permitted him to do it, notwithstanding the plaintiff's objection. This we think was an error, and, in the absence of any proof to the contrary, injury must be presumed to have resulted to the plaintiff, whereby he was prevented from having a fair trial of his case. We perceive no further prejudicial error, but for the reasons indicated the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

(75 Cal. 596)

CARPENTER *et al.* v. SUPERIOR COURT OF SAN JOAQUIN COUNTY.
(No. 12,395.)

(*Supreme Court of California.* April 21, 1888.)

1. INFANCY—GUARDIAN AD LITEM—PROBATE PROCEEDINGS.

Code Civil Proc. Cal., in the chapter on "Parties to Civil Actions," section 372, provides that a guardian *ad litem* shall be appointed to represent infants; section 1718 provides for the appointment of an attorney to represent infants in probate proceedings. *Held*, that such provisions being for two representatives, neither of whom is subordinate to the other, the former section does not apply to probate proceedings.

2. SAME—WILLS—CONTEST—APPOINTMENT OF ATTORNEY—JUDGMENT—VALIDITY.

Under Code Civil Proc. Cal. § 372, requiring a guardian *ad litem* to be appointed to represent infant defendants, and section 373, allowing the infant, if 14 years old, 10 days after service of summons to appear and make choice, the appointment of an attorney to represent the infant in a proceeding to contest a will is sufficient, though he is not designated as guardian *ad litem*; and though it does not appear at whose instance the appointment was made, or that 10 days elapsed prior thereto, it appearing to have been made after service, judgment is not so invalid as to authorize the court to set it aside after motion for new trial had been made and denied.

3. SAME—AMENDMENT OF PETITION—REAPPOINTMENT OF ATTORNEY.

Reappointment of an attorney for a minor, or of a guardian *ad litem*, after demurrer to petition and amendment thereof, is not necessary.

Commissioners' decision. In bank.

Petition by Carpenter and others for writ of *certiorari* to the superior court of San Joaquin county. Demurrer to petition. Code Civil Proc. Cal. § 373, allows infants for whom guardians *ad litem* are appointed, if 14 years old, 10 days after service of summons to appear and make choice.

Sawyer & Burnett, for petitioners. *Carter & Smith* and *S. D. Woods*, for respondents.

HAYNE, C. Demurrer to a petition for a writ of *certiorari*. The facts shown by the petition are substantially as follows: A document purporting

to be the will of Charles W. Carpenter, deceased, was admitted to probate, and letters testamentary were issued to the executor named therein. Subsequently, and within the year, the petitioners commenced proceedings to contest the validity of the will. A trial was had. The jury found against the validity of the will, and the court entered judgment accordingly. A motion for a new trial was made and denied. After all this had occurred, certain minors, for whom an attorney had been appointed by the court, through which attorney they had appeared and taken part in the proceedings, made a motion to have all the proceedings set aside, mainly on the ground that they had not been represented by a guardian *ad litem*. The court granted this motion, and set aside the verdict and judgment, and the application is for a writ to annul such action. The demurrer is on the ground that the petition does not state facts sufficient to constitute a cause of action.

After judgment upon the verdict had been entered, and a motion for a new trial had been regularly made and denied, the court below was not authorized to set aside its action for mere error. *Coombs v. Hibberd*, 43 Cal. 452; *People v. Center*, 61 Cal. 194; *Bank v. Deuprey*, 66 Cal. 169, 4 Pac. Rep. 1173; *Dorland v. Cunningham*, 66 Cal. 484, 6 Pac. Rep. 135; *Lang v. Superior Court*, 71 Cal. 491, 12 Pac. Rep. 306. The foundation of this rule is that the modes in which a decision may be reviewed are prescribed by statute, and the courts are not at liberty to substitute other modes in their place. Such being the foundation of the rule, it is not affected by the fact that terms of court are abolished, and the decision in *Estate of Langan*, 16 Pac. Rep. 188, has no application. That case has reference to proceedings taken and orders made irregularly and through inadvertence. To such misprisions and inadvertencies the rule in question has no application. Thus, where a motion for new trial was granted without any submission of the motion, and before the record upon the motion was completed, it was held to be proper for the aggrieved party to move to have the order granting the new trial set aside. *Morris v. De Celis*, 41 Cal. 331; and see, also, *De Gaze v. Lynch*, 42 Cal. 363, and *Hall v. Polack*, 42 Cal. 218. In such cases the fact that the order was irregularly and improvidently made takes it out of the general rule. Compare *Rousset v. Boyle*, 45 Cal. 69. Such a state of things being of rare occurrence, is not presumed, but must be affirmatively shown. The objection that the court has acted in an unauthorized mode goes to the power of the court, and hence its action may be reviewed on *certiorari*; for which the case of *Lang v. Superior Court*, above cited, is a precedent. It is true that a decision which is absolutely void may be brushed aside at any time and in any mode. *People v. Greene*, 16 Pac. Rep. 197. But nothing short of such invalidity would justify such action. The question, therefore, is whether the verdict and judgment against the will were absolutely void.

The notice of motion to set them aside states several grounds upon which the motion was to be made, viz.: (1) That they were "against law." This is too vague to mean anything more than that they were erroneous, which, as we have seen, is not a question which the court was authorized to consider on such an application. (2) That "there never was any service of citation in said matter, contest, and cause had or made upon said proponent." This is expressly negated by the allegations of the petition for the writ, which must be assumed to be true. And (3) that no guardian *ad litem* was appointed for the minors, and that, therefore, the appearance for them was unauthorized.

The last ground is the one upon which the counsel for respondents rely. The position is based upon the proposition that the provisions in relation to guardians *ad litem* in the chapter on "Parties to Civil Actions" apply to probate proceedings. But, in the first place, we do not think that the provisions referred to apply to probate proceedings. It has been held that for some purposes probate proceedings are not "civil actions." *Estate of Scott*, 15 Cal. 220; *Ex parte Smith*, 53 Cal. 204. And we do not think they are to be con-

sidered civil actions or proceedings within the meaning of the said provisions. If these general provisions were intended to apply to probate proceedings, what was the use of making special provisions in reference to the appointment of attorneys for minors in such proceedings? Is it not to be inferred that the special provisions were put in because the general ones were not intended to apply? This inference is strengthened when the provisions are considered together. The thing which a guardian *ad litem* is appointed to do is to "represent" the infant in the action or proceeding, (Code Civil Proc. § 372,) by which we understand that he is to conduct and control the proceedings on behalf of the infant. Now, the attorney for minors in probate proceedings is to "represent" the minor, (Id. § 1718,) and, so far as he is concerned, to conduct and control the proceedings; so that, if the general provisions apply, it would be possible to have two representatives of the minor in the same contest, neither of whom would be subordinate to the other. We do not think such a result could have been intended.

But if the provisions in the chapter on parties to civil actions are assumed to have been intended to apply to probate proceedings, we think they were substantially complied with. The petition shows that on the filing of the papers for contestant "a citation was issued to the said executor and all the said legatees and devisees; * * * that said citation was immediately served by the sheriff upon each of said legatees and devisees and said executor, by delivering, etc.; * * * that thereafter, on the 31st day of January, the said superior court duly made an order, etc." The order referred to appointed an attorney "to represent in all the proceedings in this court" the said minors, (naming them.) The term "guardian *ad litem*" is not used; but the attorney was appointed to perform the functions of a guardian *ad litem*, and the neglect to call him by a certain name is unimportant. It is true that it does not appear at whose instance the appointment was made, nor whether there was an interval of 10 days between the service and the appointment. But it appears that the appointment was after the service. And that is sufficient to prevent the proceedings from being absolutely void; for, as observed by the learned counsel for the respondents, "there is a vast difference between an erroneous appointment of a guardian and no appointment at all."

Nor is it material that there was no reappointment of the attorney after the sustaining of his demurrer and the amendment of the petition. It is not necessary that there should be a new guardian *ad litem* every time a pleading is amended. We think, therefore, that the verdict and judgment against the validity of the will were not void. It results that the court had no power to set them aside, and, there being no appeal, (*Estate of Calahan*, 60 Cal. 233; *Estate of Sbarboro*, 70 Cal. 147, 11 Pac. Rep. 563,) the party is entitled to the writ. We therefore advise that the demurrer to the petition be overruled, with leave to answer within 20 days.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the demurrer to the petition is overruled, with leave to answer within 20 days.

PATERSON, J., did not participate in the decision.

77 Cal. 91

THOMAS v. JAMESON. (No. 12,410.)

(Supreme Court of California. September 22, 1888.)

1. TRUSTS—RESULTING TRUSTS—LOAN OF PURCHASE MONEY—EXTENT OF TRUST.

Plaintiff purchased real estate for which he was to pay \$950, \$200 in cash, and the balance to be secured by mortgage on the property; and, to enable him to make the cash payment, procured a loan of \$200 from defendant. As security for its payment, title to the property was taken in defendant, he executing the mortgage back, and verbally agreeing to convey to plaintiff on payment of the \$200, and being secured on account of his liability on the mortgage. *Held*, that defendant held the entire property in trust for plaintiff.¹

2. SAME—PLEADING—VARIANCE.

Plaintiff alleged, and the court found, that the contract for the purchase of the property was made on June 11th. The deed to defendant bore date June 9th, and was acknowledged the next day, but the testimony showed that the contract was made before the deed was executed. *Held*, that the discrepancy in dates should have been corrected, but did not show error requiring reversal.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; WILLIAM A. CHENEY, Judge.

Will D. Gould, for appellant. *H. M. Smith* and *W. H. Clark*, for respondent.

BELCHER, C. C. The plaintiff claimed that the defendant held the title to certain real property in trust for him, and he brought this action to have the trust declared, and a conveyance enforced. The material facts of the case, as shown by the evidence and found by the court, are substantially as follows: Mrs. Thompson owned two lots in East Los Angeles, and agreed to sell them to the plaintiff for \$950, \$200 of the money to be paid on the execution of the deed, and the balance in one year thereafter, with interest thereon at the rate of 10 per cent. per annum. The plaintiff agreed to purchase the lots on the terms named, but, not having the \$200 at hand, applied to the defendant for a loan of that amount. The defendant agreed to loan him the money, to be repaid in a year, with 10 per cent. interest, and to give his note for the \$750, and a mortgage on the lots, to secure the same, provided the title should be taken in his name to secure him. The plaintiff agreed to this, and thereupon received the \$200 from defendant, and paid it to Mrs. Thompson; telling her at the same time, in the defendant's presence, that he had borrowed the money of defendant, and that she was to make the deed to him. She accordingly made a deed of the lots to defendant, and he executed and delivered to her his note and mortgage for the \$750. It was further understood and agreed between the parties that, on the plaintiff's paying the \$200 and the interest thereon, and securing the defendant from all liability on his note and mortgage to Mrs. Thompson, defendant would convey the lots to plaintiff. The plaintiff complied with all his agreements, and, when the \$200 became due, tendered that amount, with the interest which had accrued thereon, to defendant, and also tendered to him the said note and mortgage, with a full written satisfaction and discharge thereof. The transactions were all verbal ones, and the proof of them was objected to on that ground, but the objections were overruled and exceptions reserved. Upon the findings the court gave judgment in favor of the plaintiff, from which and from an order denying a new trial the defendant appealed.

1. The complaint stated a cause of action, and the evidence, if admissible, was sufficient to justify the findings and judgment.

2. A resulting trust arises by operation of law, and the facts creating it

¹That a trust results, where the consideration is advanced by the grantee for another person, the grantee taking title in his own name to secure payment of such advances, see the note to *Hellman v. Messmer*, (Cal.) 16 Pac. Rep. 766, cited in the opinion. See, also, *Bitzer v. Bobo*, (Minn.) 38 N. W. Rep. 609, and note; *Hunt v. Patchin*, 35 Fed. Rep. 316, and note.

may be shown by parol. The court did not err, therefore, in admitting the plaintiff's evidence, and in refusing afterwards to strike it out.

3. The rule is well settled that when real property is purchased, and one party pays the purchase money and another party takes the title, a resulting trust immediately arises in favor of the party paying the money, and the other party becomes his trustee; and, also, that if the one party pays only a part of the purchase money, the party taking the title becomes the trustee for the other party *pro tanto*. And the same rule applies if the money is paid by the party taking the title, provided it is advanced by him as a loan to the other party, and the title is taken to secure its repayment. *Millard v. Hathaway*, 27 Cal. 140, 142; *Sandfoss v. Jones*, 35 Cal. 481; *Somers v. Overhulser*, 67 Cal. 237, 7 Pac. Rep. 645; *Hellman v. Messmer*, 16 Pac. Rep. 766.

4. It is claimed for the appellant that the court erred in deciding that defendant held the title to the whole property in trust for the plaintiff; that at most a trust arose, and could be enforced as to such proportion of the property only as was paid for by the \$200 loaned by defendant to plaintiff; and that there was no trust as to that part of the property which was paid for by the note and mortgage of defendant. A similar question arose in *Hidden v. Jordan*, 21 Cal. 92, and it was there held that a trust arose as to the whole property. We think that case correctly decided, and, upon the point in hand, decisive of this.

5. It is alleged in the complaint, and found by the court, that the plaintiff contracted with Mrs. Thompson for the purchase of the lots on the 11th day of June, 1885. The deed for the lots from Mrs. Thompson to defendant, which was introduced in evidence, was dated June 9, 1885, and acknowledged on the next day. It is urged for appellant that this discrepancy in dates conclusively shows error, and necessitates a reversal of the judgment. But it clearly appears from the testimony that the contract was made early in June, and before the execution of the deed. The dates referred to in the complaint and finding were evidently erroneous, and might and should have been corrected. The error was, however, harmless, and for such errors judgments are never reversed. Code Civil Proc. § 475. We find no material error in the record, and therefore advise that the judgment and order be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

75 Cal. 123

MONTGOMERY v. KEPPEL *et al.* (No. 12,266.)

(Supreme Court of California. February 16, 1888.)

1. MORTGAGES—PRIORITY—NOTICE.

During the negotiations for a loan, to secure which a mortgage was given by the mortgagor to the plaintiff, it became known to plaintiff that the title to the land which was offered for security was in the defendant, and that the mortgagor was then negotiating for its purchase. This purchase was consummated, a deed delivered to the mortgagor by defendant, and a purchase-money mortgage executed by the mortgagor to defendant. Plaintiff's mortgage was recorded a few days before the execution and record of the deed by the defendant to the mortgagor, and before the execution and record of the purchase-money mortgage. *Held*, that plaintiff must be charged with knowledge that part of the purchase money had not been paid when the deed was executed to the mortgagor, and that he had notice of defendant's mortgage, and his mortgage must be postponed to that of defendant.

2. SAME—ESTOPPEL—IN PAIS—CORPORATIONS—OFFICERS.

During said negotiations, plaintiff's attorney informed the secretary of the defendant corporation that he was examining the title to the land, and inquired on behalf of plaintiff how much money plaintiff would have to pay defendant for the land in order to get a perfect title, as he was taking a mortgage,—to which said officer replied, "\$12,978;" and the attorney informed said secretary that, if he found the title all right in other respects, he would put plaintiff's mortgage on record, and pay

said sum to defendant, and take the deed of defendant to the mortgagor. Subsequently, said sum was paid by the attorney to the defendant. *Held*, that the defendant was not estopped from setting up the priority of its mortgage by the conduct of the secretary; there being no intention on the secretary's part to deceive, and plaintiff could not have been misled by the secretary's statement.

Department 2. Appeal from superior court, Butte county; LEON FREER, Judge.

Hundley & Gale, for appellant. *W. F. Goad* and *Arthur Rodgers*, for respondent.

THORNTON, J. The plaintiff brought this action to foreclose a mortgage against the mortgagor, Garret Keppel, and the Spring Valley Mining & Irrigating Company. Other persons were made parties, which need not be here especially mentioned. As to all these defendants, except Keppel, the general allegation is made that they have, or claim to have, some interest in or claim upon said lands, or some part thereof, as purchasers, mortgagees, judgment creditors, or otherwise, which interests or claims are subsequent to and subject to the lien of plaintiff's mortgage. The defendant corporation above named set up a mortgage upon a portion of the land covered by the plaintiff's mortgage executed by Keppel to it; and which of these mortgages was prior in right, as appears from the transcript, was the principal question tried and determined by the court. It appears from the findings of fact that the mortgage to the corporation defendant was executed on the 22d day of November, 1883, acknowledged by the mortgagor on the same day, and filed for record in the office of the county recorder of Butte county (where the mortgaged property was situate) at 10:25 o'clock on the 26th day of November, 1883. It further appears that the land mortgaged to the corporation was conveyed by it to the common mortgagor on the same day on which the mortgagor executed to the defendant above named, the mortgage just mentioned; that the mortgage was executed to secure to the defendant a part of the purchase money of the said land, the other portion having been paid by Keppel, the purchaser, in cash prior to the delivery of the conveyance to him by the defendant; that on the 24th of November, 1883, the deed of conveyance of the land sold to Keppel was delivered to him by defendant, and was recorded in the proper office in Butte county, on the 26th day of November, 1883. The mortgage to plaintiff was executed on the 22d of November, 1883, and was recorded in the proper office in Butte county on the 22d day of November, 1883. This last mortgage was executed to secure a loan of a large sum of money made by plaintiff to Keppel. While Keppel was negotiating with plaintiff for this loan, it became known to plaintiff that the title of a portion of the land which he (Keppel) offered as security was in the corporation defendant, for the purchase of which Keppel was then negotiating with the corporation. This purchase was consummated by the delivery of the deed above mentioned, executed to Keppel by the corporation, a payment of a portion of the purchase money by Keppel, and, concurrently with the execution of the deed, the execution to the corporation by Keppel of the mortgage above mentioned to secure the payment of the remainder of the purchase money. All the above constituted parts of the transaction of purchase by Keppel of the corporation of the land above referred to. Of this negotiation of Keppel to purchase, the plaintiff at the time of making the loan to him, was aware; and he must be held to have known that the mortgage conveyed to him no interest in this land until the delivering of the deed by the corporation to Keppel. Being aware of the purchase by Keppel of this land of the defendant, plaintiff must be held to have known of the terms of the purchase, and all of them; and, if he did not know them, he must have deliberately abstained from knowing. The evidence shows that the plaintiff was in communication with Keppel all the time that the purchase was pending, knew all the terms of it, and it would be most strange if they were not communicated to plaintiff by Keppel. Hav-

ing readily accessible means of acquiring knowledge of a fact, which he might have ascertained by inquiry, is equivalent to notice and knowledge of it. This is well settled by repeated decisions of this court. *Fair v. Stevenot*, 29 Cal. 486; *Smith v. Yule*, 31 Cal. 184; *Pell v. McElroy*, 36 Cal. 272; *Thompson v. Pioche*, 44 Cal. 516. Under these circumstances we must hold that plaintiff knew that a part of the purchase money was not paid when the deed was executed to Keppel by the corporation, and that a mortgage was executed by Keppel to the corporation to secure this unpaid portion of the purchase money at the same time that the deed was executed. This being the state of the case, we must hold that the plaintiff had notice of defendant's mortgage when the mortgage to him on the land mentioned became operative, and that, therefore, his mortgage as to this land must be postponed to that of the corporation defendant. The finding to the contrary of the above is not sustained by the evidence.

But it is urged that the corporation is by the conduct of one of its officers estopped from setting up the priority of its mortgage to that of plaintiff. This contention is based on the following facts found by the court below: "That in making said loan of \$80,000 to defendant Garret Keppel, and during the time negotiations and granting of said loan, W. F. Goad, Esq., was the agent and attorney for plaintiff, and was authorized to examine into the title of the land described in plaintiff's mortgage; that said Goad was informed that the legal title to the land described in said deed, dated October 23, 1883, from defendant Spring Valley Mining & Irrigating Company to defendant Garret Keppel, was in said defendant corporation grantor; that said Goad, as such agent and attorney, after obtaining said information, and on or about the 10th day of November, 1883, with defendant Garret Keppel, called at the principal office of said corporation defendant, which was in San Francisco; that said Goad there met Willis E. Davis, the secretary of the Spring Valley Mining & Irrigating Company, and told said secretary that plaintiff, A. Montgomery, had employed him to examine the title to said land to see whether it was satisfactory; that he (said Goad) was employed to do so by said plaintiff, and was plaintiff's agent in such matters; that he wanted to see that the title was perfect; that plaintiff, A. Montgomery, wanted to know how much money he would have to pay the defendant Spring Valley Mining & Irrigating Company in order to get a perfect title, as plaintiff was taking a mortgage; that said secretary then gave as such sum \$12,978; that said Goad then informed said secretary that if he found the title perfect in other respects at Oroville, where he was going, he should put plaintiff's mortgage on record, and, upon his return to San Francisco, would pay the \$12,978,—give a check for it,—and take the deed of the Spring Valley Mining & Irrigating Company, which deed, being that hereinbefore referred to, had been prepared in form, and was shown to said Goad by said secretary; that said Goad went to Oroville on or about the 19th day of November, 1883, and stayed until the 22d, when plaintiff's mortgage was acknowledged and recorded; that said Goad returned to San Francisco, and on his way back, on the 23d, paid, at the request of defendant Garret Keppel, to the Marysville Savings Bank, \$61,-138.70; that upon his return to San Francisco, and upon the 24th day of November, 1883, said Goad, at his office, delivered a check in payment of said sum, \$12,978, in the presence of defendant Garret Keppel to said Davis, the secretary of the corporation defendant, of which check the following is a copy: 'No. ——. SAN FRANCISCO, November 24, 1883. The Bank of California pay to Spring Valley Mining & Irrigating Company, or order, twelve thousand nine hundred and seventy-eight (\$12,978) dollars. A. MONTGOMERY. Per W. F. GOAD. Indorsed: SPRING VALLEY MINING & IRRIGATING COMPANY, By WILLIS E. DAVIS, Secretary.' That said check was paid; that, upon the delivery of said check, said secretary, Davis, delivered said deed of said corporation, executed and acknowledged by the president and secretary,

to defendant Garret Keppel, and said Goad; that said Goad thereupon sent said deed to the office of the county recorder of Butte county, where the same was filed for record on the 26th day of November, 1888, as aforesaid."

We cannot see how an estoppel can grow out of these facts. In the first place, admitting that Davis was the secretary of the corporation, it does not appear that he had authority to bind or affect the corporation by any statement he might make in regard to Keppel's purchase. Conceding that he had authority to affect the corporation by the statement of a fact, the question put to him was not as to a fact, but as to a question of law. Further, that a statement shall operate as an estoppel, it must be made with the express intention to deceive, or with such carelessness, or culpable negligence as to amount to constructive fraud. *Boggs v. Mining Co.*, 14 Cal. 367, 368; *Davis v. Davis*, 26 Cal. 40, 41. We see here no intention of Davis to deceive, nor can we perceive that plaintiff was or could be misled by anything which Davis stated to his attorney. That the plaintiff was not without the means of acquiring the knowledge which he sought is too plain for argument. He might have ascertained it from the mortgagor, with whom he was communicating all the time, that the negotiation for the loan was going on; or, if he had inquired of the company as to the terms of its transactions with Keppel, he would, no doubt, have ascertained what they were. There is no estoppel shown by the evidence or the finding. *Davis v. Davis, supra*. The mortgage of the corporation must be held prior and superior to that of plaintiff on the land above mentioned, and therefore the judgment and order denying a new trial must be reversed, and the cause remanded for a new trial. Ordered accordingly.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

75 Cal. 229

In re BIDDEL'S ESTATE. (No. 12,559.)

(*Supreme Court of California.* March 8, 1888.)

EXCEPTIONS, BILL OF—PETITION TO SETTLE.

A petition to settle a bill of exceptions, which avers that the bill does not state sufficient of the testimony of witnesses to explain the questions to which objections are taken, but which does not set forth the statements of the bill which are alleged to be contrary to the facts, together with the facts and the point of exception, is insufficient.

Jas. L. Crittenden, for petitioner.

PER CURIAM. This is an application to settle a bill of exceptions. The petition is insufficient. Its averments should show the mode in which the bill of exceptions is settled by the judge of the superior court, so that this court can see whether the statements of the bill are contrary to the facts. To illustrate: The petition should set forth the statements of the bill which are alleged to be contrary to the facts, together with a statement of the facts. The point of the exception should also be stated. The court can then, by comparing the bill of exceptions as settled or proposed to be settled by the judge with the facts as stated, determine whether or not its statements are contrary to the facts. The averments in relation to the bill of exceptions do not conform to the above, which we understand to be the rule. Averments that the bill of exceptions does not state sufficient of the testimony of witnesses to explain the questions to which objections or exceptions are taken, will not do. The petition must contain allegations, the terms of which show this to be the case. The application is therefore denied, and the petition dismissed without prejudice.

77 Cal. 79

SCHULTZ v. NOBLE. (No. 11,039.)

(Supreme Court of California. September 13, 1888.)

FRAUDS, STATUTE OF—PROMISE TO PAY DEBT OF ANOTHER—EXECUTED PROMISE.

In an action based on a note signed by defendant and indorsed by plaintiff, evidence that the note was made and sold to raise money to reimburse defendant for losses incurred by him for plaintiff; that defendant signed as principal at plaintiff's request, the latter not wishing to injure his own credit; and that plaintiff promised to pay the note when due,—is not incompetent on the ground that under the statute of frauds an oral promise to pay the debt of another cannot be enforced, as, such promise being executed by the promisor, he cannot afterwards dispute its validity.¹

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

T. C. Van Ness, for appellant. *Lloyd & Wood*, for respondent.

BELCHER, C. C. This is an appeal by the plaintiff from a judgment and an order denying him a new trial. The action was based upon a promissory note, which was signed by the defendant, indorsed by the plaintiff, and made payable to the order of Boyd & Davis. The answer denied the material allegations of the complaint, and, by way of affirmative defense, alleged that the note was in fact the note of plaintiff; that it was executed with defendant as apparent maker and plaintiff as apparent indorser at the request of plaintiff, and was given to defendant that he might negotiate it, and thereby raise money to satisfy an antecedent indebtedness to defendant, which plaintiff was obligated to pay; that plaintiff promised to pay the note at or before its maturity, and that it was negotiated for \$9,000, and the proceeds applied in satisfaction of his indebtedness.

At the trial the defendant called witnesses to prove that he was a stockbroker, and that plaintiff requested him as such to purchase certain mining stocks for a Mrs. Theall, and verbally promised to guaranty him against any loss that might result from the purchase; that he purchased the stocks, paying for them with his own money, and held them at the request of plaintiff, till they had depreciated in value more than \$10,000, and then on the order of plaintiff sold them; that plaintiff promised to give defendant his note for the \$10,000, payable in 60 days, but, when asked to execute it, said it would hurt his credit to give his note for \$10,000, but he would indorse defendant's note for that sum, and would certainly pay it at its maturity; that defendant accepted this offer, and thereupon the note in suit was executed and sold, and the amount of it was placed to plaintiff's credit. The plaintiff objected to this evidence, and, after it was given, asked to have it stricken out, upon the ground that a verbal promise to answer for the debt or default of another is void, and parol evidence of such promise is inadmissible. The court overruled the objection, and denied the motion, and afterwards refused, at the request of plaintiff, to instruct the jury that the evidence did not constitute any defense. The appellant insists that these rulings were erroneous, and whether they were or not is the only question presented for decision.

We think the evidence admissible, and the rulings proper. It is true that a verbal promise to answer for the debt or default of another cannot be enforced, except in the cases mentioned in section 2794 of the Civil Code; still, if such a promise be executed by the promisor, he cannot afterwards raise the question of its validity. It has been held, where an action was brought to enforce a contract required by the statute of frauds to be in writing, and parol proof of the contract was admitted without objection, that the contracting party could not have the proofs stricken out because it subsequently appeared

¹See, as to what promises to pay the debt of another are within the statute of frauds, *Stewart v. Jerome*, (Mich.) 38 N. W. Rep. 895, and note; *Helt v. Smith*, (Iowa,) 39 N. W. Rep. 81, and note.

that the contract was only a verbal one. *Livermore v. Stine*, 43 Cal. 274; *Sweetland v. Shattuck*, 66 Cal. 31, 4 Pac. Rep. 885. It was proper to show the circumstances under which the note was made; and, if the facts were as claimed by defendant and found by the jury, then the plaintiff's parol contract was executed, and the note paid and satisfied, when he took it up. *Cohen v. Goux*, 48 Cal. 97; *Treadwell v. Himmelmann*, 50 Cal. 9; *Howard v. Stratton*, 64 Cal. 487, 2 Pac. Rep. 263. In our opinion the judgment and order should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

77 Cal. 82

WOOD v. PENDOLA. (No. 12,618.)

(Supreme Court of California. September 20, 1888.)

APPEAL—BOND—FILING AFTER MOTION TO DISMISS—APPROVAL OF COURT.

Under Code Civil Proc. Cal. § 954, providing that no appeal can be dismissed for insufficiency of the undertaking, if a good and sufficient undertaking, approved by a justice of the supreme court, shall be filed in that court before hearing upon the motion to dismiss, failure to file a sufficient undertaking within the required time, and to have indorsed thereon the approval of a justice, renders the appeal ineffectual.

In bank. Appeal from superior court, Calaveras county; C. V. GOTTSCHALK, Judge.

Frank W. Street and Ira H. Reed, for appellant. *Reddick & Solinsky*, for respondent.

PATERSON, J. The notice of appeal specifies that the defendant appeals from the judgment rendered against him on September 27, 1887, and also from the order made January 13, 1888, denying defendant's motion for a new trial. In the undertaking, on appeal, no reference is made to the order. It recites simply that "the said defendant has appealed to the supreme court of the state of California from said judgment, and from the whole thereof." Section 954, Code Civil Proc., provides: "If the appellant fails to furnish the requisite papers, the appeal may be dismissed; but no appeal can be dismissed for insufficiency of the undertaking thereon, if a good and sufficient undertaking, approved by a justice of this court, be filed in the supreme court before the hearing upon motion to dismiss the appeal." The motion to dismiss was submitted at the May term, in Sacramento, upon briefs to be thereafter filed. Several weeks thereafter another undertaking was filed, but it has never been approved by a justice of the supreme court. Therefore, if the undertaking be considered as simply irregular and insufficient, under section 954, *supra*, the failure to file a good and sufficient undertaking within the time allowed by that section, and to have indorsed thereon the approval of a justice of this court, renders the appeal ineffectual. The appeal from the order denying the new trial is dismissed.

We concur: SEARLS, C. J.; MCFARLAND, J.; SHARFSTEIN, J.; THORNTON, J.; MCKINSTRY, J.

77 Cal. 83

PAGE v. PAGE. (No. 12,640.)

(Supreme Court of California. September 22, 1888.)

PRACTICE IN CIVIL CASES—DISMISSAL—REQUISITES.

Under Code Civil Proc. Cal. § 581, requiring, in the dismissal of actions, an entry of such dismissal in the clerk's register, and also an entry of the judgment, an action is not dismissed until the judgment is entered as required, though the dismissal be properly entered in the register. Following *Page v. Superior Court*, 18 Pac. Rep. 385.

Cal. Rep. 16-19 P.—57

Commissioners' decision. In bank. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

Action for divorce by William M. Page against Emily C. Page. To an order setting aside a former order, the nature of which appears in this opinion, plaintiff took a *certiorari*, which was dismissed. 18 Pac. Rep. 385. Thereupon he took this appeal from the same order.

S. B. McKee, Jr., for appellant. *Flournoy & Mhoon*, for respondent.

HAYNE, C. In a suit for divorce, the trial court made an order that the plaintiff pay to the defendant a certain sum as alimony and counsel fees, *pendente lite*. About three weeks afterwards the court made a second order, setting aside the first. Thereupon the plaintiff took certain steps, which, it is claimed, constituted a dismissal of the suit. A few weeks after this the court made a third order, wherein it is recited that the second order, setting aside the order for alimony and counsel fees, was "obtained by means of an artifice and trick practiced upon this court." The plaintiff attempted to have this third order annulled on *certiorari*, but, failing in this, took the present appeal, which is from the third order. The contention on the part of the appellant is that at the time the third order was made the suit was dismissed, and the court had no jurisdiction to take any further steps therein. And the question is whether said action was dismissed as contended.

There was a proper entry of dismissal in the clerk's register, but no judgment entered thereon. The statute provides that "the dismissal * * * is made by entry in the clerk's register; judgment may thereupon be entered accordingly." Code Civil Proc. § 581. The entry of judgment seems to be the final step in the process of dismissal. And it was held upon the application for *certiorari* that until judgment was entered the action was not dismissed, the court saying: "It was for the legislature to declare what should constitute the evidence of dismissal, and the statute requires both the entry in the register and the entry of a judgment." *Page v. Superior Court*, 18 Pac. Rep. 385. That case determined the precise question involved here. It may be that as against the plaintiff himself the action would, for some purposes, be considered dismissed upon a proper entry in the register. We express no opinion as to that. But we think the dismissal is not complete in the sense that the control of the court over the cause is terminated until the judgment is entered. Taking that to be the case, it cannot be doubted that the court had ample power to set aside an order obtained as this appears to have been. The other positions do not require special notice. We therefore advise that the order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

77 Cal. 85

GARNER v. WRIGHT. (No. 12,425.)

(Supreme Court of California. September 22, 1888.)

EJECTMENT—TITLE TO MAINTAIN ACTION.

In ejectment, the plaintiff proving no title, but relying on prior possession, of which, as well as of his ouster, the evidence was vague and unsatisfactory, there being nothing to show definitely that either plaintiff or defendant was in possession of any definite portion of the land in dispute, neither having any inclosure thereon, judgment given by the court for defendant will not be disturbed.

Commissioners' decision. In bank. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

Ejectment by J. C. Garner against John Doe Wright for certain land in Fresno county. Judgment for defendant, and plaintiff appealed.

W. D. Grady, for appellant. *Wharton & Short*, for respondent.

HAYNE, C. Action of ejectment. The plaintiff did not prove any title, but endeavored to show a prior possession. He had no inclosure, and his evidence generally was vague and unsatisfactory, both as to his possession and as to an ouster. The defendant did not show any title, but relied upon possession of a portion of the tract. This portion, according to his counsel, was all he claimed. He had no inclosure, and his evidence also was extremely vague. It is difficult to say that either party was in possession of any definite portion, or that there was an ouster of plaintiff from any definite portion. The court below gave judgment for defendant, and we cannot say, upon the record, that its judgment should be disturbed. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

77 Cal. 90

MINTURN v. BLISS. (No. 12,328.)

(*Supreme Court of California*. September 22, 1888.)

APPEAL—REVIEW—DISCRETION OF TRIAL COURT—NEW TRIAL—APPLICATION.

An application for a new trial is addressed to the sound discretion of the court, and, in the absence of a clear showing to the contrary, the appellate court will presume that the discretion was properly exercised, and will refuse to disturb the ruling.

Commissioners' decision. In bank. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

W. D. Grady, for appellant. *J. K. Law* and *Atwell & Bradley*, for respondent.

BELCHER, C. C. This is an appeal by the plaintiff from an order granting the defendant a new trial. The motion was made upon the grounds, among others, that the evidence was insufficient to justify the decision, and that errors in law were committed at the trial, and excepted to by the defendant. It does not appear upon what ground the motion was granted, but, as has frequently been held, if it might properly have been granted upon any one of the grounds specified, the order cannot be reversed here. There was a conflict of evidence upon some material points, and it is conceded by counsel for respondent that the court erred in admitting some of the evidence offered by the plaintiff. It is claimed, however, that the errors were harmless. The application was addressed to the sound, legal discretion of the court, and in the absence of a clear showing to the contrary it will be presumed that its discretion was properly exercised. Looking at the whole record, we cannot say that the court abused its discretion, and we therefore advise that the order be affirmed.

HAYNE, C., concurs.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

77 Cal. 89

CARLTON v. WILLIAMS. (No. 12,368.)

(*Supreme Court of California*. September 22, 1888.)

1. HUSBAND AND WIFE—WIFE'S ESTATE—LEASE—ACKNOWLEDGMENT.

A lease is a "grant or instrument" within the meaning of Civil Code Cal. § 1093, providing that no estate in the real property of a married woman passes by any grant purporting to be acknowledged by her, unless the grant or instrument is acknowledged by her, etc.

2. SAME—RATIFICATION—ACCEPTANCE OF RENT.

The fact that rent was accepted under the lease does not validate it, but at most creates a tenancy terminable by notice.

Commissioners' decision. In bank. Appeal from superior court, San Diego county; JOHN D. WORKS, Judge.

Civil Code Cal. § 1093, provides that "no estate in the real property of a married woman passes by any grant purporting to be executed or acknowledged by her, unless the grant or instrument is acknowledged by her in the manner," etc. Appellants contended that a lease was not included in the statute.

Collier & Mulford, for appellant. *Hunsaker & Britt*, for respondent.

HAYNE, C. Action of ejectment. The defendant claims the right to the possession under a lease. The lease was from a married woman, and was not acknowledged. The argument is that a lease by a married woman is not one of the instruments which are required to be acknowledged. We see no merit whatever in the argument. The fact that rent was accepted did not validate the lease, but at most created a tenancy terminable by proper notice, and it was so terminated. The findings are sufficient. We therefore advise that the judgment be affirmed, with \$50 damages.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed, with \$50 damages.

77 Cal. 80

PICO v. PHELAN. (No. 12,361.)

(Supreme Court of California. September 22, 1888)

LANDLORD AND TENANT—WHEN RELATION EXISTS.

In an action for rent, evidence for plaintiff showed that defendant occupied and used the land; that he refused to allow others, to whom plaintiff leased part of the land, to enter upon it, claiming to have leased the land of another, and to have paid rent on it; and that a written lease had been made out from plaintiff to defendant for the preceding year, during which defendant had also occupied the land, but was never executed. *Held*, that defendant's possession was adverse to plaintiff, and the latter could not recover.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; A. BRUNSON, Judge.

Action for rent. The plaintiff offered testimony that defendant occupied his lands, and used them, refusing to allow others, to whom plaintiff leased part of the land, to enter upon it; that defendant had entered the land the year before with the intention of leasing of plaintiff; and that a written lease had been made, but not executed. The court, upon this evidence alone, found for defendant, holding that the latter's possession was adverse to plaintiff. Plaintiff appeals.

Howards & Scott, for appellant. *S. Haley*, for respondent.

HAYNE, C. Action to recover rent of certain real property for the year 1882. It was admitted that there was no agreement for that year. The theory of plaintiff was that defendant was formerly his tenant and held over. The court found that there was no relation of landlord and tenant between the parties, and we think the evidence shows that the possession of defendant was adverse to the plaintiff. There was no error in law or abuse of discretion. We therefore advise that the judgment and order denying a new trial be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

3 Cal. Unrep. 22

PENDERGRASS v. BURRIS. (No. 12,509.)

(*Supreme Court of California.* September 22, 1883.)

MORTGAGES—WHAT CONSTITUTES—DEED ABSOLUTE.

Plaintiff's intestate owed defendant and others large amounts of money which he was unable to pay, and in consideration of the release of defendant's and payment of other debts conveyed a ranch to him, defendant surrendering intestate's notes, and taking possession of the land. Intestate remained on the land, boarding with the tenants, until his death, four years after; collected rents, sold crops, and cultivated a portion for one year himself. There was evidence that the intestate was agent and tenant of defendant, and did not claim ownership of the land. Defendant testified that the sale was absolute, but that shortly afterwards he agreed, in writing, that if intestate could within a year find a purchaser, he would convey the land, taking the amount of the debts and interest, and allowing intestate to retain the residue. Admissions of defendant of facts from which a mortgage, instead of a sale, might be inferred, were explained. Some other circumstances were proved for and against the theory that the transaction was intended only as security for a debt. *Held*, that the finding of the trial court, that the intention of the parties was to make an absolute sale, should not be disturbed.

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Ejectment by T. W. Pendergrass, administrator of the estate of G. T. Thornton, deceased, against David Burris, to recover the possession of certain lands in Tulare county. At the trial it was shown that plaintiff's intestate at one time owned the land, but conveyed it to defendant by deed absolute in form, but which plaintiff claimed to be in fact security for a debt. There was evidence that before the execution of the deed the grantor owed the grantee and others large amounts which he was unable to pay, and which drew more than the legal rate of interest, and conveyed the land in consideration of the release of defendant's debt and the payment by him of the other debts. When the deed was made intestate's notes were surrendered to him, and defendant took possession of the land, although intestate lived on it until his death, four years after, boarding with the tenants. Defendant testified that the transaction was an absolute sale, and that intestate owed him nothing after the deed was made. He also testified that all intestate had to do with the land after the sale was as his agent in renting it out, collecting rent, selling crops, etc., and that one year he cultivated a part of the land as defendant's tenant. Defendant further testified that, shortly after the deed was made, intestate, thinking the land could be sold for more money, requested defendant to allow him to sell the land and pay him back the amount of the debts, with interest, to which defendant consented, and signed a writing to that effect, giving intestate one year in which to find such purchaser, the agreement stating that time was of the essence of the contract. Defendant and intestate never had a settlement of their transactions after the sale during the time intestate was collecting the rents and selling the crops from the land. Some of the money derived from the rents intestate used, with defendant's consent, to pay some debts he still owed. There was evidence of conversations of intestate in which he acknowledged the land to be defendant's, and that he was only acting as his agent; and of conversations in which defendant admitted intestate's right to the land upon payment of the debts and interest. Defendant told creditors of intestate after his death that he was a creditor of intestate's to a large amount, and that if they did not allow him to be appointed administrator he would put his claim in, which would consume the estate, so that they would get very little, but if he was appointed he would pay them 75 cents on the dollar of their debts, to which they agreed, and he paid them that amount. Afterwards the

present plaintiff was appointed administrator in defendant's place. Defendant explained this on the ground that intestate owed him a large sum for money collected from tenants, crops sold, etc., while acting as agent for defendant. Defendant paid all the taxes on the land after the deed was made. The finding and judgment of the court (without a jury) was for defendant, and plaintiff appealed.

Sidney V. Smith and M. S. Babcock, (Stanly, Stony & Hays, of counsel,) for appellant. Brown & Daggett and Atwell & Bradley, for respondent.

PER CURIAM. This case turns upon the question whether or not a certain deed was intended to be a mortgage. The court below found that it was not a mortgage. The ingenious argument of counsel for the appellant has cast some doubt upon the correctness of this conclusion. Nevertheless, upon the evidence in the record, we do not feel warranted to declare that the court below erred in its decision. The judgment and order denying a new trial are affirmed.

77 Cal. 100

ESPINOSA v. PHELAN. (No. 12,557.)

(*Supreme Court of California. September 22, 1883.*)

1. PUBLIC LANDS—TITLE FROM STATE—CONTEST—ORDER OF REFERENCE.

Under Pol. Code Cal. § 3414, providing that, when a demand shall be made upon the surveyor general or register of the land-office by one of the parties to a contest for land pending in his office for a trial in the courts, such officer shall make an order referring such contest to the district court of the county wherein the land is, an order of reference is sufficient if it appear from it that such contest has arisen, and that upon the demand of one of the parties a reference is made, although by a clerical omission the order does not recite that such reference was made upon such demand.

2. SAME—ORDER OF REFERENCE—AUTHORITY OF DEPUTY.

Whether a contest for land is pending before the surveyor general or the register of the land-office, an order of reference to a court for trial under Pol. Code Cal. § 3414, may be made by the deputy of the former, as, by Pol. Code Cal. §§ 350 and 497, the surveyor general and his deputy are *ex officio* register and deputy-register.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; A. W. HUTTON, Judge.

Action to determine contest for land, referred for trial by the surveyor general, brought by Refugio Espinosa against Thomas Phelan. From an order dismissing the action plaintiff appealed. Pol. Code Cal. §§ 350, 497, make the surveyor general and his deputy *ex officio* register of the land-office and deputy-register. Section 3414 makes it the duty of the surveyor general or register, upon demand of a party to a contest pending in his office, to refer the matter to the district court of the county wherein the land lies for trial.

Lee & Scott, for appellant. Stephen M. White, for respondent.

FOOTE, C. This is an action to determine a contest as to which of the parties has a better right to purchase certain school land from the state. The court below dismissed the action upon the ground that it did not have jurisdiction to try it, being of opinion that there was no valid order of reference on file. The order of reference, among other things, contained this recital: "On October 14, 1886, a duly-verified protest against the issuance of a patent to said Thomas Phelan or his assigns of said land, and a demand that all conflicting claims to purchase said land was filed in the office of the state surveyor general by said Refugio Espinosa. It is therefore ordered and directed that the contest as set forth between the above-named parties be, and the same is hereby, referred to the superior court in and for the county of Los Angeles, state of California, for adjudication." From this and the other portions of the order in question it is evident to us that a contest had arisen in the office of the surveyor general, and *ex officio* register of the state land-office, between

Espinosa and Phelan as to who had the better legal right to purchase the land therein mentioned from the state, and that the order of reference was made in consequence of a demand made by Espinosa. It is true there is evidently, by clerical error, an omission in the order to write, after the word "demand," "be referred to the proper court of the state for trial," but nevertheless it is plain that the order was not made upon his own motion by the surveyor general, *ex officio* register, but was made upon the demand of Espinosa. The words, "it is therefore ordered," refer to the "demand" previously recited as having been made by Espinosa, and must mean that the surveyor general and *ex officio* register made the order of reference to the superior court of Los Angeles county because of the demand of Espinosa that he should do so. Nothing in the statute requires that such a demand should be made in writing. Whether the contest was initiated by the protest and demand in the office of the register or surveyor general, under section 3414 of the Political Code, did not affect the validity of the order which was made by the deputy who acted in that capacity, and signed and sealed the order for both register and surveyor general. Pol. Code, §§ 350, 497; *Cunningham v. Crowley*, 51 Cal. 132. We are of opinion that the court had jurisdiction to try the action, and that it should not have been dismissed. We therefore advise that the judgment and order be reversed and the cause remanded for further proceedings.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for further proceedings.

77 Cal. 87

MCLEOD v. MEADE. (No. 12,325.)

(Supreme Court of California. September 22, 1888.)

REWARD—ACTION FOR—PLEADING—GENERAL DEMURRER.

A complaint alleging that defendant "offered a reward of \$500 for the arrest of the murderer of L. T." avers that defendant himself offered to pay the reward, and not that another person would pay it, and is, on general demurrer, sufficient.

Commissioners' decision. In bank. Appeal from superior court, San Luis Obispo county; J. B. CAMPBELL, Judge.

Action by A. C. McLeod against O. J. Meade for a reward for arresting an alleged murderer. Judgment for defendant, on demurrer to the complaint, and plaintiff appeals.

Graves, Turner & Graves and *R. T. Terry*, for appellant. *Tupper & Tupper*, for respondent.

HAYNE, C. Final judgment in favor of the defendant was given on demurrer to the complaint, and the plaintiff appeals. The complaint alleges that "the defendant * * * offered a reward of \$500, in the manner following, to-wit: '\$500 reward for the arrest of the murderer of Louis Trabucco, committed,' " etc.; that said offer was signed by defendant, as sheriff, and sent to the plaintiff, and that, relying upon the same, he arrested the murderer, and delivered him up to the sheriff, and complied with all the terms of the offer. The argument in support of the demurrer is that the above is not to be construed as a reward offered by the sheriff himself, but merely as information that some one not named had offered a reward. Possibly a demurrer specifically pointing out the supposed ambiguity should have been sustained. We express no opinion as to that, but we think the objection cannot be made on a general demurrer. The complaint expressly alleges that "defendant * * * offered" the reward, and in the face of this allegation we do not see how it can be said that the reward was offered by somebody else. If this be the proper construction of the pleading, it stated a cause of action.

Ryer v. Stockwell, 14 Cal. 134. We therefore advise that the judgment be reversed, with directions to overrule the demurrer.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, with directions to overrule the demurrer.

77 Cal. 114

MORRILL *et al.* v. EVERSON. (No. 12,465.)

(*Supreme Court of California*. September 22, 1888.)

SPECIFIC PERFORMANCE—CONTRACTS ENFORCEABLE—CONSIDERATION.

A contract for a lease of property, then worth \$1,600, and with a rental value of \$12 a month, for a term of nine months, at a rent of \$10 a month, with a right of purchase at \$1,300, is, as to the right of purchase, without adequate consideration within the meaning of Civil Code Cal. § 3391, providing that specific performance cannot be enforced against a person who has not received an adequate consideration.

Commissioners' decision. In bank. Appeal from superior court, San Diego county; JOHN D. WORKS, Judge.

Suit for specific performance by Charles L. Morrill and Arthur G. Nason, appellants, against Melstine Z. Everson, respondent.

Puterbaugh, Leovy & Humes and Houghton, Silent & Campbell, for appellants. *John M. Lucas*, for respondent.

HAYNE, C. Suit for specific performance of a contract in relation to a lot in the city of San Diego. The plaintiffs were real-estate brokers, and the defendant was a somewhat weak-minded and excitable woman of not much business knowledge. The property, at the time of the contract, was of the value of \$1,600, and of the rental value of \$12 per month. The contract was that the plaintiffs rented the property for the term of nine months, at a rental of \$10 a month, to be paid in advance, and had the right of purchasing at any time during the term for the sum of \$1,300. During the latter part of the term the value of the property was \$4,000, and the plaintiffs then sought to buy. The court below declined to enforce the contract, and the plaintiffs appeal.

The respondent's position that there was no mutuality cannot be sustained. *Hall v. Center*, 40 Cal. 63. But we think that while there was a consideration sufficient to support the contract at law, yet that, so far as the right of purchase is concerned, there was no adequate consideration, and that, consequently, a court of equity will not specifically enforce it. Before the Code the preponderance of authority seems to have been that mere inadequacy of consideration, not amounting to evidence of fraud, was not ground for refusing specific performance. Pom. Spec. Perf. § 194. But the Civil Code contains the following provision: "Sec. 3391. Specific performance cannot be enforced against a party to a contract in any of the following cases: (1) If he has not received an adequate consideration for the contract. (2) If it is not, as to him, just and reasonable. * * *" Here the inadequacy of consideration seems to be mentioned as a distinct ground from the injustice and unreasonableness, and the provision seems to be explicit and absolute. We do not doubt that the point of time, to which the question of adequacy must relate, is the time of the formation of the contract, and it is safe to say that it is not necessary that there be the highest possible price, but only a consideration which is adequate under all the circumstances. But we think that there was no such consideration for the contract which is sought to be enforced. The lease was a comparatively unimportant part of the contract. The rent for the entire term amounted to only \$90. The real thing which the plaintiffs wanted

was the right to purchase, which, under the circumstances of the market, was extremely valuable. They got this right, without any corresponding obligation to purchase, for the insignificant rent paid for the use of the premises, which rent was less even than the rental value of the property. This being the case, we think that, while there was a consideration which was sufficient to render the contract binding at law, yet that, so far as the right of purchase was concerned, there was no "adequate" consideration within the meaning of the provision of the Civil Code above referred to. The criticisms upon the findings do not seem to require a reversal. We therefore advise that the judgment and order denying a new trial be affirmed.

We concur: BELCHER, C. C; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

77 Cal. 106

PEEK v. PEEK. (No. 12,315.)

(Supreme Court of California. September 22, 1888.)

1. FRAUDS, STATUTE OF—AGREEMENTS RELATING TO LAND—PART PERFORMANCE—FRAUD.
In an action of ejectment a cross-complaint was filed praying specific performance and conveyance. It appeared that defendant had been induced to marry plaintiff's father solely upon his oral promise to convey the land to her, which he never intended to do, but on the morning of the marriage conveyed the land to plaintiff, without consideration, and shortly afterwards deserted defendant. *Held* that, the grantor having fraudulently induced defendant irretrievably to alter her situation, the statute of frauds did not apply.¹
2. SAME—PART PERFORMANCE—MARRIAGE.
Marriage is not in itself sufficient part performance of an oral promise to avoid the operation of the statute of frauds.¹
3. SAME—JOINT RESIDENCE.
Joint residence by husband and wife, after marriage, on land which the husband orally promised to convey to her in consideration of marriage, will not take such promise out of the statute of frauds.¹
4. DEED—CONSIDERATION.
That a husband promised his wife, on her death-bed, that their son should have certain property, will not constitute a valuable consideration for a conveyance by the father to the son, and the latter is only a volunteer.

Commissioners' decision. In bank. Appeal from superior court, San Bernardino county; HENRY M. WILLIS, Judge.

Ejectment by Lee Peek, a minor, by Jerry McNew, his guardian, against Nettie A. Peek, for land in San Bernardino county. Defendant filed a cross-complaint, asking a conveyance of the legal title to the land. Judgment for plaintiff, and defendant appealed.

Rowell & Rowell, Harris & Allen, and Wells, Van Dyke & Lee, for appellant. *H. C. Rolfe*, for respondent.

HAYNE, C. Ejectment, with a cross-complaint by defendant praying for a conveyance of the legal title. The facts are as follows: One L. R. Peek orally promised the defendant that if she would marry him, he would, on or before the marriage, convey to her the property in controversy. She relied upon this promise, and married him "for no other reason or consideration." The conveyance was not made. He put it off by excuses and protestations, and on the morning of the marriage, without the knowledge of defendant, conveyed the property to his son by a former marriage, who was then a boy about 10 years old. The marriage with defendant did not prove a happy one, and after a year's residence upon the property Peek deserted the defendant, and the son, Lee Peek, brought the present action to recover possession of the property. The court below gave judgment for the plaintiff, and the defendant appeals.

The foundation of the defendant's claim being the promise of L. R. Peek, the first question to be considered is whether such promise was of any validity. It is clear that it was within the statute of frauds. But it is contended that there was such part performance and fraud as would induce a court of equity to give relief, notwithstanding the statute. We think that if the actual fraud of L. R. Peek be left out of view, there was no such part performance as would take the case out of the statute. There may undoubtedly be cases of a part performance of oral antenuptial agreements sufficient to warrant their enforcement in equity. See *Neale v. Neales*, 9 Wall. 1. But it seems to be generally agreed that the marriage alone does not amount to such part performance. See *Ath. Mar. Sett.* 90; *Browne, St. Frauds*, (4th Ed.) § 459;

¹As to what is a sufficient part performance to take a parol agreement relating to land out of the statute of frauds, see *Martin v. Patterson*, (S. C.) 2 S. E. Rep. 859, and note; *Slingerland v. Slingerland*, (Minn.) 39 N. W. Rep. 146, and note.

Henry v. Henry, 27 Ohio St. 121. With reference to this subject, Story says: "The subsequent marriage is not deemed a part performance, taking the case out of the statute, contrary to the rule which prevails in other cases of contract. In this respect it is always treated as a peculiar case, standing on its own grounds." 2 Eq. Jur. § 768. Nor does the fact that the defendant resided with her husband upon the property make any difference. The reason assigned for holding possession to be part performance is that, unless validity be given to the agreement, the vendee would be a trespasser. But it is manifest that this reason would not apply where the vendor was the husband and the vendee the wife, living with him upon the property. The possession which is referred to by the cases which hold it to be sufficient part performance is a possession exclusive of the vendor. Browne, St. Frauds, (4th Ed.) § 474. But the fact that the marriage was brought about by the actual fraud of L. R. Peek seems to us to make a difference. There can be little doubt upon the record that there was actual fraud on his part. He denies that he made any promise to convey the property in controversy. But the court finds that he did make it, and, taking this to be the fact, we think that the defendant's account as to the time of the promise, and of the reason she married him without the conveyance, must be accepted as the true one. According to her testimony, the promise was repeated up to the time of the marriage, and she was induced to have the ceremony performed before the conveyance was executed by means of excuses and protestations, which must have been made for the purpose of deceiving her. On the day before the marriage, he pretended that he was going to have the deed executed at once. He said to the defendant: "The officers are in town that are required to draw up the papers. Come to-night, and I will have the place deeded to you, and the \$15,000 put in your name. He left me in the hotel, and in a few minutes he came and told me that Mr. Frank McKenny was out of town, and it could not be attended to that evening." The next day "he said he would have the deeds drawn, and he went up and said that they were all busy at the court-house, and he couldn't have it done at that time; and he called on me again with the same story, that the gentlemen at the court-house were busy, and that he could not have the deeds fixed, and that I could rest contented." He, however, succeeded in inducing the defendant to marry him that evening by protesting that the papers should be executed as soon as practicable. After the marriage he kept up for a short time the pretense that he was going to fulfill his promise, but never did so. It seems clear that he never intended to have the deed executed. The story that he could not have it done because the officers at the court-house were busy is ridiculous. On the very day that he was making this excuse he got a deed executed conveying the property to his son. And the fact that he induced the defendant to marry him by promising to convey the property to her, when at that very time he was conveying it to somebody else, seems conclusive as to his fraudulent intent. We think, therefore, that the conclusion of the court below, that the deed was not made "with any fraudulent intent whatever," is not sustained by the facts. This fraud on the part of L. R. Peek, by which he induced the defendant to irretrievably change her condition, seems to us to be ground for relief in equity. It has been laid down that if the agreement was intended to be reduced to writing, but was prevented from being so by the fraudulent contrivance of the party to be bound by it, equity will compel its specific performance. 2 Story, Eq. Jur. § 768; Ath. Mar. Sett. 85. And the recent case of *Green v. Green*, 34 Kan. 740, 10 Pac. Rep. 156, is exactly in point. In that case a widow, owning 160 acres of land, orally promised a man that if he would marry her, she would devote the proceeds of the land to their joint support. Relying upon this promise, he married her, but subsequently ascertained that on the eve of the marriage she had conveyed the property to her children by former marriage, "in consideration of love and affection." The court held that he could maintain an action to have the deed

set aside on the ground of fraud. Compare, also, *Petty v. Petty*, 4 B. Mon. 215.

We do not say that the mere fraudulent omission to have an agreement reduced to writing would of itself be ground for specifically enforcing the agreement. But where the fraudulent contrivance induces an irretrievable change of position, equity will enforce the agreement; and the marriage brought about by the fraudulent contrivance is a change of position, within the meaning of the rule. In *Glass v. Hulbert*, 102 Mass. 24, in reasoning, upon somewhat different facts, to the conclusion that, in order to be ground for the enforcement of the oral contract, the fraudulent contrivance must have induced some irretrievable change of position, the court said: "The cases most frequently referred to are those arising out of agreements for marriage settlements. In such cases, the marriage, although not regarded as a part performance of the agreement for a marriage settlement, is such an irretrievable change of situation that, if procured by artifice, upon the faith that the settlement had been made, or the assurance that it would be executed, the other party is held to make good the agreement, and not permitted to defeat it by pleading the statute." This, we think, is a correct statement of the law.

It is argued, however, that the plaintiff knew nothing of the fraud, and therefore is not affected by it. But it is very clear that a mere volunteer, however innocent, cannot retain the fruits of the fraud, and we think that with reference to at least a portion of the property the plaintiff was a mere volunteer. There are two grounds upon which it is urged that he was a purchaser for valuable consideration. In the first place, it is said that his father was his guardian, and as such owed the plaintiff a balance of \$148, and that this sum was part of the consideration of the deed. But there was no consent of the ward to such an application of the sum due him. His testimony is as follows: "I never paid my papa any money for the deed that he showed me. I do not know anything about how much money was mentioned in the deed as being the consideration for it. I never knew anything about that. Nothing of that kind passed between us. No property or money or anything. I did not have any property at that time to give him. If I had any, I didn't know it." So that, even if the ward could have consented to such an appropriation of his funds without the sanction of the probate court, there was no such consent. Nor was there any sanction of the probate court. It may be that upon a proper settlement of the guardian's accounts a much larger sum will be found to be due from him. He cannot get rid of liability to his ward in that way. In the next place, it is said that L. R. Peek promised his first wife upon her deathbed that the son should have the property. But it is clear that such promise was a mere moral, and not a valuable, consideration. It did not prevent the plaintiff from being a volunteer. See, generally, *Lloyd v. Fulton*, 91 U. S. 484, 485. Finally, it is argued that the first wife furnished half of the money with which the property was purchased, and that a trust resulted to her in consequence. This was the view taken by the trial court. But, conceding that a trust did result, it did not affect the whole property, but at most only a portion corresponding to the proportion of the price which she furnished; and the portion which it did affect was in no sense a consideration for the deed which is involved here. Upon the theory that a trust resulted to the first wife, the plaintiff must claim as her successor in interest. It does not appear that she left a valid will in his favor, and if not he could succeed to a portion only of her interest. Furthermore, it might become a question as to whether the defendant took with notice of the son's equitable interest, and as to how she would be affected thereby. These latter questions have not been argued, and we think they should be left open upon the retrial. It is deserving of serious consideration whether L. R. Peek, who was a party to the contract which the defendant relies upon, should not have been joined as a party to the cross-suit. But the objection as to his non-joinder as a defendant to the cross-complaint was not taken by demurrer, and is not argued in the respondent's

brief, and for these reasons we express no opinion concerning it. We therefore advise that the judgment and order denying a new trial be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

77 Cal. 102

SHARON v. SHARON. (No. 11,087.)

(*Supreme Court of California.* September 22, 1888.)

1. DIVORCE—PLEADINGS—AMENDMENT.

To allow defendant in an action for divorce and division of property to amend his answer, by making a denial of an allegation concerning the property more specific, is not an abuse of the discretion given trial courts regarding amendments.

2. APPEAL—REVIEW—INTERMEDIATE ORDERS.

Where the judgment appealed from decides only as to the divorce, leaving the division of property sought for future decree, the appeal does not bring up for review a ruling upon an amendment of pleadings affecting the property only; as under Code Civil Proc. Cal. § 956, an intermediate order can be reviewed, on an appeal from the judgment, only when it involves the merits or necessarily affects the judgment.

In bank. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Action for divorce and division of property by Sarah Althea Sharon against William Sharon. Divorce granted, and cause retained for action as to property. Plaintiff appeals. For opinion on former appeal, see 16 Pac. Rep. 345.

D. S. Terry, for appellant. *W. H. L. Barnes* and *Wm. F. Herrin*, (*R. S. Mesick*, of counsel), for respondent.

PER CURIAM. This action was commenced to have an alleged marriage of plaintiff and defendant declared legal and valid, and for a divorce and a division of the community property. After a protracted trial upon the main issue presented, namely, as to whether the parties were husband and wife, the court ordered findings to be drawn in favor of the plaintiff. Thereupon the defendant asked, and, against the objection and exception of plaintiff, obtained leave to amend his answer so as more particularly and specifically to deny that there was any community property. This order was made and entered on the 9th day of January, 1885. Subsequently, on the 19th day of February, 1885, findings were filed and judgment entered. The court found that the plaintiff and defendant were husband and wife, and that defendant had been guilty of willful desertion; and it decreed that the marriage existing between the parties be dissolved, and that they and each of them be freed from the obligations thereof. A referee was then appointed to take an account of the community property, and to report the same to the court with all convenient dispatch; and it was "further ordered, adjudged, and decreed that the question of property be and the same is hereby reserved for future consideration, and, upon the coming in of the referee's report, plaintiff has leave to apply for a further and final decree, settling the matter of property, as between the parties," etc. The plaintiff appealed from the judgment, and in support of her appeal insists—and this is the only point made—that the court erred in allowing the defendant to amend his answer, and that the order should be reviewed and reversed.

This contention of the appellant cannot be sustained, for two reasons:

1. On an appeal from a judgment an intermediate order can only be reviewed when it "involves the merits or necessarily affects the judgment." Code Civil Proc. § 956. The judgment appealed from declared an alleged mar-

riage to be legal, and granted a divorce, but did not determine as to the property rights of the parties. The plaintiff was entitled to one-half of the community property, but whether there was any such property, and, if any, how much, were questions reserved for further consideration and adjudication. The order complained of in no way involved the merits or necessarily affected the judgment as entered. It is therefore not subject to review on this appeal.

2. Applications to amend pleadings are addressed to the sound legal discretion of the trial court, and this court will not interfere with the exercise of that discretion unless it has been manifestly abused. The authorities to this effect are numerous, and need not be cited. And the fact that the new matter set up by way of amendment was known to the defendant at the time of filing his original answer is no good reason why the amendment should not be permitted. *Bank v. Stover*, 60 Cal. 395. The application in this case was based upon the affidavits of defendant and his attorney, and after careful examination we are unable to see that the court abused its discretion. Judgment affirmed.

77 Cal. 120

PEOPLE v. GALE. (No. 20,418.)

(Supreme Court of California. September 24, 1888.)

EMBEZZLEMENT—BY EXECUTOR—INDICTMENT—SUFFICIENCY.

An indictment charging that defendant, as administrator of P., received of K. \$1,794, of which, in his final account, he accounted for but \$1,700, and so fraudulently appropriated the sum of \$94, of said P.'s estate, does not, without the averment of other inculpatory facts, charge the crime of embezzlement.

Commissioners' decision. In bank. Appeal from superior court, Tehama county; CHARLES P. BRAINARD, Judge.

Indictment for embezzlement. From a judgment sustaining a demurrer thereto the people appeal.

Geo. A. Johnson, Atty. Gen., for the People. *Chipman & Carter*, for respondent.

FOOTE, C. This appeal is taken by the people of the state of California from an order made by the court below sustaining the defendant's demurrer to the indictment filed against him. An inspection of the indictment shows that it was attempted by it to charge the defendant with the crime of embezzlement. After stating that the defendant, as administrator of the estate of one Warren Polly, deceased, had received from one Kingsly the sum of \$1,794, but had accounted for but \$1,700 of that sum in rendering his final account in said estate to the proper court, it is charged "that, in making and rendering the said final account as aforesaid, in the said county of Tehama, the said Gale did then and there, as such administrator, fraudulently appropriate to his own use and purpose the sum of \$94, which said money then and there belonged to the estate of the said Warren Polly, deceased, contrary," etc. The fact, as charged in the indictment, that the defendant received into his hands as administrator the sum of \$1,794, but in rendering his final account charged himself with only \$1,700, does not, in the absence of all averments of other necessary inculpatory facts, constitute the crime of embezzlement. Therefore we advise that the order appealed from be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

77 Cal. 121

GREGORY v. BOVIER. (No. 12,500.)

(Supreme Court of California. September 25, 1888.)

1. JUDGMENT—COLLATERAL ATTACK—JUSTICE OF THE PEACE.

A justice's judgment cannot be collaterally attacked by showing that the debt on which it is based was merged in a former judgment rendered in another township.

2. SAME.

Neither can it be collaterally attacked by showing that defendant did not reside in the township in which the judgment was rendered, where the return upon the summons in the action shows that the proper officer served it on defendant in that township.

3. EXECUTION—SALE—TITLE OF PURCHASER—COLLATERAL ATTACK.

Nor can the title to land obtained under the judgment be collaterally attacked on the ground that the land was sold *en masse*, the period for redemption having expired.

Commissioners' decision. In bank. Appeal from superior court, San Diego county; JOHN D. WORKS, Judge.

John M. Lucas, for appellant. *Hunsaker & Britt* and *Hendrick & Younkin*, for respondent.

FOOTE, C. Action to quiet title. The court below gave judgment for the defendant as prayed for in the answer and cross-complaint. From that and an order denying a new trial the plaintiff appealed.

It appears that the defendant claimed title, as against the plaintiff, by virtue of an execution sale under a judgment rendered against him by a justice of the peace in San Diego township of the county of San Diego, and one of the plaintiff's contentions was that this judgment was void, because a justice of the peace in Agua Caliente township of the same county, having previously taken jurisdiction of the subject-matter of the contract involved in both actions, and exercising his jurisdiction by merging the same into a judgment, had made it impossible that there could be exercised over the same subject-matter the jurisdiction of another justice's court. It appears to us that in a collateral attack, such as is made in this action, upon the judgment rendered in San Diego township, the trial court properly held that it was not permissible to show that the debt upon which it is based was merged in the former judgment rendered in Agua Caliente township. *Freem. Judgm. § 284a; Lewis v. Armstrong*, 45 Ga. 131.

It is further urged upon us that the judgment rendered in San Diego township is void because the court did not have jurisdiction to try the action, by reason of the fact, as is claimed, that the defendant did not reside in the township where judgment was rendered against him. In answer to that it is sufficient to say that it was not competent to prove that his residence was not in that township, because the return upon the summons in the action showed that the proper officer had served it upon the defendant in the township where the suit was brought, and this was sufficient proof to authorize the court to determine that it had jurisdiction of his person so as to render its judgment in the premises valid. *Fagg v. Clements*, 16 Cal. 389. The court having, upon sufficient evidence, as shown affirmatively by the record, obtained jurisdiction, it was not competent in a collateral action, such as this, to disprove the existence of that jurisdiction. The objection should have been taken upon the trial in the justice's court of San Diego township, and it was too late to make it in this action. *Id.* 389.

Neither was it available for the plaintiff in this collateral action to attack the defendant's title on the ground that the lots of land were sold *en masse*, the period for redemption having passed. *Vigoureux v. Murphy*, 54 Cal. 347; *Griswold v. Stoughton*, 84 Amer. Dec. 409; *Hibberd v. Smith*, 67 Cal. 565, 4 Pac. Rep. 473, 8 Pac. Rep. 46, citing *Blood v. Light*, 38 Cal. 657, and other cases.

In his supplemental brief the appellant claims that the judgment should be reversed, because it granted relief outside of any matter presented to the court for decision by the pleadings. And in this connection his argument seems to be that the court gave affirmative relief upon what it denominates a "cross-complaint," which was not in fact such, not containing any allegations warranting affirmative relief. It is not what the pleading is called which determines its character, but facts which it sets up. *Holmes v. Richet*, 56 Cal. 311. We think the latter part of the answer was a cross-complaint, and that the relief granted was proper under the facts stated and the prayer of the pleadings. No prejudicial error appearing in the record, we advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

THORNTON, J., (*concurring*.) I concur in the judgment herein for the reason that conceding that the plaintiff had a right to show that the judgment in *Allison v. Gregory* in the justice's court was of no effect to transfer a right by a sale under an execution issued upon it, on the ground that he was a resident of a township different from that in which he was served, he was on the trial of this cause in the court below allowed to offer evidence on such issue, and the court ruled against him on the question, which was one of fact. The court, in pronouncing judgment against him, must have so ruled in sustaining the jurisdiction of the justice's court in the cause above mentioned. On the other points in the opinion I am of opinion that the judgment of the learned commissioner is correct, and concur in it.

GREGORY v. ALLISON, (two cases.) (Nos. 12,448, 12,449.)

(*Supreme Court of California*. September 25, 1888.)

In bank. Appeals from superior court, San Diego county; JOHN D. WORKS, Judge. John M. Lucas, for appellant. H. S. Mulford, for respondent.

PER CURIAM. For the reasons given in the case of *Gregory v. Bovier*, ante, 232, this day filed, the judgments and orders are affirmed.

77 Cal. 129

SLOSS v. DE TORO *et al.* (No. 12,397.)

(*Supreme Court of California*. September 26, 1888.)

1. VENUE IN CIVIL ACTIONS—EXECUTORS AND ADMINISTRATORS—SALES UNDER ORDER OF COURT—ACTION TO SET ASIDE.

An action by the owner of an undivided interest in lands to have an administrator's sale of another undivided interest in the same lands set aside as fraudulent, and the title revested in the former owners, involves "the determination, in any form," of a right or interest in real property, within the meaning of Code Civil Proc. Cal. § 392, providing that actions for the determination, in any form, of a right or interest in real property, must be tried in the county in which the subject of the action, or some part thereof, is situated.

Commissioners' decision. In bank. Appeal from superior court, San Diego county; JOHN D. WORKS, Judge.

Wells, Van Dyke & Lee, *H. M. Smith*, and *H. L. Titus*, for appellants. *H. S. Mulford*, for respondent.

BELCHER, C. C. The plaintiff commenced this action in the superior court of San Diego county, and the defendants moved to have the case transferred to the superior court of Los Angeles county for trial. The motion was denied, and the appeal is from that order. The allegations of the complaint are

substantially as follows: Augustin Olvera died testate, seized of an undivided interest in a tract of land situate in San Diego county. The tract was afterwards partitioned, and a portion thereof, described as lot 70, and containing 9,238 acres, was allotted to the estate in severalty. The plaintiff was the owner of an undivided interest in lot 70, equal to 488.25 acres, the title to which he acquired by conveyance from the widow of the deceased. In July, 1881, the defendant Juan de Toro was appointed administrator of the estate by the superior court of Los Angeles county, and received letters of administration, which had not been revoked. In September, 1886, De Toro obtained an order from that court, authorizing him, as administrator, to sell an undivided part of lot 70, and in March, 1887, in pursuance of that order, he sold to defendant, Forbes, at private sale, for \$5.05 per acre, all the right, title, and interest of the estate in and to a described portion of the lot, containing 4,500 acres; and in April following the sale was approved by the court. The sale was fraudulent. Forbes was the brother-in-law of De Toro, and his business manager and adviser. Prior to the sale, the two connived together, and, without the knowledge or consent of plaintiff, or the heirs to the estate, or their successors in interest, secretly agreed that the administrator should sell the described land to Forbes for the nominal sum of \$5.05 per acre, and that the latter should thereafter resell the land at its market value, which was rapidly increasing, and was then worth not less than \$25 per acre, and that the administrator should have a share of the proceeds of such sale. Within a few days after the sale to him, Forbes again sold the land to other parties for \$25 per acre. There was no necessity for a sale of the land. The administrator had in his hands personal property sufficient to pay all outstanding indebtedness, and all expenses of administration which had then accrued, and there was no family allowance to be provided for. Moreover, the court never acquired jurisdiction to make the order, for the reason that none of the conditions required by law to authorize such a sale existed, and the petition, therefore, was wholly insufficient. The sale of the land, as made, greatly depreciated the value of the remaining part of the tract, and worked great and irreparable injury to the plaintiff, and to the heirs and their successors and assigns. The prayer was that the order of sale be vacated and annulled; that the sale thereunder be declared void and set aside; and that the defendants be enjoined from disposing of the proceeds thereof until the further order of the court. The defendants demurred to the complaint, and thereupon, upon proper showing, moved to have the place of trial changed to Los Angeles county, upon the ground that both of them were, and had been for more than 10 years, residents of that county. Whether the court erred in denying the defendants' motion or not, must be determined by a consideration of the provisions of the Code in reference to the "place of trial of civil actions." Section 392 of the Code of Civil Procedure provides as follows: "Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial as provided in this Code: (1) For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property. * * *" And section 395 provides that in all cases not covered by the three preceding sections "the action must be tried in the county in which the defendants, or some of them, reside at the commencement of the action." The question then is, did this action require the determination, in any form, of a right or interest in real property? It seems to us that it did. The main purpose of the action evidently was to have an alleged fraudulent sale of land set aside and the title revested in its former owners. This purpose could only be accomplished by showing—*First*, that the plaintiff had an estate or interest in the land; and, *second*, that the defendants had wrongfully tried to deprive him of that interest. If the action had been ejectment, or to quiet title, it would not more

clearly have required a determination as to the plaintiff's right or interest in the property. In our opinion the order appealed from was properly made, and should be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reason given in the foregoing opinion the order appealed from is affirmed.

THORNTON, J. I concur; but in concurring in the judgment of this court herein, I think it proper to state that I do not intend to say or intimate that the complaint sets forth facts sufficient to constitute a cause of action.

77 Cal. 94

LOW v. WARDEN. (No. 12,607.)

(*Supreme Court of California.* September 22, 1888.)

1. NEGOTIABLE INSTRUMENTS—ACTIONS ON—INSTRUCTIONS.

In an action on a note made payable to plaintiff and his brother, as partners, and claimed by plaintiff to have been sold to him, which defendant denied, an instruction that, "by the pleadings, defendant admits that he made a note to the plaintiff and his brother," the fact being that he admitted making the note to them as partners, is immaterial, and harmless error, if error at all.

2. SAME—INDORSEMENT—PARTNERSHIP—POWER OF PARTNER.

An instruction that if plaintiff, before the action was brought, with the consent of his brother, wrote across the back of the note the name of the firm, with intent to assign the same to himself, this constituted a sufficient assignment, and plaintiff thereby became the owner, is not erroneous, as taking away from the jury the question whether the note was in fact assigned and delivered to plaintiff or not.

3. SAME—INSTRUCTIONS—OPINION ON MATTERS OF FACT.

Also, under Const. Cal. § 19, art. 6, providing that "judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law," an instruction that "this is a question of fact, and the main question, as it seems to me, is the question of payment," is not error, as taking from the jury the question whether the note had been assigned to plaintiff, there being no conflict as to the assignment, and nearly all the testimony being in relation to payment.

4. SAME—PAYMENT—BANKS AND BANKING—COLLECTION.

An instruction that, if plaintiff instructed a bank to renew or collect the note before maturity, an agreement by the president of the bank for an extension of time was not binding upon plaintiff, and that plaintiff could, at any time before payment to him or to his credit in the bank, bring an action, is not prejudicial error as assuming that the bank president had made an agreement for extension, where the evidence is conflicting as to whether certain money paid by defendant to the bank was intended to discharge the note, since plaintiff could bring the action if the note was not actually paid.

5. SAME—DEPOSIT OF MONEY WITH BANK.

An instruction that if defendant, before the beginning of the action, deposited the amount due on the note, the fact that, after the action was commenced, he drew said money, would cut no figure in the case, and the jury should find for defendant, would be error, as equivalent to stating that, if defendant deposited the money for any purpose whatever, the verdict should be for him.

6. SAME—WITHDRAWAL OF FUND.

Evidence that the money deposited by defendant in the bank was withdrawn by him on his own check, was admissible as tending to show that the money was not deposited to pay the note, but for defendant's own use.

Commissioners' decision. In bank. Appeal from superior court, San Luis Obispo county; D. S. GREGORY, Judge.

Graves, Turner & Graves, for appellant. *W. H. Spencer*, for respondent.

BELCHER, C.C. The plaintiff commenced this action to recover the amount due on a promissory note, which was executed by the defendant, and was made payable to D. Low & Bro., or order. The complaint alleged that at the time the note was executed the plaintiff and his brother, Edward Low, were partners, doing business under the firm name of D. Low & Bro., and that

before the commencement of the action the note was sold, assigned, indorsed, and transferred by the payees thereof to the plaintiff. The answer denied the alleged sale, indorsement, and transfer of the note, and alleged that it had been fully paid by the defendant. The case was tried before a jury, and the verdict and judgment were in favor of the plaintiff. The defendant moved for a new trial, and, his motion being denied, appealed from the judgment and order.

In its first instruction the court told the jury that "by the pleadings defendant admits that he made a note to the plaintiff and his brother, Edward Low," etc. This language is claimed by appellant to be outside of the issues in the case, and to be erroneous, because the allegation of the complaint, which was not denied, was that the note was made to the plaintiff and his brother, as partners, and not as individuals. There is nothing in this point, for, conceding all that is claimed, the error, if any, was immaterial and harmless. In the fourth instruction the court told the jury, in substance, that if, before the commencement of the action, the plaintiff, with the consent of his brother, Edward, wrote across the back of the note "D Low & Brother," with the intent to assign the same to himself, that this constituted a sufficient assignment and indorsement of the note, and he thereupon became the owner and holder thereof. We see no error in this instruction. It did not take from the jury the question as to whether the note was in fact assigned and delivered to plaintiff or not, but simply stated to them concisely the law applicable to the facts proved. The fifth instruction is in these words: "If you find that the instructions from the plaintiff to the bank were to renew or collect the note before maturity, then, I charge you, any agreement the president of the bank may have made for extension of time to the defendant was not as agent for plaintiff, and was not binding upon plaintiff, and that plaintiff could, notwithstanding, at any time before the actual payment of the note to him, or to his credit in the bank, commence an action against the defendant on the note." This instruction was not very happily framed, but, in view of the testimony, we are unable to see that the defendant was prejudiced by it. The plaintiff testified: "I authorized Mr. Andrews, the president of the Bank of San Luis Obispo, to collect the note. I told Mr. Warden that he could pay the note to Mr. Andrews, the president of the bank of San Luis Obispo, or give another note." Mr. Andrews, for defendant, testified: "Mr. Low left the note, and asked me to attend to it; look after it; not to let it outlaw. Just before it was to outlaw I spoke to Mr. Warden about it. Mr. Low authorized me either to get another note, or take the money due on it. * * * At the time the money was paid, I told Mr. Warden that if he wanted a week's time to give a satisfactory note in lieu of the money that he could have it. * * * Mr. Low did not say anything to me to give time beyond the outlawing of the note. He told me not to let it outlaw." The money was paid to the bank on the 9th day of December, 1884, the action was commenced on the next day, and on the next day thereafter the note would have become outlawed. The plaintiff had a right to commence the action unless the note had in fact been paid. Upon the question as to whether the note was paid or not the testimony was conflicting. The defendant testified: "I paid the note by leaving the money due on it in the Bank of San Luis Obispo on the 9th day of December, 1884, and took a receipt for the money to be applied on the note. I paid the principal and interest due on the note by leaving the money with the Bank of San Luis Obispo, after having first had an understanding with the plaintiff to that effect. * * * The understanding with the bank when I paid the money to it was that it should be applied on the note in payment of the principal and interest due on it, and I paid it in good faith." On the other hand, the president and cashier of the bank both testified that the defendant deposited the money in the bank in his own name, and to his own credit, and then went away to try to get a new note with which to take up the old one, and

that he subsequently drew all of this money out of the bank upon his own check.

The testimony in reference to the withdrawal of the money was objected to by the defendant as irrelevant and immaterial, and the objection overruled. We think the ruling proper. The testimony was admissible as tending to show that the defendant placed the money in the bank in his own name, and for his own use, and not as a payment of his note. The court instructed the jury upon the question of payment very fully and clearly, and in commencing one of its instructions upon this subject used these words: "This is a question of fact; and the main question, as it seems to me, is the question of payment." It is claimed that in so saying the court erred, because it thereby expressed an opinion with respect to a matter of fact, and, in effect, took from the jury the consideration of the question as to whether the note had been assigned or indorsed to the plaintiff or not. We see no merit in this point. There was no conflict in reference to the indorsement and transfer of the note, and nearly all of the testimony was in relation to the question of payment. The words complained of added nothing to the instruction, but they in no way trench, so far as we can see, upon that provision of the constitution which says that "judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." Section 19, art. 6. The defendant requested the court to give to the jury an instruction which reads as follows: "If you find from the evidence that before the commencement of this action the defendant paid to the Bank of San Luis Obispo the amount due on said note at that time, the fact that the defendant, subsequent to the commencement of this action, drew said money from said bank cuts no figure in the case, and you must find for the defendant." The instruction was written with a pencil, and the court declined to consider it for that reason. Whether the reason assigned for refusing to give the instruction was a valid one or not, it is not necessary to determine. If given, the instruction would have been misleading and erroneous, and it might have been refused on that ground. It would have told the jury, in effect, that if the defendant, before the commencement of the action, paid to the bank the amount of money due on the note, the verdict must be in his favor, whether the money was paid for the use of the plaintiff, and to be applied on his note, or upon his own account, and to be placed to his own credit. This is evidently not law, and it is not true, therefore, that the fact that defendant subsequently drew the money from the bank cut no figure in the case. We find nothing in the record calling for a reversal of the judgment, and therefore advise that the judgment and order be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

77 Cal. 164

Ex parte McNULTY. (No. 20,439.)

(*Supreme Court of California.* September 28, 1888.)

1. PHYSICIANS AND SURGEONS—REGULATION OF PRACTICE—CONSTITUTIONAL LAW.

Act Cal. April 1, 1878, entitled "An act supplemental to and amendatory of an act to regulate the practice of medicine in the state of California," and requiring persons practicing medicine and surgery to possess certain qualifications, and to have a certificate from a board of examiners, which certificate may be revoked by the board for unprofessional conduct, is, *in toto*, constitutional, and valid.

2. SAME—PRACTICING AFTER CERTIFICATE REVOKED—HABEAS CORPUS.

Section 1 of the above act declares the certificate conclusive as to the right of the person named therein to practice in any part of the state. Section 7 prescribes a penalty for practicing "without first having procured a certificate." *Held*, that the

penalty is not prescribed for one who has obtained a certificate, but engaged in practice after the certificate had been revoked for unprofessional conduct; and a conviction on such ground will justify a discharge on *habeas corpus*.

SEARLS, C. J., dissenting.

In bank. On *habeas corpus*. From conviction in superior court of city and county of San Francisco; J. F. SULLIVAN, Judge.

McAllister & Bergin, for petitioner. *Taylor & Haight* and *George E. Harpham*, for respondent.

McFARLAND, J. The petitioner, P. Roscoe McNulty, is imprisoned by force of a judgment of the lower court upon conviction of what is asserted to be a crime under the act of the legislature, entitled, "An act supplemental to and amendatory of an act to regulate the practice of medicine in the state of California," (approved April 3, 1876,) which became a law April 1, 1878. St. 1877-78, p. 918. This act requires, generally, that every person practicing medicine or surgery shall possess certain qualifications, and shall have issued to him a certificate from one of three boards of examiners, each board to be appointed by one of three certain medical societies named in said act. It is provided, also, that a certificate may be revoked by the board granting it, when its holder has been guilty of "unprofessional conduct."

The first contention of counsel for petitioner, that the statute above mentioned is, *in toto*, unconstitutional, and therefore entirely void, has been determined the other way by this court in *Ex parte Frazer*, 54 Cal. 94. In that case it was held that the general frame-work of this statute was not in violation of the constitution, although no opinion was expressed as to the validity of certain independent provisions which it contains. The contention that the police court of San Francisco, in which the prosecution was commenced, had no jurisdiction of the offense sought to be charged against petitioner, because it is punishable by imprisonment for 365 days, need not, under the view which we take of another point in the case, be here determined. And the same may be said of the position taken by petitioner that, under the authority of *Ex parte Cox*, 63 Cal. 21, the legislature could not delegate to the board of examiners the power to declare by rules and regulations what should constitute "unprofessional conduct," and thus, by its own act, establish a crime; and, further, that if such power could be delegated, then, as in this case no rules declaring what should constitute unprofessional conduct had been adopted, petitioner is in the position of one who has been convicted under a void *ex post facto* law. There are also some other points made by counsel, which we do not think necessary to be here discussed. The complaint upon which petitioner was tried was insufficient, and, in our opinion, the demurrer to it should have been sustained. It is true that, generally, the sufficiency of a complaint, or an indictment, cannot be inquired into on *habeas corpus*. Where the complaint, though inartificially drawn, shows an evident attempt to state the essential facts which constitute the crime sought to be charged, the defect in the statement would not warrant the discharge of the defendant. It is true, also, that, upon *habeas corpus*, the court will not, ordinarily, look into the sufficiency of the evidence to prove the facts which constitute the offense. But when the facts charged, or attempted to be charged, in the complaint or indictment, and proved by the evidence, do not constitute any public offense, then the defendant will, upon *habeas corpus*, be discharged. *Ex parte Kearny*, 55 Cal. 215. Now, in this case it clearly appears that in the police court and in the superior court, to which an appeal was taken, the case was tried, and the petitioner convicted upon the theory that the complaint stated, or attempted to state, and the evidence showed the following facts, and none other, viz.. The petitioner, having regularly received a diploma from a recognized medical college of Pennsylvania, made application on January 8, 1884, to one of the boards of examiners constituted

under said statute above mentioned for a certificate; and on said day said board issued to him a certificate in due form, as provided for in said statute, and he commenced the practice of his profession. Afterwards, on August 25, 1885, the said board made an order revoking said certificate for "unprofessional conduct" on the part of petitioner, consisting in this: That he had in the San Francisco Chronicle newspaper, and in a printed pamphlet, advertised himself as a specialist in certain enumerated diseases. After the action by the board, the petitioner continued to practice medicine; and for thus continuing to practice he was charged, tried, convicted, and punished. But in our opinion this conduct on the part of petitioner did not constitute a criminal offense, or subject him to any punishment under the statute in question. Section 1 of the said act of 1878, after providing for the certificate, declares that "such certificate shall be conclusive as to the right of the person named therein to practice medicine and surgery in any part of the state." And the only penal clause, or clause creating a criminal offense, in the act is contained in section 7, and is as follows: "Any person practicing medicine or surgery in this state, without first having procured a certificate so to do from one of the boards of examiners appointed by one of the societies mentioned in section 2 of this act, shall be guilty of a misdemeanor, and shall be subject to the penalties provided in section 13 of the act, to which this act is amendatory and supplemental." Nothing is declared in this act to be a crime except practicing "without first having procured a certificate." Practicing after an order of the board revoking the certificate for unprofessional conduct is not declared to be a crime, and no penalty is attached to it. Respondent's position, really, is that the legislature must have intended such conduct to be a criminal offense. It would be vain to inquire what intent lurked in the minds of the persons who happened to be members of the legislature when the act was passed. It certainly would be a forced thing to imagine their intent to be that a man should lose his liberty for the violation of any vague, undefined notion of unprofessional conduct which might, after the fact, be entertained by certain individuals constituting a board of examiners. At all events, the question whether or not the conduct in question is made a crime must be determined from the language used in the statute, and we find there nothing that declares such conduct to be a criminal offense. Nor is there anything in what is left of the act of 1876 (although no reference is made to that act in the complaint) which makes the conduct ascribed to petitioner a crime. Constructive crimes—crimes built up by courts with the aid of inference, implication, and strained interpretation—are repugnant to the spirit and letter of English and American criminal law. Let the petitioner be discharged.

I concur: SHARPSTEIN, J

I dissent: SEARLS, C. J.

THORNTON, J., (*concurring*.) I concur in the conclusion reached by Justice MCFARLAND, and am inclined to concur in the reasons given by him for such conclusion. But I cannot hold that the legislature has the constitutional power to enact a law punishing a physician who has been decided to be competent to practice, as was the case with the petitioner here, when a certificate was issued to him, for what is styled "unprofessional conduct," and as advertising himself in a newspaper and in a printed pamphlet as a specialist in certain enumerated diseases. This goes beyond the police power, under which power the statute to be considered was enacted. That a rule of professional conduct by a board of medical men prohibiting such advertisements, and declaring them unprofessional, can be declared a misdemeanor, and punished, would extend the police power beyond whatever has been allowed. As well might the board declare that wearing any other hat than one of a white color,

by a physician, should be unprofessional conduct, and cause it to be punished as a misdemeanor. The advertisement of the character mentioned does no harm to any one. It may be of benefit to the public, by giving to the subjects of the diseases mentioned information of the existence and residence of a person who has peculiar skill in curing them. Such laws are passed to prevent injury to the community, not to prevent or exclude a benefit to it. We are told that at one time the able and celebrated Hahnemann, a competent and properly licensed physician, was prosecuted and persecuted in a German state for compounding his own medicines, under a law enacted in the interest of apothecaries. I cannot conclude that such a statute here could be regarded as a valid exercise of power under our constitution. Professional etiquette prescribed by a class of men so eminent in standing as the medical practitioners of our state is a matter to be regarded and respected, but it has its limits, and I cannot conceive that a violation of it by a competent physician can ever be by the state made a penal offense. The rules in regard to such etiquette between the members of the medical, as between those of the legal, profession, must find their enforcement from a source other than the state. It is highly proper and just that it should be so. As the state cannot make the conduct of petitioner penal directly, it cannot do so indirectly. To hold as contended here by counsel adverse to the claims of petitioner would be to affirm the validity of a statute in which an attempt is seemingly made to accomplish that indirectly which cannot be directly done. For the reasons given above, the petitioner, in my judgment, should be discharged from custody.

PATERSON, J., (*concurring.*) There is no doubt that the exercise of the right to practice medicine, or to pursue any other lawful employment, may be regulated by law; but the right is one of the privileges and immunities in which the citizen is entitled to be secured and protected under the constitution and laws of the state. In *Ex parte Cox*, 63 Cal. 21, it appeared that the petitioner had been convicted of a misdemeanor, consisting of a violation of one of the rules and regulations of the board of state viticultural commissioners. This court there said: "The legislature had no authority to confer on the officer or board the power of declaring what acts should constitute a misdemeanor. The legislative power of the state is vested in the senate and assembly. That power could not, as to the case before us, be delegated to the officer or board." In this case, even if it be conceded that the legislature could delegate to the board of examiners the power to declare by rules and regulations what should constitute unprofessional conduct, and thus by its own act establish a crime, it is sufficient to say that no such rules or regulations have ever been prescribed. Before one can be convicted of a crime there must be some rule of action prescribing with some certainty and expressing intelligibly the sovereign will. Whatever may be said of the right of the board of examiners to revoke the license of the petitioner to practice medicine, and thus cast upon him the odium which must always follow such an expulsion from the ranks of reputable practitioners, the liberty of the petitioner cannot be made to depend upon a thing so vague and uncertain as the undefined views of the members of the board as to what constitutes unprofessional conduct. In every case, to constitute crime, there must be a union of act and intent. How can it be said there is an intent to commit a crime where the law, which it is claimed has been violated, exists only in the minds of individuals? The authorities upon which the respondent relies, namely, *State v. Board*, 32 Minn. 324, 20 N. W. Rep. 238; *In re Smith*, 10 Wend. 449, are not in point so far as the question of crime is concerned. The first case cited was a *mandamus* to compel the state medical examining board to issue to the applicant a certificate. The other was *certiorari* to annul an order expelling Smith from a medical society, and declaring him incapable of practicing medicine.

77 Cal. 117

PEOPLE v. LEONG SING. (No. 20,384.)

(*Supreme Court of California.* September 24, 1888.)

HOMICIDE—INDICTMENT—VARIANCE—PRESUMPTION ON APPEAL.

A conviction upon an indictment charging the murder of Leong Chin will not be reversed because the evidence shows deceased's name to have been Leong Chung, where the record does not purport to contain all the evidence, as, in such case, deceased will be presumed to have borne both names.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Indictment against Leong Sing for the murder of Leong Chin. Verdict of guilty, and judgment thereon, from which defendant appealed.

Geo. A. Johnson, Atty. Gen., for the People. *Jas. H. Smith*, for appellant.

FOOTE, C. The defendant was convicted of murder in the first degree. From the judgment rendered against him, and an order denying a new trial, he has appealed. The most important point made by counsel for the reversal of the judgment is, as alleged, that the evidence in the record shows conclusively, without any conflict whatever, that the defendant did not kill and murder one Leong Chin, as charged in the information, but that if he killed and murdered any human being it was one Leong Chung, whose name is not mentioned or referred to in any way in the information or record, so as to be identified as the same person as Leong Chin. Of course, if it affirmatively appeared from the record that the defendant was charged with the murder of one man, and the proof showed that he had murdered another, the defendant could not be there punished, as there he would have been tried for an offense of which the proof showed him not to be guilty. But it seems to us, in this case, that even admitting that the information charges the murder of Leong Chin, and the proof, so far as it appears in the bill of exceptions, shows the murder of Leong Chung, by the defendant, yet he might still have been lawfully convicted of the offense charged in the information. The bill of exceptions nowhere states that the evidence therein set forth is all the evidence which was had at the trial. And it will be presumed in favor of the correctness of the verdict and judgment, in the absence of any evidence to the contrary in the record, that the jury had before them evidence that Leong Chin and Leong Chung were identical; that the man killed and murdered had two names, by either of which he was equally well known. It has been heretofore held by the supreme court, in a case where a defendant was charged with the larceny of the property of one Sang Hop, that proof showing his personal name to be Yup Chin, and his business name Sang Hop, was sufficient to uphold a verdict of guilty of the offense charged. *People v. Leong Quong*, 60 Cal. 107. Further, it has been said that where the bill of exceptions prepared by the defendant does not affirmatively show that the venue was not proven on the trial, this court will presume that it was proven, and refuse to reverse the judgment. *People v. Marks*, 72 Cal. 47, 13 Pac. Rep. 149. In the case of *People v. Huff*, 72 Cal. 118, 13 Pac. Rep. 168, the defendant claimed a reversal of the judgment, because, as he alleged, the record did not show affirmatively that the judge was present at a view by the jury of the premises where the offense charged was committed. The appellate court held that it was incumbent upon the defendant to show affirmatively that the judge was not present at the view, and that, the record being silent as to the matter, it would be presumed he was present. If the venue is not proven, and it affirmatively appears from the bill of exceptions that it was not, of course the defendant could not be legally adjudged guilty. So here, if it affirmatively appeared that the defendant had not killed Leong Chin, but had killed someone else, the verdict and judgment could not stand. But the question arises, are we permitted to say, from the record here, that there was no evidence before the jury which made it evident that Leong Chin and Leong Chung were identical, and the person murdered was called both Leong Chin and Leong Chung? We cannot say that there may not have been evidence of this sort which established the fact that Leong Chin was Leong Chung, and that the defendant was proved to have killed and murdered that person as charged in the information, because the bill of exceptions does not purport to contain all the evidence adduced on the trial. *People v. Marks*, 72 Cal. 47, 13 Pac. Rep. 149. There is nothing in the record which shows affirmatively that Leong Chin was not identically the same person as Leong Chung. The fact that there may have been omitted from the bill of exceptions proof which showed that the murdered man was called by both names should not avail the defendant, who did not, on his trial in the court below, raise the point of variance between the proof and the allegations of the information to obtain a reversal here. To do that he should show error affirmatively; should show that there

was no evidence that the two names were both borne by the murdered man, as all omissions and uncertainties in a bill of exceptions preferred by him are to be construed against him. *People v. Williams*, 45 Cal. 27.

The other points made by counsel for the appellant do not require discussion. There is no merit in them under the record before us. No prejudicial error appearing, we advise that the judgment and order be affirmed.

I concur: BELCHER, C. C.

I concur in the conclusion: HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

77 Cal. 126

MALLAGH v. MALLAGH *et al.* (No. 11,859.)

(Supreme Court of California. September 26, 1888.)

TRUSTS—CONSTRUCTIVE TRUSTS—STATUTE OF FRAUDS.

Plaintiff, who owned two pieces of land, a ranch and a town lot, which were mortgaged, conveyed them to her son without consideration, that he might effect a sale, which he failed to do. The land was sold under the mortgages, the mortgagees becoming the purchasers; but the legality of the sale being questioned, plaintiff continued in possession, the son managing the property till a compromise was effected by which the ranch was sold to a third person, most of the proceeds paid to the mortgagees, and the town lot conveyed by them to the son. Another sum was paid by the son to the mortgagees, the origin of which cannot be accounted for, except as proceeds of the produce of the land. *Held*, that no express trust existed in the son as to plaintiff's land, but a constructive trust, to which the statute of frauds had no application.

Commissioners' decision. In bank. Appeal from superior court, San Luis Obispo county; D. S. GREGORY, Judge.

On motion for rehearing. For former opinion, see 16 Pac. Rep. 535.

Venable & Goodchild and W. H. Spencer, (Garber & Bishop, of counsel,) for appellants. Graves, Turner & Graves, for respondent.

FOOTE, C. Action to declare a trust. The court below gave judgment for the plaintiff, and the defendants appeal. The facts, as shown by the record, are as follows: In 1877 the plaintiff, who was a Spanish woman, not understanding the English language, owned two pieces of real property, one of which was a ranch of 500 acres, and the other a lot in San Luis Obispo. Both of these were mortgaged, and the interest was eating up the property. In this condition of affairs she conveyed the property to her son David, at his suggestion, in order to enable him to manage the same and try to effect a sale. The court finds, and we think the evidence shows, that no consideration was paid for this deed, and that David was the agent of his mother with respect to the property. He did not succeed in effecting a sale, and the property was sold under foreclosure proceedings to the persons who held the mortgage. It was claimed, however, in behalf of the mortgagor, that the proceedings on the foreclosure sale were void; and the plaintiff and her other children continued in possession of the property, David managing the same and disposing of the produce of the ranch, and receiving the money arising from the sales thereof. A compromise was effected by the sale and conveyance of the ranch to one Graig for \$7,000, the payment to the purchasers at the sheriff's sale of \$6,700, and the conveyance by them to David of the town lot, which is the property in controversy. This sum of \$6,700, as well as a previous payment of \$1,701.50, was paid to the mortgagees by David. It affirmatively appears that the payment of \$6,700 came from the sale of the ranch to Graig. And while it is not shown whose money the \$1,701.50 was, the inference is that it was out of the proceeds of the sales of the produce. The fact of the agency

being established, and the money for the produce having been received by the agent, and not accounted for by him, the presumption is that he used that money to make the payment. It cannot be presumed that he used his own funds to make payments in relation to the subject-matter of the agency. But if he did use his own funds for this payment, it would make no difference, for it is clear that an agent cannot acquire his principal's property by using his own funds to make what is in effect a redemption of the subject-matter of the agency.

These being the facts, it would seem that the law is perfectly plain. There was no express trust, but a constructive one, arising from the conduct of David and the confidential relation in which he stood to the plaintiff, and the statute of frauds has no application. *Brison v. Brison*, 17 Pac. Rep. 689; *Wood v. Rabe*, 96 N. Y. 426. We therefore advise that the judgment and order denying a new trial be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

77 Cal. 136

PEOPLE v. BOARD OF SUPERVISORS. (No. 12,786.)

(Supreme Court of California. September 27, 1888.)

TAXATION—TAXABLE PROPERTY—MORTGAGE TO STATE.

Const. Cal. art. 13, § 4, provides that a mortgage shall, for the purpose of taxation, be treated as an interest in the property, and, with certain exceptions, the value of the property so affected, less the value of such security, shall be taxed to the owner. Section 1 provides that property belonging to the state shall be exempt from taxation. Held that the owner of land on which there is a mortgage to the regents of the university is entitled to have the amount of the mortgage deducted from the value of the property for the purposes of taxation, notwithstanding the fact that such amount, as an interest of the state, will not be otherwise taxed.

In bank. On *certiorari*.

George A. Johnson, Atty. Gen., and Langhorne & Miller, for petitioner.
George Flournoy, Jr., (Flournoy & Mhoon, of counsel,) for respondents.

McFARLAND, J. Mrs. C. L. Tams is, and during the fiscal year 1888 has been, the owner of certain real property of the value of \$142,845, situated in the city and county of San Francisco, upon which there was and is a mortgage executed to and held by the regents of the university of California to secure the sum of \$63,000. The assessor of said city and county assessed said property to Mrs. Tams for said fiscal year at its full value, viz., \$142,845, and refused to deduct therefrom the amount of said mortgage, or any part thereof. Upon application duly made to the respondent, sitting as a board of equalization, the latter ordered the amount of the mortgage (\$63,000) to be deducted from the full cash value of the land, thus establishing the value of the latter to be assessed to the mortgagor at \$79,845. To review this action of the board this writ of *certiorari* was sued out, the petitioner contending that the board had no power to deduct the mortgage, because, being held by the regents of the university, it is the property of the state, (as decided in *Hollister v. Sherman*, 63 Cal. 38,) and therefore not taxable. And, as the point is not made here that the question thus presented cannot be reached on *certiorari*, we will examine it on the merits.

Section 4 of article 13 of the constitution provides that "a mortgage * * * by which a debt is secured shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. Except as to railroad and other *quasi* public corporations, in case of debts so secured, the value of the property so affected by such mortgage, * * * less

the value of such security, shall be assessed and taxed to the owner of the property." Section 1 of the same article provides that the property belonging to the state shall be exempt from taxation. And it is argued by petitioner, as before stated, that, in the case before us, the whole value of the land should be assessed to the mortgagor, because the mortgage is exempt from taxation. But the real question is, not what property is exempt from taxation, but what property is assessable to the mortgagor? Section 4, therefore, governs the case, and not section 1. And the rule established by section 4, that the value of the property, less the value of the mortgage, shall be assessed to the mortgagor, is general, and applies to all mortgages not especially excepted, the only exceptions being those made by railroad and other *quasi* public corporations. All mortgagors are given the benefit of the rule, except the corporations above named. It is true that section 4 also provides that the value of the mortgage shall be assessed and taxed to the owner thereof; but the fact that the mortgage happens to belong to the state, and is therefore exempt from taxation, does not render nugatory the provision that there shall be assessed to the mortgagor only the value of the land less the value of the mortgage. If the mortgage were held by an individual it would be assessed to him. Being held by the state it is not taxable; but that is the case with every kind of property. If private property, it is taxable; if public property, it is not taxable. And the right of the mortgagor is not affected at all by the circumstance that the mortgage is or is not assessable and taxable. It is urged that under this rule the state will lose a great many taxes. But the state should not expect to collect taxes on her own property; much less should she expect somebody else to pay them. Under the rule contended for by petitioner Mrs. Tams would have to pay taxes on \$63,000 belonging to the state. The anticipated losses of the state will therefore simply be like the fancied losses of other people who fail to get what they ought not to have. In our opinion the value of the mortgage to the regents of the university was properly deducted from the full value of the property; and the order of the board of equalization sought to be reviewed is affirmed.

We concur: SEARLS, C. J.; MCKINSTRY, J.; SHARPSTEIN, J.; THORNTON, J.

77 Cal. 179

PEOPLE v. JANUARY. (No. 20,168.)

(Supreme Court of California. September 28, 1888.)

CRIMINAL LAW—APPEAL—RECORD—INSTRUCTIONS. *

Pen. Code Cal. § 1207, provides that the judgment roll consists of (1) the indictment or information and a copy of the minutes of the plea or demurrer; (2) a copy of the minutes of the trial; (3) the charges given or refused, and the indorsements thereon; (4) a copy of the judgment. Section 1176 provides that "when written charges have been presented, given, or refused, or when the charges have been taken down by the reporter, the questions presented in such charges need not be excepted to or embodied in a bill of exceptions; but the written charges on the report, with the indorsements showing the action of the court, form part of the record, and any error in the decision of the court may be taken advantage of, on appeal, in like manner as if presented on a bill of exceptions." By section 1127 the court is required to indorse and sign its decisions upon all written charges presented. *Held*, that section 1176, by implication, requires like action upon the report of the instructions given by the court upon its own motion, and that a copy of the alleged charge of the court, verified by the short-hand reporter, but upon which was indorsed the trial judge's refusal to certify to its correctness, was not a part of the record. THORNTON, J., dissenting.

In bank. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

McKune & George, N. Greene Curtis, and A. L. Hart, for appellant. Geo. A. Johnson, Atty. Gen., for the People.

SEARLS, C. J. Defendant was indicted by the grand jury of the county of Sacramento for the crime of embezzlement, in having fraudulently appropriated to his own use the sum of \$39,549.25, the money and property of one W. A. January, intrusted to him as the clerk, agent, and servant of the said W. A. January. A trial was had before a jury, and a verdict finding defendant guilty of the charge set forth in the indictment was rendered. Thereupon a judgment was rendered by the superior court of Sacramento county to the effect that the defendant be imprisoned in the state prison for the term of 10 years. From this judgment an appeal was taken to this court. No bill of exceptions setting forth the evidence in the case was ever settled by the judge of the court below, and hence the appeal is to be heard upon the judgment roll. What purports to be a copy of the charge of the court to the jury is embodied in the transcript, and certified by the clerk, but without authentication by the court, judge, or reporter. The cause was tried in 1885, and the appeal taken to this court in 1886. The only attempt at an authentication of the charge of the court to the jury is found in a statement filed in this court May 16, 1888, containing substantially, but not literally, a copy of the alleged charge of the court, verified by the short-hand reporter on the 2d day of May, 1888, as being a correct transcript of the charge actually given, upon which is indorsed, under date of May 16, 1888, the refusal of the judge who tried the cause to certify to the truthfulness of the charge. It is claimed by respondent that the purported copy of the charge forms no part of the judgment roll, and, not being incorporated in a bill of exceptions, cannot be reviewed by this court. The judgment roll, or "record of the action," consists of "(1) the indictment or information, and a copy of the minutes of the plea or demurrer; (2) a copy of the minutes of the trial; (3) the charges given or refused, and the indorsements thereon; and (4) a copy of the judgment." Pen. Code, § 1207.

Section 1176 of the same Code provides that "when written charges have been presented, given, or refused, or when the charges have been taken down by the reporter, the questions presented in such charges need not be excepted to or embodied in a bill of exceptions, but the written charges or the report, with the indorsements showing the action of the court, form part of the record, and any error in the decision of the court thereon may be taken advantage of, on appeal, in like manner as if presented in a bill of exceptions." By section 1127 the court is required to indorse and sign its decision upon all written charges presented; and section 1176, by implication, requires like action upon the report of the instructions given by the court upon its own motion. There are, then, two methods by which counsel may have the action of the court, in giving or refusing instructions, reviewed: (1) By embodying such instructions in a bill of exceptions to be settled, allowed, and certified by the judge. (2) By filing with the court the written instructions given or refused, with the indorsement of the judge thereon; and as to the instructions given by the court on its own motion, and taken down by the reporter, by having a copy or report thereof in long-hand, with the indorsement of the action of the court thereon, filed with the clerk in like manner. The clerk cannot give verity to what purports to be the instructions given or refused by inserting them in the judgment roll. He is not in a position to know at all times what action the court has taken, and, were it otherwise, the power of verification is not, and should not, for many and weighty reasons, be vested in him. The reasoning of MCKINSTRY, J., in *People v. Flahave*, 58 Cal. 249, although applied to a case of written instructions, is equally applicable to the case at bar. It is as follows: "The clerk of the superior court is not authorized to insert in the record any paper purporting to set forth instructions, whether headed 'Instructions for the prosecution' or 'for defendant,' or not, unless such instructions are shown, by the court's indorsement, to have been given or refused, in whole or in part. In no other way can that officer be made acquainted with the action of the court with respect to the instructions"

as presented by counsel." Like considerations apply to the attempted authentication of the record by the reporter. It is true, the report of the official reporter is to be taken as *prima facie* evidence of its truth; but we are not considering it as evidence of facts, but as to whether or not it is verity itself, and whether such verity is established in the mode provided by law. To hold that the action of the court is to be measured by the report of the reporter would, in effect, be to transfer the judicial function of the judge to the phonographic reporter for all purposes of review. A most important duty devolves upon a judge in certifying to the accuracy of the record of his proceedings. This duty cannot be discharged by another, or taken from him, except by some direct and specific provision of law. We conclude that as the charges of the court, with "indorsements thereon," form a part of the record, so the charges without such indorsement are not entitled to a place in the record, and neither the action of the reporter nor clerk can make them such without such indorsement by the court or judge; and the report of the charges given by the court is placed by section 1176, Pen. Code, in the same category, and is without force, as a record, unless indorsed in like manner. It follows that what purports to be the instructions of the court cannot be reviewed on this appeal. The demurrer to the indictment was properly overruled. It was drawn for a violation of the provisions of section 508 of the Penal Code, and the facts stated are sufficient to bring the case within that section. *People v. Gray*, 66 Cal. 271, 5 Pac. Rep. 240; *People v. Treadwell*, 69 Cal. 227, 10 Pac. Rep. 502. The judgment and order appealed from are affirmed.

We concur: PATERSON, J.; SHARPSTEIN, J.; McFARLAND, J.; MCKINSTRY, J.

THORNTON, J., (*concurring*.) I regard the bill of exceptions in this case as a part of the record, and on examining it I find no error in the ruling of the court. I do not concur, but dissent from the views expressed in the above opinion drawn by the chief justice. I concur in the conclusion that the judgment and order should be affirmed.

77 Cal. 139

HABENICHT v. LISSAK. (No. 11,034.)

(Supreme Court of California. September 27, 1888.)

1. PLEDGE—SALE BY PLEDGOR—PRICE TO BE PAID PLEDGEE—EQUITABLE ASSIGNMENT.

A pledgor of goods sold them to defendant, who agreed to pay the purchase money to the pledgee, to be applied to the payment of the debt for which they were pledged, and defendant obtained possession of part of the goods by getting credit from the pledgee. Upon defendant's default, the goods were sold by the pledgee at auction. *Held*, that a complaint by the pledgor's assignee against defendant, setting forth the above facts, and praying for the difference between the price realized at the auction sale and the price agreed to be paid by defendant, stated a cause of action, and not facts showing an equitable assignment to the pledgee of the debt due by defendant to the pledgor.

2. SAME—PLEADING.

An allegation in the complaint that defendant was indulged for over a year longer than his original agreement allowed him to pay for and receive the goods, is a sufficient averment that a reasonable time was given him to comply with his contract before resale.

3. SAME—EVIDENCE—RELEVANCY.

The transactions between the pledgor and the pledgee were competent evidence, as tending to establish that defendant knew the goods were pledged when he bought them, and that he did not expect to receive them unless he paid for them.

4. SAME—EVIDENCE—PAROL.

Parol evidence is admissible to show that the goods sold by the contract and those offered for delivery by the pledgee were identical.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Henry E. Highton, for appellant. *Pillsbury & Blanding*, for respondent.

FOOTE, C. This is an action for a breach of contract upon sale of a large number of bags. They were sold to the defendant by Hughes & Co., and were to be delivered by Rogers, Meyer & Co., who held them in pledge for a debt due to them from Hughes & Co. The claim of Hughes & Co. was assigned by them to the plaintiff. The defendant did not pay for the bags as he agreed to do, and they were sold at auction by the firm who held them in pledge. The price they brought was credited upon the debt which Hughes & Co. owed to Rogers, Meyer & Co., and became a payment *pro tanto* to Hughes & Co., and this suit was instituted to recover from the defendant the difference between the price he had agreed to pay Hughes & Co. for the bags, less the amount he had paid them and the amount of money which they brought at auction. The action appears to have been brought under section 3311 of the Civil Code, which reads as follows: "The detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is not vested in him, is deemed to be: (1) If the property has been resold, pursuant to section thirty hundred and forty-nine, the excess, if any, of the amount due from the buyer, under the contract, over the net proceeds of the resale." In this instance the property pledged was sold by the pledgee to reimburse himself for the purchase price, and the claim of Hughes & Co. was assigned in writing to the plaintiff, Habenicht. All the steps necessary under the statutes to make a legal and fair sale of the property held in pledge were duly taken, and no unfairness appears in the sale. The plaintiff had judgment as prayed for, and from that and an order refusing a new trial the defendant has appealed.

The facts of the case seem to be that the bags were originally sold by Rogers, Meyer & Co. to Hughes & Co. under a certain written contract. They did not pay for them at once, but did inspect, receive, and accept them in such a way as to make the delivery to them valid, and they then allowed the bags to remain in pledge with Rogers, Meyer & Co., to be given up to them by the latter as they should pay for them. Thereafter Hughes & Co. did make payments to Rogers, Meyer & Co. on account of their debt due for the bags; Hughes & Co. being the owners of the bags, although they had transferred their possession to Rogers, Meyer & Co. in pledge. There is no question but that the title to the bags passed to Hughes & Co., for Mr. Hughes, as a witness, says he "received every consignment of these bags as they arrived, and accepted them. These bags came on a dozen vessels. As each lot arrived I inspected and accepted it. I examined the bags on the wharf as they came out of the ship." Civil Code, § 1141. When the title to the bags passed to Hughes & Co., and they had pledged them to Rogers, Meyer & Co., the defendant, Lissak, with full notice and knowledge that the bags had been thus pledged, agreed to buy them from Hughes & Co., and to pay the price agreed upon into the hands of Rogers, Meyer & Co., for the account of Hughes & Co., upon the delivery to him of the bags as he thus paid for them. The particular bags which are involved in this controversy were not paid for or delivered to the defendant, and he never had title thereto. But it appears to us from the evidence that he could have had possession of them if he had paid for them as he agreed to do. His main defense seems to be that under the warranty, express or implied, the bags sold to him were to be merchantable as "return bags," and that they were not fit for the purpose as warranted. The jury passed upon that question as submitted to them upon the evidence, and we are not prepared to say that they were wrong. The complaint, in our opinion, states facts sufficient for a cause of action for the breach of a buyer's agreement, where the title to personal property has not passed. Nor do we concur in the view of defendant's counsel that the language of the complaint shows that Rogers, Meyer & Co. were the equitable assignees of the claim due from the defendant to Hughes & Co.

The complaint states that Rogers, Meyer & Co. were the pledgees of the goods of Hughes & Co., which they sold to the defendant with his knowledge that they were so pledged, and that he agreed to pay the money he owed for them to Rogers, Meyer & Co., in order that it might be applied to the payment of the price for the goods which Hughes & Co. primarily owed. He was getting credit from Hughes & Co. for so much of the purchase price due them from him, and in that way getting possession of the goods. In other words, knowing when he bought the bags that they were in pledge, he bought them with the understanding that if he got possession of them he must pay for them as delivered to him, and that the money must go through the hands of Rogers, Meyer & Co., to Hughes & Co., their debtor. This was not an assignment to Rogers, Meyer & Co. of the fund or debt he owed Hughes & Co. There was no privity of contract alleged in the complaint or shown in the evidence between the defendant and Rogers, Meyer & Co. All that the defendant had to do with them was to get possession of the goods he bought, knowing them to be in pledge for Hughes & Co.'s debt. To get possession he paid money belonging to Hughes & Co. into the hands of Rogers, Meyer & Co., for Hughes & Co.'s account. We do not perceive anything in the record which would have justified the court below in granting the request asked for. The plaintiff had made out at least a good case as set out in the complaint, there being sufficient evidence to have sustained a verdict, and that evidence corresponded with the allegations of the complaint.

It was necessary to show the transactions of Hughes & Co. with Rogers, Meyer & Co. in order to make it evident that the defendant knew the goods were pledged when he bought them, and that he did not expect to receive them unless he paid for them through Rogers, Meyer & Co. There was no evidence introduced to vary the terms of a written contract.

The bought and sold notes between Hughes & Co. and the defendant did not specify any indeterminate lot of "return grain bags." They specified a lot of 720,000 such bags, i. e., a specific number of a certain quality of bags. All that was necessary was to make it certain that those sold by the contract and those offered for delivery were the identical same lot of bags, and that was admissible by parol evidence. 2 Whart. Ex. § 641, and note 1.

We cannot notice in detail the many exceptions to the introduction of evidence, but after carefully examining all of them we can see no error on the part of the trial court. The instructions as given to the jury were fair and in accordance with the law of the case. We perceive no error on the part of the court below in refusing or modifying instructions.

The complaint shows that the defendant was indebted for over a year longer than his original agreement allowed him to pay for and receive the bags. This is a sufficient averment that a reasonable time was given him to comply with his contract before receipt of the goods, and the proof sustains the averment.

No prejudicial error appears in the record. We advise that the judgment and order be affirmed.

We concur: BELCHER, C. C. ; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

77 Cal. 123

YOLO COUNTY v. DUNN, Comptroller. (No. 12,562.)

(Supreme Court of California. September 27, 1888.)

POOR AND POOR-LAWS—SUPPORT—RIGHT OF COUNTY TO STATE AID.

Const. Cal. art. 4, § 12, authorizes the legislature to grant aid to institutions for aged persons in indigent circumstances, in proportion to the number of inmates;

and that counties, cities, etc., providing for such persons, shall receive the same *pro rata* appropriations; the legislature (St. 1883, p. 380) granted to every such institution \$100 per annum for each aged person maintained therein, and by the same act provided that "no institution which has less than ten" such persons shall be entitled to the aid. *Held*, that a county which provides for the maintenance of aged, indigent persons is entitled to the *pro rata* appropriation, whether or not there be as many as 10 such persons in any one institution within the county.

Commissioners' decision. In bank. Appeal from superior court, Yolo county; C. H. GAROUTTE, Judge.

George A. Johnson, Atty. Gen., for appellant. *W. J. McGee*, (*Robt. T. Devlin*, of counsel,) for respondent.

BELCHER, C. C. The county of Yolo requested the state comptroller to draw his warrant on the state treasurer for an amount of money which had been audited and allowed by the state board of examiners to the county for its support and maintenance of aged persons in indigent circumstances. The comptroller refused to draw the warrant, and thereupon this proceeding was commenced to obtain a writ of mandate compelling him to do so. The court below granted the writ, and hence this appeal. The constitution provides that "the legislature shall have the power to grant aid to institutions conducted for the support and maintenance of minor orphans, or half orphans, or abandoned children, or aged persons in indigent circumstances,—such aid to be granted by a uniform rule, and proportioned to the number of inmates of such respective institutions;" and "that whenever any county, or city and county, or city or town, shall provide for the support of minor orphans, or half orphans, or abandoned children, or aged persons in indigent circumstances, such county, city and county, city or town, shall be entitled to receive the same *pro rata* appropriations as may be granted to such institutions under church or other control." Art. 4, § 22. In 1883 the legislature passed an act (St. 1883, p. 380) appropriating "to each and every institution in this state, conducted for the support and maintenance of aged persons in indigent circumstances, and either solely for that purpose or in connection with the support and maintenance of minor orphans, half orphans, and abandoned children, aid as follows: For each aged person in indigent circumstances, supported and maintained in any such institution, the sum of \$100 per annum." The act then provides how books must be kept, and how claims for aid must be authenticated, and must be presented to and audited and allowed by the state board of examiners. And if a claim be audited and allowed it is made the duty of the comptroller to draw his warrant for the amount thereof, and of the treasurer to pay the warrant on presentation. Section 7 of the act provides as follows: "In order that the provisions of this act shall not be abused, it is hereby declared: *First*. That no institution which has less than ten aged indigent persons shall be deemed entitled to aid under this act. *Second*. That no person under the age of sixty years shall be deemed an aged person in indigent circumstances, within the meaning of this act. *Third*. That no person, for whose specific support there is paid to any such institution the sum of \$15 or more per month, shall be entitled to aid under this act," etc.

It appears from the petition filed in this case that during the time for which it asked aid the petitioner had supported and maintained twelve aged persons in indigent circumstances, and that seven of them were kept in its county hospital, and five in other places. It is contended for appellant that all of the provisions of the statute, in reference to private institutions, apply to counties, cities, and towns; and that the latter are not entitled to receive any aid from the state for supporting aged persons in indigent circumstances, unless at least ten such persons are supported and maintained at the same time and in the same institution or place; and it is claimed that, as petitioner supported only seven such persons in its hospital building, the writ was improper.

erly granted. This contention cannot, in our opinion, be sustained. The statute does not in terms make any provision as to counties, cities, and towns, but is confined solely to private institutions. And the constitution, after providing that the legislature may grant aid to private institutions for the support of orphans and aged indigent persons, goes on to say that whenever such aid is granted, then any county, city, or town, for like services, shall be entitled to receive the same *pro rata* appropriations as may be granted to such institutions. In this, as will be observed, no limitation is found as to the number of persons who must be supported in order to entitle the county, city, or town to receive aid, or as to the place or places where they must be supported. In *San Francisco v. Dunn*, 69 Cal. 73, 10 Pac. Rep. 191, the same statute and section of the constitution were before the court for consideration, and it was held that, an appropriation having been made by the legislature for the support of aged persons in indigent circumstances by private institutions, the provisions of the constitution as to counties, cities and counties, cities and towns, become self-executing. Said the court: "The evident intent of the constitution is to vest in the legislature the discretion to grant state aid to institutions for support of orphans and indigent aged persons; and upon the exercise of that discretion to appropriate to the aid of counties, cities and counties, cities and towns, for similar purposes, *pro rata* amounts." The case was submitted upon the petition and a general demurrer thereto, and it was thereby admitted that the county provided for the support of all the indigent aged persons for which it asked aid. In our opinion it was immaterial whether all or any of them were kept in the hospital building. The only material facts were, were they aged persons in indigent circumstances, and did the county provide for their support and maintenance? These questions being answered in the affirmative, it was evident that the county was entitled to the relief sought.

We think the judgment as entered right, and therefore advise that it be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

77 Cal. 152

POPE v. KIRCHNER. (No. 11,043.)

(Supreme Court of California. September 28, 1888.)

1. INSOLVENCY—PROCEDURE—NOTICE OF ADJUDICATION—PUBLICATION—MISNOMER.

Under California insolvency act, § 7, requiring notice of an adjudication of insolvency to be published and served, such notice is sufficient, although by a clerical error a wrong letter is used in the insolvent's name, the name being properly printed in two other places.

2. SAME—NOTICE—AFFIDAVIT OF MAILING.

Nor is the affidavit of mailing such notice defective because written to be sworn to by one person, whose name appears at the beginning, and actually subscribed and sworn to by another.

3. SAME.

Such affidavit is sufficient if it states that the notices were addressed to the creditors at their places of business, as stated in the schedule, although such schedule shows the residence of the creditors instead of the place of business; as, in the absence of proof to the contrary, after granting the discharge, the place of business and residence will be presumed to be the same.

4. SAME—MISNOMER OF CREDITOR.

A slight mistake in the spelling of a creditor's name, as the use of a "c" for an "e," will not vitiate such affidavit.

5. SAME—DISCHARGE—COLLATERAL ATTACK—INSUFFICIENT INVENTORY.

Although said statute requires an accurate description of the insolvent's estate, a statement of "debts due petitioner, \$—," is sufficient after discharge, as against collateral attack.

6. SAME—INVENTORY—OMISSION OF WORTHLESS DEBTS.

Nor will it avoid the discharge that debts were omitted from the inventory, it appearing that they were worthless, and barred by limitation.

In bank. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

G. E. Harpman, for appellant. A. Morgenthal, for respondent.

PER CURIAM. Action upon a promissory note. Defense, a discharge in insolvency. The points made relate to the validity of such discharge.

1. It is contended that the requisite notice of the adjudication of insolvency was not given. The statute provides that a copy of the order must be published, and in addition that it shall be served either personally or by mail. See section 7 of the Insolvency Act. The appellant objects to the publication, and also to the service. The objection to the publication is as follows: The order which was published is in these words: "*In the matter of Herman Kirchner, an Insolvent Debtor.* Herman Hirschner having filed in this court his petition, schedule, and inventory in insolvency, by which it appears that he is an insolvent debtor, the said Herman Kirchner is hereby declared," etc. It is perfectly apparent from the foregoing that the name "Hirschner" was a mere clerical error. And this appears upon the face of the order. The objection to the publication, therefore, is not well taken.

There are several grounds of objection to the service by mail: (a) It is said that the affidavit of deposit in the post-office was insufficient, because it was not signed by the person for whom it was drawn up. The affidavit begins as follows: "Herman Kirchner, being duly sworn, says," etc. It was signed by "V. W. GASKILL, Deputy County Clerk," and the certificate is: "Subscribed and sworn to this 20th day of April, 1881. JOHN F. WILLARD, Deputy County Clerk." The affidavit, therefore, was sworn to by the person who subscribed to it, who was Gaskill. And this being the case we think that the recital in the affidavit as to "Herman Kirchner being duly sworn" may be rejected as surplusage, and that the affidavit is to be considered as made by Gaskill. (b) The language of the affidavit is that the notice was addressed "one to each of said creditors at his place of business, as stated in said schedule." The address of the creditor in the schedule is given in a column headed "Residence of creditors;" and it is argued that, since no place of business is given in the schedule, the statement in the affidavit cannot be true. But in the first place, if the address was correctly given, the mistake of styling it a place of "business," when in fact it was a place of "residence," does not seem to be material. And in the second place it may be that the party resided at his place of business. There is no evidence that he did not, and, the certificate of discharge being *prima facie* evidence of the regularity of the proceedings, it is to be presumed that such was the case, in the absence of a showing to the contrary. The address given does not seem to be a very definite one; but, for all we know to the contrary, it may have been a very well-known place. The slight mistake in the spelling of the creditor's name, "McGilligan & Clark" instead of "Megilligan & Clark," is of no importance.

2. It is contended that the discharge was invalid, because of the insufficiency of the petition and inventory. The position is that the following statement of debts due the insolvent, viz., "Debts due petitioner \$274," is not an "accurate description" of the estate, as required by section 4 of the insolvency act. But it seems to have satisfied the insolvency court. If the assignee had not been able to ascertain what the debts were by reason of the vagueness of the description, in all probability the court would not have granted the discharge. While the certificate of discharge is only *prima facie* evidence, yet we do not understand that upon a collateral attack the creditor can raise objections which amount to a special demurrer to the petition. If there is not a total absence of essential averments, but only an insufficiency in the state-

ment thereof, a collateral attack upon the discharge cannot be made. *Mogk v. Peterson*, 17 Pac. Rep. 447.

It is argued, however, that some debts were omitted altogether from the inventory. In this regard the insolvent testified at the trial that he had not put in the inventory debts amounting to \$650; that these debts were "outlawed," and that he could not get anything on them; and that he had not collected anything on them since. There was no evidence in contradiction of this. Taking the fact to be that the debts mentioned were utterly worthless and barred by limitation, we do not think their omission is ground for a collateral attack on the discharge. It is true that the insolvent should not take upon himself to decide what debts are worthless. And the insolvency courts should require full statements of the debts due to the insolvent. But where it is proven that the omitted debts were in fact worthless and barred by limitation, we are not prepared to say that the discharge can be collaterally attacked on the ground of the omission. The omission of these debts is claimed to amount to fraud and false swearing, but we see no ground for this position. The other matters do not require special notice.

The judgment and order denying a new trial are affirmed.

THORNTON, J., (*concurring*.) The affidavit of the deposit in the post-office was sufficient. If it was Kirchner's affidavit, it was sufficient, though not signed by him. In *Ede v. Johnson*, 15 Cal. 53, this was expressly held, and we think correctly held. If it was not Kirchner's affidavit, Deputy County Clerk Gaskill's affidavit was signed by him. It is immaterial that the affidavit commences, "Herman Kirchner being duly sworn," etc. It is evident that this was a clerical error or mistake, from the fact that the words just above quoted are followed by the statement "that he is a deputy clerk of the county of Alameda." It appears that Ryder was the clerk of the county, and Gaskill, the affiant, his deputy, in April, 1881, when the affidavit was made. We cannot perceive any tenable grounds authorizing the ruling that the insolvency court did not have jurisdiction. The facts appearing bring it within the ruling in *Bennett v. His Creditors*, 22 Cal. 38, which is applicable here.

On the foregoing grounds I concur in the judgment.

77 Cal. 171

PEOPLE v. EASTMAN. (No. 20,436.)

(Supreme Court of California. September 28, 1883.)

LARCENY—INTENT—EVIDENCE.

Defendant was originally the owner of the property alleged to have been stolen, and had pledged it for a debt owing by him to the prosecuting witness. Defendant had worked for the prosecuting witness, and claimed wages for his services, and on refusal of the prosecuting witness to advance him money took the property in the day-time, without any concealment, and pledged it to another. *Held*, that the refusal to allow defendant to show that the prosecuting witness owed him for the services enough to satisfy the debt for which the property was pledged was reversible error, as it tended to show the intent with which the property was taken.¹

Commissioners' decision. In bank. Appeal from superior court, Mendocino county; ROBERT MCGARVEY, Judge.

Yell & Searwell, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

FOOTE, C. The defendant was convicted of the larceny of a mare. From the judgment and an order denying him a new trial this appeal is taken.

¹That taking property openly, under a *bona fide* claim of right, is not larceny, see *People v. Schultz*, (Mich.) 38 N. W. Rep. 306; *Howard v. State*, (Tex.) 8 S. W. Rep. 306, and note. There must be a fraudulent intent at the time of the taking. *Buchanan v. State*, (Tex.) 9 S. W. Rep. 57; *Bryant v. State*, (Tex.) 8 S. W. Rep. 937. In general, as to what must be the character of the taking to constitute larceny, see *Frazier v. State*, (Ala.) 4 South Rep. 691, and note.

The evidence went to show that the defendant was originally the owner of the mare, and that she was in pledge to McClure, the prosecuting witness, for a debt which the defendant owed him; that the defendant had worked for McClure for two months, and claimed wages for his services; that under this state of facts, McClure declining to advance him some money, the defendant, in the day-time, and without any concealment, took the mare away from McClure's farm, and pledged her to another party for \$10. The most important question to be determined by the jury, under the facts of this case, was the intent with which the defendant took and carried the mare off. It, therefore, seems to us that it was a material circumstance in the determining of that question whether the complaining witness owed the defendant wages which would have amounted to the sum of \$30, for which the mare was pledged, for, if the defendant had taken the mare off under the honest belief that he had a right to do it, in view of the fact that he might, in good faith, have considered his unpaid claim for wages to have been sufficient to have reimbursed McClure for the amount due him on pledge, the jury would have been warranted in believing that the intention to steal was absent, although a trespass was committed. It is one thing to take and carry off personal property with the intention to steal, and another to take it away under a mistaken idea of legal rights honestly entertained; and any fact or circumstance which tends to throw light upon the actual intent of the party charged with the felonious taking is pertinent evidence, and should be allowed to go to the jury. From the fact that in this case the defendant was not allowed to show whether or not McClure had paid him or owed him for work and labor done for two months, we think he was prejudiced, and advise that the judgment and order be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed and cause remanded for a new trial.

77 Cal. 183

Ex parte FENTON. (No. 20,471.)

(*Supreme Court of California.* October 9, 1888.)

CRIMINAL LAW—FORMER JEOPARDY—ARREST BY JUSTICE OF THE PEACE.

The fact that one has been once arrested and examined before a magistrate and discharged is not a bar to a second arrest and examination on the same charge, as a person has not been once in jeopardy till put upon trial, in a court of competent jurisdiction, on indictment or information sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance.¹

In bank. Application for writ of *habeas corpus*.

Petitioner was arrested on a charge of grand larceny, and discharged on examination in justice's court in Trinity county. Afterwards he was arrested on same charge, and before a justice of a different township was held for trial. He sues out this writ on the ground of "once in jeopardy."

P. Reddy, for petitioner. *J. W. Turner* and *James W. Bartlett*, Dist. Atty., for the People.

PER CURIAM. The record in this case, and the agreed statement upon which it is submitted, taken together, show sufficient cause for issuing the warrant under which defendant is held. The fact that defendant had been previously arrested on the same charge, examined before a magistrate, and discharged, is not a bar to a second arrest and examination. A person cannot

As to what will sustain a plea of former jeopardy, see *Foster v. State*, (Tex.) 8 S. W. Rep. 664, and note; *People v. Bentley*, (Cal.) 18 Pac. Rep. 799, and note; *State v. Davis*, (W. Va.) 7 S. E. Rep. 24, and note; *Fox v. State*, (Ark.) 8 S. W. Rep. 836.

be said to have been once in jeopardy until he is put upon trial before a court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance. The writ is discharged, and the defendant remanded to the custody of the sheriff.

77 Cal. 176

PEOPLE v. TRAVERS. (No. 20,398.)

(*Supreme Court of California.* September 28, 1888.)

CRIMINAL LAW—FORMER JEOPARDY—REVERSAL OF FORMER JUDGMENT.

A judgment of conviction upon an information for an attempt to commit burglary, which was afterwards, upon appeal by defendant, reversed, and a new trial awarded, will not bar further prosecution thereon, although defendant in his appeal therefrom did not ask a new trial, but only a reversal and his discharge from imprisonment.¹ McFARLAND, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; D. J. MURPHY, Judge.

Information for attempt to commit burglary. From a judgment of conviction an appeal was taken by defendant, and the judgment reversed. Upon a second trial defendant was again convicted, and appeals. For opinion on former appeal, see 15 Pac. Rep. 293.

Geo. A. Johnson, Atty. Gen., for the People. Garret W. McEnerney, for appellant.

SEARLS, C. J. The defendant was informed against for an attempt to commit burglary, and was convicted. The appeal is taken from the judgment and from an order denying a new trial. The only error relied upon is based upon the instruction of the court below, directing the jury to find for the state, upon the defendant's plea of once in jeopardy, and its refusal to instruct the jury to find for the defendant upon that plea. The facts upon which the plea of once in jeopardy is based are as follows: Defendant had been previously tried upon the same information, whereupon a verdict was rendered of "Guilty as charged," but without specifying whether the attempt to commit burglary was of the first degree, (committed in the night-time,) or of the second degree, (in the day-time.) Upon this verdict, so rendered, judgment was entered punishing defendant for a term of two years in the state prison. An appeal was taken from the judgment, and a reversal had, and new trial ordered by this court. On the going down of the *remittitur*, the defendant filed a supplementary plea of once in jeopardy. The second trial resulted in a verdict finding the defendant guilty of an attempt to commit burglary of the second degree.

The question is, was the defendant, upon these facts, entitled to a verdict in his favor upon his plea of once in jeopardy? "No person shall be twice put in jeopardy for the same offense." Const. Cal. art. 1, § 13. A person is in legal jeopardy when he is put upon trial before a court of competent jurisdiction, upon information or indictment sufficient in form and substance to sustain a conviction, and a competent jury has been regularly charged with his deliverance. Cooley, Const. Lim. 404. If, however, the court had no jurisdiction of the cause, or if the indictment or information was so defective that no valid judgment could be rendered upon it; or if, by any overruling necessity, the jury are discharged without a verdict, or the jury are discharged with the consent of the defendant, either express or implied; or if, after verdict against the accused, it has been set aside on his motion for a new trial, or on writ of error, or in arrest of judgment,—in all these, and a few other cases which might be enumerated, the accused may again be put upon trial,

¹As to what will sustain a plea of former jeopardy, see *Ex parte Fenton*, (Cal.) *ante*, 267, and note.

and the proceedings had will constitute no protection. *Id.* 405. It is true that, in his former appeal from the judgment, the defendant did not ask for a new trial, but demanded a reversal of the judgment, and that he be discharged. This last prayer was denied by the court, and a new trial ordered in accordance with section 1260, Pen. Code. In *People v. Howell*, 28 Cal. 456, it was held that if the defendant in a criminal case is convicted and appeals, and the judgment is reversed, the appellate court may order a new trial, even though the defendant does not move for such new trial, and denies the power of the court to grant it, and that where the judgment in such a case is reversed, and a new trial ordered, he cannot successfully set up the former trial in bar of another trial and conviction. *People v. Barric*, 49 Cal. 342, is to the same effect. When the defendant appealed from the judgment, and procured a reversal, one of the effects of which was the ordering of a new trial, the judgment and verdict in such a case must be assumed to be set aside at the instance of the defendant, upon the theory that he who procures the reversal or affirmance of a judgment impliedly assents to all the consequences legitimately following such reversal or affirmance. 1 Bish. Crim. Law, §§ 1004, 1016. The judgment and order appealed from are affirmed.

We concur: THORNTON, J.; PATERSON, J.; SHARPSTEIN, J. McFARLAND, J., dissents.

77 Cal. 147

PEOPLE v. FINE. (No. 20,406.)

(*Supreme Court of California.* September 27, 1883.)

1. CRIMINAL LAW—EVIDENCE—FLIGHT OF ACCUSED.

On a trial for assault, the testimony of the sheriff as to his search for defendant, tending to show flight after the assault, is admissible, as proper to be considered in determining the guilt of the prisoner.¹

2. SAME—INSANITY AS A DEFENSE—OPINION EVIDENCE.

The admission of evidence as to the sanity of the accused, objected to on the ground that the witnesses were not his "intimate acquaintances," as required by Code Civil Proc. Cal. § 1870, subd. 10, which authorizes as evidence the "opinion of intimate acquaintances as to the sanity of the accused, the reason for the opinion being given," will not be disturbed on appeal, unless it appear that the court abused the discretion vested in it as to such a matter.

Commissioners' decision. In bank. Appeal from superior court, Stanislaus county; MINOR, Judge.

Code Civil Proc. Cal. § 1870, subd. 10, authorizes, in criminal prosecutions, the admission in evidence of the opinion of intimate acquaintances, as to the sanity of the accused, the reasons for the opinion being given.

P. J. Hazen, Hatton & Fulkerth and *Turner & Maddox*, for appellant. *Geo A. Johnson*, Atty. Gen., for the People.

FOOTE, C. The defendant was convicted of an assault with a deadly weapon. From the judgment rendered against him and an order denying a new trial he has appealed. The information charged an assault with a deadly weapon with intent to commit murder, and was sufficient under sections 950, 951, 959, 960, Pen. Code. *People v. Monteith*, 73 Cal. 7, 14 Pac. Rep. 373. The testimony of the sheriff relative to his search for the defendant, as tending to show his flight after committing the assault, was properly admitted, because if such flight was proved it was a circumstance which the jury might consider in determining the guilt of the defendant. The instructions for the defendant, refused by the court, were either inapplicable, or were fully given in other portions of the charge. It is objected that the court below permitted

¹As to the admissibility of evidence of flight of the accused, in criminal cases, see *State v. Moncla*, (La.) 2 South. Rep. 814, and note; *Carden v. State*, (Ala.) 4 South. Rep. 823.

witnesses to testify as to the sanity of the accused, when, as alleged, they were not his "intimate acquaintances," and were incompetent under subdivision 10, § 1870, Code Civil Proc. But it does not appear that the court abused the discretion vested in it as to such a matter, hence the appellate court should not interfere. *People v. Pico*, 62 Cal. 53. Several other errors are claimed to have been committed, on account of which it is urged that the defendant is entitled to a new trial. After a careful examination of the record we are unable to perceive any prejudicial error, and advise that the judgment and orders be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and orders are affirmed.

77 Cal. 173

PEOPLE v. WASSERVOGLE. (No. 20,426.)

(Supreme Court of California. September 28, 1888.)

1. FALSE PRETENSES—WHAT CONSTITUTES—STATEMENTS AS TO CREDIT.

Pen. Code Cal. § 533, provides that "every person who knowingly and designedly, by false or fraudulent representation or pretense, defrauds any person of money or property, * * * is punishable," etc. *Held*, that a statement by defendant that he had credit with the firm on which the draft was drawn for its amount, and that the firm would honor the draft, when he knew that he had no credit with the firm, and that the draft would not be honored or paid, was within the statute.

2. SAME—EVIDENCE.

Evidence that defendant before this transaction had drawn other drafts on the same firm, which had not been paid, is admissible, as tending to show that he had no credit with the firm, and must have known that the draft in question would not be honored.

Commissioners' decision. In bank. Appeal from superior court. Santa Clara county; F. E. SPENCER, Judge.

W. H. Layson, for appellant. Geo. A. Johnson, Atty. Gen., for the People.

BELCHER, C. C. The defendant was charged with obtaining money under false pretenses, and convicted. He moved for a new trial, and has appealed from the judgment and order denying his motion.

1. The demurrer to the information was properly overruled. The offense is charged in the language of section 532 of the Penal Code,¹ and the false pretense is particularly set forth. It is true that, to come within the statute, a representation must be of some fact, past or present; but the statement of defendant that he had credit with the firm named for the amount of the draft, and that the firm would honor the draft, when he knew that he had no credit with the firm, and that the draft would not be honored or paid, was sufficient. Among the definitions of the word "credit" are the following: "Credit is confidence or trust reposed in one's ability to pay what he may promise." Abb. Law Dict. "The ability to borrow on the opinion conceived by the lender that he will be repaid." Bouv. Law Dict. "Credit is the capacity of being trusted." *Bank v. Trust Co.*, 3 N. Y. 356. And a false pretense has been defined to be "a representation of some fact or circumstance, calculated to mislead, which is not true." *Com. v. Drew*, 19 Pick. 184. After quoting this definition, Mr. Bishop says a fuller and practically better one would be: "A false pretense is such a fraudulent representation of an existing or past fact, by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value." 2 Bish. Crim. Law, § 415; and see *People v. Jordan*, 66 Cal. 10, 4 Pac. Rep. 773. The claim that

¹Penal Code, § 532, provides that "every person who knowingly and designedly, by false or fraudulent representation or pretense, defrauds any person of money or property, * * * is punishable," etc.

"credit" implies only futurity, and not a present fact, cannot be supported.

2. The evidence was sufficient to support the verdict; and the testimony that defendant, before this transaction, had drawn other drafts on the same firm, which had not been paid, was admissible as tending to show that he had no credit with the firm, and must have known that the draft in question would not be honored. The pretense need not be in words; that is, it was not necessary for the defendant to say in so many words that he had funds to his credit with the New York firm. The pretense may be gathered from the acts and conduct of a party. It has been held that the drawing and passing a check on a banker with whom the drawer had no account, and which he knew would not be paid, was a false pretense, within the statute. *Rex v. Jackson*, 3 Camp. 370; 2 Bish. Crim. Law, § 430; *People v. Donaldson*, 70 Cal. 116, 11 Pac. Rep. 681. It is true, as claimed for appellant, that to constitute the offense charged four things must concur, and four distinct averments must be proved: (1) There must be an intent to defraud; (2) there must be actual fraud committed; (3) false pretenses must be used for the purpose of perpetrating the fraud; and (4) the fraud must be accomplished by means of the false pretenses made use of for the purpose, viz., they must be the cause which induced the owner to part with his property." *Com. v. Drew, supra*. We think there was testimony tending to establish all of these four requisites, and therefore that the judgment cannot be reversed for want of evidence.

3. We see no material error in the charge of the court, or in the instructions given and refused. The court used the word "funds," and in this it is claimed that it went outside of the record. But we think the word "credit," as used in the information, includes "funds." Looking at the whole record, we find no reason for a reversal of the judgment, and therefore advise that it be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

77 Cal. 150

CHAMBERLIN v. COUNTY OF DEL NORTE. (No. 11,076.)

(Supreme Court of California. September 28, 1888.)

1. JUDGMENT—BY DEFAULT—ON OVERRULING DEMURRER—NOTICE OF DECISION.

Under Code Civil Proc. Cal. § 476, providing that when a demurrer to a pleading is sustained or overruled, and time to amend or answer is given, the time begins to run from the service of notice of the decision or order, a default should be vacated where no notice of the overruling of the demurrer has been served on defendant, although the time given to amend has elapsed since the demurrer was overruled.

2. SAME—OPENING DEFAULT—DISCRETION OF COURT.

In an action against a county for legal services, judgment by default being entered, after the overruling of a demurrer to the complaint, defendant moved to set aside the default, filing affidavits to the effect that plaintiff rendered no services and was entitled to nothing; that the only member of the then board of supervisors who knew of the transaction resided 15 miles from the county-seat and the residence of the district attorney, and had no means of communicating with the latter verbally until three days prior to the rendition of the judgment; and that during those three days he, the said district attorney, was busily engaged at the meetings of the board, having an unusual amount of important business to attend to, engaging all his office hours and part of the nights; whereby he did not have time to and did not consult with said member of the board about the defense of the action. Held, that the trial court did not abuse its discretion by vacating the default.

Commissioners' decision. In bank. Appeal from superior court, Del Norte county; JAMES E. MURPHY, Judge.

Action by J. D. H. Chamberlin against the county of Del Norte, for money due for legal services. From an order vacating a judgment by default plaintiff appeals. In support of the motion to vacate, it was shown that John N.

McVey, the only member of the board of supervisors who was a member when the transaction in controversy took place, lived at a distance of 15 miles from the county-seat and residence of the district attorney, and had not had an opportunity of consulting with him until three days prior to the entering of the default; during which time the district attorney was engaged during all his office hours, and was even compelled to work nights, at a session of the board at which an unusually large amount of important business was transacted, and did not, therefore, consult with said member until after the default was entered. McVey also made affidavit that the board had a good defense, and in fact owed plaintiff nothing.

J. F. McGowan, R. W. Miller, and J. D. H. Chamberlin, (pro se), for appellant. *Geo. A. Johnson, Atty. Gen., L. F. Coburn, Dist. Atty., L. F. Cooper, and Sawyer & Burnett,* for respondent.

BELCHER, C. C. This action was commenced on the 24th day of December, 1884, to recover the sum of \$500 for legal services alleged to have been rendered by the plaintiff at the request of defendant, and a general demurrer was interposed to the complaint. The demurrer was overruled on the 15th day of January, 1885, and the defendant was given 20 days from that date in which to file its answer. It does not appear from the record that any notice of this order overruling the demurrer was ever served upon the defendant. No answer was filed up to the 5th day of February, and on that day the clerk of the court entered a default and a judgment against the defendant for the amount prayed for in the complaint, with costs. On the same day, on motion of the district attorney, an order was made by the court giving the defendant 10 days from that date in which to prepare affidavits and move to set aside the default and to vacate the judgment. Within the time allowed the defendant, upon notice and affidavits, moved to have the default set aside and the judgment vacated; and on the 18th day of February the motion was heard and granted by the court, upon condition that defendant pay to plaintiff the sum of \$25, and all of the costs which had then accrued. From this order the plaintiff appealed.

1. Section 476 of the Code of Civil Procedure provides that "when a demurrer to any pleading is sustained or overruled, and time to amend or answer is given, the time so given runs from the service of notice of the decision or order." If the notice required by this section was not given or waived, the time to answer had not expired when the default was entered, and for that reason the motion should have been granted. And if the notice was given or waived the appellant should have made that fact to appear in the record.

2. Applications to set aside defaults are addressed to the sound legal discretion of the trial court, and, if granted, the orders are never disturbed by this court, except in cases of gross abuse. *Roland v. Kreyenhagen*, 18 Cal. 455; *Hove v. Independence Co.*, 29 Cal. 73; *Watson v. Railroad Co.*, 41 Cal. 20; *Cameron v. Carroll*, 67 Cal. 500, 8 Pac. Rep. 45. We see no clear abuse of discretion here. The affidavit of merits was sufficient, and the other affidavits show at least plausible reasons why the answer was not filed within the time allowed. We advise that the order be affirmed.

WE concur: **FOOTE, C.; HAYNE, C.**

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

77 Cal. 156

Ex parte STERNES. (No. 20,423.)

(Supreme Court of California. September 28, 1888.)

1. CONTEMPT—JUDGMENT—COLLATERAL ATTACK—HABEAS CORPUS.

The judgment convicting petitioner of contempt recited that a writ of *habeas corpus* was duly served upon petitioner, requiring him to produce the body of the person therein named; that petitioner made return that such person was not in his custody at the time of the issuance or service of the writ; whereupon the judge proceeded to take testimony as to said matter; and, it appearing that such person was in his custody, and that it was in his power to produce him when the writ was served, and the hearing having been continued to enable him to produce the body of such person, which he had failed to do, he was therefore adjudged guilty of contempt. *Held* that, as the court had jurisdiction to render the judgment, it could not be collaterally attacked, in a *habeas corpus* proceeding, by showing that the person required to be produced was not in petitioner's custody, and that the writ was not duly served on petitioner.

2. SAME—PROCEDURE—AFFIDAVIT OF FACTS SHOWING CONTEMPT.

Failure to produce the required person in obedience to the writ was a contempt committed in the face of the court, and no affidavit of the facts constituting the contempt was necessary to give the court knowledge thereof, and jurisdiction to punish it.

In bank. Application for writ of *habeas corpus*. Conviction had in superior court, Nevada county; J. M. WALLING, Judge.

E. A. Forbes and *A. L. Hart*, for petitioner. *Hale & Craig*, for respondent.

PATERSON, J. From the stipulation filed herein it appears the petitioner could prove, if permitted to do so, that at the time of the issuance of the writ of *habeas corpus* commanding him to produce the body of one Ah Fong, said Ah Fong was in the actual custody of one W. H. Lee, in the county of Yuba, and that at the time of the service of the writ upon petitioner said Ah Fong was in the actual custody of the sheriff of Yuba county, at Marysville, and therefore out of the jurisdiction of the superior court of Nevada county on a *habeas corpus* proceeding (article 6, § 5, Const.;) that the original writ was not delivered to petitioner, who is a deputy sheriff of Yuba county, as required by Pen. Code, § 1478; that, after service of an imperfect copy of the writ upon him, he demanded of the sheriff of the county of Yuba the delivery to him of the custody of Ah Fong, that he might comply with the command of the court, but said sheriff refused, and has always refused, to permit him to take said Ah Fong into his custody; and that "the said court adjudged that the said Sternes had the actual custody of the said Ah Fong, and willfully refused to produce him in said court, without any trial of said fact, or any charge upon that subject having been made, or any warrant or attachment, notice or order to show cause having been issued, or any opportunity for the said Sternes to be heard upon the said question, without any trial and without any evi-

dence." The stipulation aforesaid was made at the hearing to aid the court in the dispatch of its business; counsel for respondent objecting, however, that no evidence could be received in this matter to contradict or impeach the recitals and findings contained in the judgment of the superior court. The judgment of conviction, upon which respondent relies as a conclusive answer to the petition and return to the writ herein, sets forth a copy of the petition upon which the writ was issued out of the superior court commanding the production of the body of the said Ah Fong, a copy of the writ, and concludes as follows: "And [said writ] having on said 5th day of April, 1888, been duly served upon George H. Sternes at Nevada township, Nevada county, Cal.; and said matter having on the 6th day of April, 1888, been at the request of said Sternes continued for hearing until 10 o'clock A. M., April 7, 1888; and on said last-named date said Sternes having appeared in said court and made and filed in said court his return to said writ, in which return it was alleged, among other things, that said Sternes was the person named John Doe in said writ; that said Ah Fong was not in his custody or under his control at the time of the issuance of or the service of said writ upon him; and said judge having thereupon proceeded to take testimony as to said matter, and it appearing therefrom to the satisfaction of said judge that said Ah Fong was in the custody and under the control of said Sternes at the time of the issuance and service upon him of said writ, and that it was within the power of said Sternes to produce the body of said Ah Fong in obedience to said writ at the time of service of said writ upon him; and said judge having thereupon continued the further hearing of said matter until Monday, April 9, 1888, at 2 o'clock P. M., at the request of said Sternes, to enable him to produce the body of said Ah Fong before said judge in obedience to said writ: now, on this day last aforesaid, said George H. Sternes having appeared before said judge, and having failed to produce the body of said Ah Fong before said judge in obedience to said writ, it is therefore adjudged that said George H. Sternes is guilty of contempt of said court," etc.

We understand counsel for petitioner to admit that the functions of the writ of *habeas corpus* issued herein do not extend beyond an inquiry into the jurisdiction of the superior court in which the judgment was rendered, and the validity of the process upon its face; but he contends that we may and should inquire whether at the time the writ of *habeas corpus* was issued for the production of the body of Ah Fong he, said Ah Fong, was held in actual custody within the jurisdiction of the court issuing it; and, if it be determined that he was not within the jurisdiction of said court, the order made adjudging the petitioner guilty of contempt was beyond the jurisdiction of the court, and therefore null and void. The attack which is made upon the judgment of the superior court involves an examination of evidence *de hors* the record, and is therefore subject to the rules applicable to collateral assaults upon judgments in other cases. One of the plainest of these rules is that from the time of the service of process upon the parties to the action or proceeding the court acquires such jurisdiction over them that its subsequent proceedings, however irregular, are not void. The first inquiry before the superior court upon the return made by the respondent Sternes therein was to determine the issue as to whether said Ah Fong was or was not in his custody or under his control at the time of the issuance of or service of said writ upon him, said Sternes. It appears from the judgment that the judge proceeded to take testimony as to said matter, and found as a fact that said Ah Fong was in the custody and under the control of said Sternes at the time of the issuance and service upon him of said writ, and that it was within the power of said Sternes to produce the body of said Ah Fong in obedience to the writ at the time of service of the writ upon him. This is the record of the court, acting within its legitimate powers, and that record must be considered as speaking the truth, and as conclusive until it has been in some way set aside or vacated.

No evidence can be received to contradict it. *Freem. Judgm.* §§ 126, 619; *Lewis v. Dutton*, 8 How. Pr. 103; *Cooley, Const. Lim.* 407. "When jurisdiction depends on a fact that is litigated in a suit, and is adjudged in favor of that party who avers jurisdiction, then the question of jurisdiction is judicially decided, and the judgment record is conclusive evidence of jurisdiction until set aside, or reversed by a direct proceeding." (*Bloom v. Burdick*, 1 Hill, 138;) and it has been held in this state that even "an inferior board may determine conclusively its own jurisdiction or power by adjudicating the existence of facts upon the existence of which its jurisdiction or power depends," (*In re Grove Street*, 61 Cal. 453. See, also, *Segee v. Thomas*, 3 Blatchf. 20; *Ex parte Cottrell*, 59 Cal. 421.) The court further found that the writ issued on the 5th day of April, 1888, had been duly served upon George H. Stermes, at Nevada township, Nevada county, Cal. There being nothing in the record to contradict this finding of the court, it is conclusive, and no evidence can be received to contradict it. If the process, or the manner in which it was served, is irregular, the jurisdictional infirmity can be cured only by some proceeding in the court where action is pending, or by appeal. *Dorente v. Sullivan*, 7 Cal. 279; *Peck v. Strauss*, 33 Cal. 685.

The failure of Stermes to produce the body of Ah Fong, as the court found he had the power to do, before the court in obedience to the writ, was a contempt committed in the face of the court, and no affidavit of the facts constituting the contempt was necessary to give the court knowledge thereof. *In re Robb*, 64 Cal. 431, 1 Pac. Rep. 881. An order to show cause or notice of a motion for an attachment would not have served Stermes any useful purpose. He had an opportunity, as shown by the judgment, to explain the circumstances of his failure to obey the writ, and the court was not in duty bound to accept as true his return to the writ. The court may have erred in its proceedings subsequent to the issuance and service of the writ; and, by a misapprehension of the facts or misconstruction of the evidence, have done the petitioner here a great injustice; but, so long as that court permits its record to remain as it is, other courts must treat it as the action of that court, and as conclusive upon all the matters decided by it, and essential to its judgment. *Ellis v. Inhabitants of Madison*, 13 Me. 312; *Watson v. Balch*, 1 Pac. Rep. 775. The petitioner is remanded to the custody of the sheriff.

We concur: SEARLS, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.; MCKINSTRY, J.

77 Cal. 190

GOSS *et al.* v. HELBING *et al.* (No. 9,795.)

(Supreme Court of California. October 5, 1888.)

1. MECHANIC'S LIEN—LIABILITY OF OWNER—CONTRACT OF AGENT.

Where one in charge of water-works, and having the management thereof, purchases a pump for use in such works, nothing being said as to his acting for any one else, the owners of the water-works are liable for the price of the pump.

2. SAME—PROPERTY SUBJECT TO.

A pump placed in the basement of a building and planted down on the ground, and connected to pipes belonging to water-works, so as to admit steam and water, is sufficiently affixed to the water-works to bring it within the California lien law.

3. SAME—OWNERSHIP OF PROPERTY—ADMISSIONS IN PLEADING.

Where certain defendants in an action to foreclose a mechanic's lien admit in their answer that they are owners of the property incumbered by the lien, they will be regarded as owners on appeal, though the facts in the findings show that their interest was held merely for security of money.

In bank. Appeal from superior court, city and county of San Francisco; M. A. EDMONDS, Judge.

R. Percy Wright, for appellant. C. E. Royce, for respondents.

PER CURIAM. The plaintiffs brought their action for the foreclosure of a mechanic's lien for the price of a certain pump alleged to have been sold and

delivered to the defendants, to be used in the Starlight Water-Works, and the court gave judgment accordingly. It appears from the evidence that the defendant Louis Helbing was in charge of the water-works, and had the management thereof. And we think that under the circumstances he must be held to have had authority to make the purchase in question. The pump was sold and delivered to him for use at the works without anything being said as to his acting for anybody else. But if he was in fact acting for somebody else there would be no difficulty in holding the undisclosed principal liable when discovered. For whom, then, was he acting as agent? We think that he must be held to have acted for the owners of the property. The evidence shows that Helbing and his wife were the real owners. The deed to Wright and Winter was merely for the security of money. They do not appear to have been otherwise interested in the property, or to have taken any part in the management of the same. The findings, though not very skillfully drawn, sufficiently show the above facts. Wright and Winter must, for the purposes of this appeal, be taken to have been owners of the property, for their answer admits that fact. So far as the ownership is concerned the findings must be taken to relate to the issues raised by the Helbings. The thing sold, if affixed to the other works, came within the lien law. *Donahue v. Cromartie*, 21 Cal. 80. And we think upon the evidence it must be considered as so affixed. It was placed in the basement of the building and "planted down on the ground and connected to pipes so as to admit the steam and water." Civil Code, § 660. The judgment and order appealed from are affirmed.

77 Cal. 184

WISE v. HOGAN. (No. 11,147.)¹

(Supreme Court of California. October 4, 1888.)

1. EXECUTORS AND ADMINISTRATORS—ACTION AGAINST—UNCERTAINTY—WAIVER OF DEFECTS.

Code Civil Proc. Cal. § 454, provides that a party suing on an account need not set forth specifically the items of indebtedness, and if the defendant is not satisfied with the general allegation he may, within five days, demand a copy of the plaintiff's account. *Held*, that a defendant, who has not taken advantage of such provision, cannot object by demurrer that the complaint is insufficient, as not specifying the separate items of indebtedness; and the fact that the defendant is sued as an administrator makes no exception to the rule.

2. SAME—DESCRIPTION OF CLAIM—LIMITATION OF ACTION.

A complaint in an action on an account against an administrator, stating that the services were rendered between two particular dates, is not defective on the ground that a part of the claim might be barred by the statute of limitations, and that an administrator is forbidden by Code Civil Proc. Cal. § 1499, to allow any claim thus barred; since, the claims not appearing on the face of the complaint to have been barred, the question could be determined on the trial, and the complaint need not state whether or not the claims were barred.

3. SAME—ALLEGATION OF PRESENTMENT.

Code Civil Proc. Cal. §§ 1491, 1493, provides that notice of ten or four months, according to the value of the estate, shall be given to creditors of a decedent's estate to present their claims, and all claims not presented within the time shall be barred. Section 1500 makes the proper presentation of the claim necessary to entitle the creditor to maintain an action thereon. *Held*, that an allegation in a complaint in such an action that the claim was, "on the 25th day of July, 1884, duly presented within ten months next following and succeeding the first publication of notice to creditors," would not be held defective on general demurrer, as failing to state that the claim was presented in time.

4. SAME—PLEADING NON-PAYMENT.

The complaint, having stated that the claim was not paid by deceased, and that it was presented to the administrator and rejected, is not defective for omitting to allege non-payment by the latter, as such fact will be presumed from his rejection of the claim.

¹Reversing *Wise v. Hogan*, 18 Pac. Rep. 764.

5. SAME—LIMITATION OF ACTION—DEMURRER.

An objection that the claim in a complaint is barred by the statute of limitations cannot be taken by demurrer, unless it appears on the face of the complaint that the claim is thus barred.¹

In bank. On rehearing. For former opinion, see 18 Pac. Rep. 784.

WORKS, J. This cause was affirmed upon an opinion of the commission. A rehearing was granted, and further argument has been heard. In the former opinion the cause was affirmed on the ground, stated in general terms, that the complaint was ambiguous and uncertain, and the demurrer thereto, on that ground, properly sustained. The objection made to the complaint in this respect is in substance that the indebtedness is alleged in general terms, the items and amounts not being specifically stated. Upon further consideration we are of the opinion that this objection was not well taken. It has been repeatedly held by this court that a party suing upon an account need not set forth specifically the items of the indebtedness, and the Code so provides. Code Civil Proc. § 454; *Tool Co. v. Prader*, 32 Cal. 634; *Tompkins v. Mahoney*, Id. 231. See, also, *McKinney v. McKinney*, 12 How. Pr. 23. If the defendant is not satisfied with the general allegation of indebtedness, the Code expressly provides a remedy. He may, within five days, demand a copy of the plaintiff's account. Code Civil Proc. § 454. If he fails to avail himself of the right thus given him, he cannot be heard to say that the complaint is insufficient on the ground of uncertainty in that respect. *Tool Co. v. Prader*, *supra*. We know of no reason why an administrator should not be bound by this rule of practice.

It is further urged against the sufficiency of the complaint that it does not show such a claim as the administrator could have allowed, for the reason that the allegation being that the services were rendered "between the 1st day of January, 1870, and the 11th day of October, 1883," the whole or a part of the claim might have been barred by the statute of limitations, at the time the claim was presented for allowance. An administrator is expressly forbidden by statute to allow a claim that is barred by the statute of limitations. Code Civil Proc. § 1499. This claim did not appear on its face to be barred. The administrator might have refused to allow it on the ground that the statute had in fact run against it. If upon suit being brought it appeared that the claim was in fact barred, his refusal to allow it would thus be justified, and the claimant could not recover. But this is a matter to be determined at the trial; the claim not appearing on its face to have been barred when presented. The fact that it did not show whether it was or was not barred would not defeat a recovery. Therefore this objection to the complaint was not well taken.

It is claimed that the complaint is insufficient in that it fails to allege the presentation of the claim in time. The allegation is that the claim was "on the 25th day of July, 1884, duly presented within ten months next following and succeeding the first publication of notice to creditors." It is provided by statute that four or ten months' notice to creditors must be given, depending upon the value of the estate, that all claims must be presented within the time limited in the notice, and that any claim not so presented shall be barred

¹ When it appears on the face of a petition that the cause of action is barred by limitation, a demurrer thereto will be sustained. *Merriam v. Miller*, (Neb.) 34 N. W. Rep. 625. But unless the facts which render the statute a bar appear in the complaint, they must be stated in the answer, to render the statute available. *Paine v. Comstock*, (Wis.) 14 N. W. Rep. 910. That a demurrer will not lie to a complaint, on the ground that the cause of action stated therein is barred by limitation, unless the facts constituting the bar appear on the face of the complaint, see *Kamm v. Bank*, (Cal.) 15 Pac. Rep. 765, and note; *Fogg v. Price*, (Mass.) 14 N. E. Rep. 741; *Gathright v. Wheat*, (Tex.) 9 S. W. Rep. 76.

In general, as to how the statute of limitations is available as a defense, see the note to *Gathright v. Wheat*, *supra*; note to *Merriam v. Miller*, *supra*; *Jennings v. Rickard*, (Colo.) 15 Pac. Rep. 677; *Trebbly v. Simmons*, (Minn.) 38 N. W. Rep. 693, and note.

forever. Code Civil Proc. §§ 1491, 1493. The proper presentation of the claim is necessary to entitle the creditor to maintain an action thereon. *Id.* § 1500; *Bank v. Howland*, 42 Cal. 129, 132. So far as appears from this complaint, the notice required and given may have been one for four months, the claim may have been presented after the expiration of that time, and may have been properly rejected for that reason. But we are met with the claim, on the part of the appellant, that the objection urged cannot be raised by a general demurrer for want of facts. Although defectively stated, there is an allegation of the presentment of the claim. The later decisions of this court are to the effect that such an allegation is sufficient to withstand a general demurrer, (*Hentsch v. Porter*, 10 Cal. 555; *Coleman v. Woodworth*, 28 Cal. 567; *Bank v. Howland*, 42 Cal. 129; *Chase v. Evoy*, 58 Cal. 343;) and the correctness of the earlier case of *Ellissen v. Halleck's Ex'rs*, 6 Cal. 386, holding to the contrary, is doubted. Following these cases, we must hold that the complaint was sufficient in this respect as against respondent's demurrer.

It is further urged that the complaint is defective in that it does not allege the non-payment of the claim by the administrator. It is averred that the claim was not paid by the deceased, and that it was presented to the administrator and rejected, but there is no direct allegation of non-payment by him. It is firmly settled in this state that an averment of non-payment is necessary to the sufficiency of a complaint for money claimed to be due on contract. *Daranay v. Eggenhoff*, 43 Cal. 395; *Scroufe v. Clay*, 71 Cal. 123, 11 Pac. Rep. 882. This is on the ground that the failure to pay, when due, constitutes the breach of the contract, and gives a right of action. In this class of cases we deem it sufficient to allege non-payment by the deceased, and that the claim has been properly presented to and rejected by the administrator. The non-payment by the debtor is a breach of the contract and gives a cause of action. The subsequent presentation of the claim to the administrator is made necessary by the statute before action can be maintained, but this does not render it necessary to allege that he has not paid the claim. Non-payment by him should be presumed from the alleged fact of his rejection of the claim.

There is the further objection to the complaint that the administrative characters of the plaintiff and defendant are not sufficiently alleged. As to the plaintiff, the death of his intestate is alleged, and, further, "that on the 18th day of June, 1884, a decree was duly given and made in the superior court in and for the city and county of San Francisco, upon which letters of administration upon the estate of said Tully R. Wise, deceased, were issued by the said superior court," etc; and the allegation as to the defendant is in effect the same. Coupled with this is the allegation, as to each, that he duly qualified and entered upon the discharge of his duties as such administrator, and has ever since been, and now is, the duly-qualified and acting administrator, etc. This would seem to be sufficient. Code Civil Proc. § 456; *Beans v. Emanuelli*, 36 Cal. 118; *Judah v. Fredericks*, 57 Cal. 389; *City of Los Angeles v. Mellus*, 59 Cal. 444, 450; *Riddell v. Harrell*, 12 Pac. Rep. 67.

The complaint is also demurred to on the ground that the claim appears to be barred by section 339 of the Code of Civil Procedure. It is sufficient answer to this objection to say that it does not appear upon the face of the complaint that the claim is barred, and that the objection cannot, therefore, be raised by demurrer. *Smith v. Richmond*, 19 Cal. 476; *Harmon v. Page*, 62 Cal. 448; *Farris v. Merritt*, 63 Cal. 118. It will be seen that the complaint in this action is defective in almost all its parts; but while this manner of pleading is objectionable, and should not be encouraged by the courts, we feel compelled, for the reasons stated, to hold it sufficient. Judgment reversed.

We concur: SEARLS, C. J.; PATERSON, J.; MCFARLAND, J.; SHARPSTEIN, J.

77 Cal. 113

PEOPLE v. WARD. (No. 20,414.)

(Supreme Court of California. September 22, 1888.)

1. ROBBERY—EVIDENCE—HARMLESS ERROR.

A witness on a trial for robbery having testified that he did not know whether defendant knew that the person robbed had all his money together or not; that he might have seen it for all witness knew; that he might have seen more than \$10,—the refusal to strike out what the witness testified that defendant "might have seen," if error at all, is harmless, as it was so uncertain as not to be likely to have injured defendant.

2. SAME.

In such case, there being evidence tending to show a conspiracy between defendant and a third party, who actually committed the crime charged, evidence of the wounded condition of the latter, and that he had pistols in his possession the next morning after the robbery, covered with blood, is admissible.

3. JURY—CHALLENGE—APPEAL—REVIEW.

The disallowance of a challenge for cause is not reviewable on appeal.

Commissioners' decision. In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Indictment against Edward Ward for an assault with intent to rob one Baker. The principals in the assault were Bently and Ridgeway. Bently was convicted of an assault with a deadly weapon, and an attempt to commit robbery. See 17 Pac. Rep. 436, 18 Pac. Rep. 799. The witness Moore, in relation to whether defendant knew that Baker had money, testified: "I don't know whether he knew Baker had all his money together. He might have seen it for all I know. I don't know whether he did or not. He might have seen more than ten dollars; I don't know." Defendant moved to strike out that portion relative to what defendant "might have seen," which was refused. It was also admitted in evidence that Ridgeway was found to be

wounded the next morning, with pistols in his possession covered with blood. The defendant was convicted, and appeals.

George A. Johnson, Atty. Gen., for the People. *W. A. Gray* and *Oregon Saunders*, for appellant.

HAYNE, C. The defendant was convicted of an assault with intent to rob.

1. The disallowance of the challenge for cause is not subject to review. *People v. Fong Ah Sing*, 70 Cal. 11, 11 Pac. Rep. 323. The case of *People v. Brown*, 72 Cal. 390, 14 Pac. Rep. 90, is not in conflict with this.

2. The denial of the motion to strike out the evidence of the witness Moore was not error. The testimony went to show a motive for the crime. But if it be conceded that there was error, the evidence was of such an uncertain character that it could not have injured the defendant.

3. The evidence of the condition in which Ridgeway was found the next morning was properly admitted. It tended to show that he committed the assault, and there was evidence tending to connect the defendant with him.

4. The instructions were proper, and the evidence sufficient. The defendant was convicted after a fair trial; and we advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

77 Cal. 125

PEOPLE v. SWARBRICK. (No. 20,430.)

(*Supreme Court of California*. September 25, 1888.)

CRIMINAL LAW—INSTRUCTION—BURGLARY.

On trial for burglary, a charge that the defense, "as attempted to be shown," that defendant was not one of the persons that entered the house, and that the complaining witness was mistaken in the identity of the person she saw there, is for the jury, does not cast discredit on the defense, or characterize it as futile, and is not error.

In bank. Appeal from superior court, Alameda county; N. HAMILTON, Judge.

Information for burglary From a judgment of conviction the defendant Charles Swarbrick appeals.

R. M. Fitzgerald, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

SHARPSTEIN, J. The only question presented for our consideration by the record on this appeal is whether the court erred in giving the following instruction to the jury: "The defense in this action is, as attempted to be shown by the defense, that the defendant was not one of the parties that entered the house, and that the complaining witness was mistaken as to the identity of the party whom she saw there. Now, that is a matter entirely with you. If the evidence does not satisfy you that he was in fact one of the parties that was in there, then, of course, you cannot find him guilty." Counsel for appellant insists that the court by this instruction "characterized the defendant's defense as an attempted defense." He did not characterize it as a futile defense, nor cast any slur or discredit upon it. He told the jury that the defense, as attempted to be shown, was that the defendant was not one of the parties that entered the house. Whether that was shown was for the jury to determine. In view of the conflicting evidence, it would have been error for the court to have instructed the jury that it had been shown that the defend-

ant did not enter the house. We discover no error in the record. Judgment affirmed.

We concur: SEARLS, C. J.; MCFARLAND, J.; THORNTON, J.; PATERSON, J.; MCKINSTRY, J.

77 Cal. 192

HEESER v. MILLER *et al.* (No. 11,562.)

(Supreme Court of California. October 19, 1888.)

QUIETING TITLE—PLEADING—COMPLAINT—CLAIM OF DEFENDANT.

An allegation in a complaint that, by reason of a patent from the state, defendant claims an estate or interest in the land in controversy adverse to plaintiff, is not necessarily inconsistent with the prior allegation that plaintiff is the owner and seized in fee; and, the prayer being that the adverse claim be decreed void, the complaint is good, on general demurrer, as one to quiet title, though it does not expressly aver that defendant's claim is invalid.

Commissioners' decision. Department 2. Appeal from superior court, Mendocino county; ROBERT MCGARVEY, Judge.

C. C. Hamilton and J. M. Mannon, (*Henley & Swift*, of counsel,) for appellant. T. L. Carothers, for respondents.

HAYNE, C. This is an appeal from a final judgment for defendants upon demurrer to the complaint. The complaint alleges, among other things, that the "plaintiff was at the commencement of the action, ever since has been, and now is, the owner and seized in fee" of the premises in controversy, and that by reason of a certain patent from the state and certain conveyances "said defendants claim estate or interest in said land adverse to this plaintiff." And the prayer is that such adverse claims be decreed to be void. The allegation that the plaintiff is the owner and seized in fee, etc., is of an ultimate fact, and is a sufficient statement of the right of the plaintiff in an action of ejectment or to quiet title. *Payne v. Treadwell*, 16 Cal. 242; *Garwood v. Hastings*, 38 Cal. 217; *Rough v. Simmons*, 65 Cal. 227, 3 Pac. Rep. 804; and compare *Ferrer v. Insurance Co.*, 47 Cal. 431. This fact is not stated as a conclusion from other facts, as was the case in *Turner v. White*, 73 Cal. 300, 14 Pac. Rep. 794. The demurrer admits the truth of the allegation, and hence it is a conceded fact that, at the commencement of the action, the plaintiff was the owner and seized in fee of the premises in controversy. If this fact were necessarily inconsistent with the fact that defendants claim the fee (not merely an interest in the land) by virtue of a patent from the state, the objection could not be raised upon a general demurrer, but would have to be presented by a special demurrer for uncertainty. *Blasingame v. Insurance Co.*, 17 Pac. Rep. 925. But the allegations are not necessarily inconsistent with each other. It may be that the patent was issued without authority of law. See *Doolan v. Carr*, 125 U. S. 625, 8 Sup. Ct. Rep. 1223. Taking the fact to be that the plaintiff was "the owner and seized" at the commencement of the action, it is impossible that another person could be the owner at such time. And it follows that the defendants' claim to be the owner of the fee (for the patent must purport to be of the fee) adversely to the plaintiff must be without foundation. Hence it is of no importance that the complaint does not expressly allege that the defendants' claim is invalid and void. The complaint is good as a complaint to quiet title; and the general demurrer should have been overruled. We therefore advise that the judgment be reversed, and the cause remanded, with directions to overrule the demurrer.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded, with directions to overrule the demurrer.

(77 Cal. 196)

CANNING v. FIBUSH *et al.* (No. 11,709.)

(*Supreme Court of California.* October 19, 1888.)

LANDLORD AND TENANT—LEASE—EXPIRATION OF TERM—POSSESSION

Where plaintiff leased to defendant premises for three months from June 1st, and on August 6th notified defendant that, if he remained after September 1st, the rent would be increased, which increase on September 1st he demanded, and defendant refused to pay, but offered and plaintiff refused, a less sum, and plaintiff "never said or did anything" to allow defendant to occupy after the expiration of the term, plaintiff may recover possession, with damages for detention.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; E. M. GIBSON, Judge.

P. F. Benson, (*J. C. Martin*, of counsel,) for appellant. Welles Whitmore and H. R. Havens, for respondents.

HAYNE, C. Appeal by plaintiff from a judgment of nonsuit. The evidence shows that the plaintiff leased the premises in controversy to the defendants for the term of three months from June 1, 1885. At the time of the agreement there was some talk of leasing them the premises after that at a higher rent, if the parties could agree. But this amounted to nothing more than that the parties would see whether a renewal could not be arranged at the end of the term. On the 6th of August the plaintiff caused the defendants to be served with a notice to the effect that if they occupied the store after September 1st the rent would be \$200 per month. On September 1st the plaintiff demanded the \$200, but the defendants declined to pay it, and offered to pay \$100, which was refused. The plaintiff "never said or did anything to allow these defendants to occupy the premises after the expiration of the three months." The original complaint averred that the rent had been raised by the notice, and was for holding over after the non-payment of such increased rent. At the trial the plaintiff obtained leave to amend the complaint by striking out the averments as to the notice, etc.; and this was done, leaving the complaint to stand for the holding over after the expiration of the lease, and for damages for the same. We think the court erred in granting the nonsuit. The lease, having been for three months only, expired on September 1st. The notice of increased rent could not of itself raise the rent, because the holding was for a fixed period, and not from month to month. *Stoppelkamp v. Mangeot*, 42 Cal. 316. It did not operate as an agreement, because it was in the nature of a proposal. The defendants, having rejected the proposal, cannot claim that it inured to their benefit. And, inasmuch as the lease expired by its own limitation, there was no necessity of a notice to terminate it. There was no acceptance of rent, or anything from which a renewal could be inferred. This being the case, we do not see how the defendants had any right to continue in possession, and, if they had no such right, why the plaintiff should not recover the premises, with damages for the detention. The other matters do not require special notice. We therefore advise that the judgment be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for a new trial.

77 Cal. 194

MURPHY v. HARRIS. (No. 11,580.)

(Supreme Court of California. October 19, 1888.)

1. EXEMPTIONS—ILLEGAL SEIZURE—BURDEN OF PROOF.

Under Code Civil Proc. Cal. § 690, subd. 3, exempting from execution "instruments of husbandry; * * * also * * * two horses,"—a debtor is not entitled to an exemption of colts, unless he is engaged in farming; and, in an action for levying on them, a finding that he was not engaged in farming for 18 months prior to the seizure, and a judgment for defendant, will not be disturbed where the evidence is vague; the burden being on the party seeking the exemption to show that he is entitled to it.

2. SAME—HORSES—HABITUAL USE AS MEANS OF LIVELIHOOD.

The exemption by Code Civil Proc. Cal. § 690, subd. 6, of the two horses, etc., cannot be claimed unless the debtor "habitually earns his living" by their use.

Commissioners' decision. Department 2. Appeal from superior court, Napa county; R. CROUCH, Judge.

Action by Charles Murphy against H. H. Harris, sheriff of Napa county, for damages for the levy and sale of two colts alleged to be exempt from execution. Judgment was rendered for defendant, and plaintiff appeals.

Coghlan & Coombs, for appellant. *F. E. Johnson*, for respondent.

HAYNE, C. The question in this case is whether two colts were exempt from execution against the plaintiff. There are two provisions which might be claimed to have some reference to the matter. The third subdivision of section 690 of the Code of Civil Procedure is as follows: "Subd. 3. The farming utensils or implements of husbandry of the judgment debtor; also two oxen, or two horses, or two mules, and their harness, one cart or wagon, and food for such oxen, horses, or mules for one month. * * *" The sixth subdivision of the same section is as follows: "Subd. 6. Two horses, two oxen, or two mules, and their harness, and one cart or wagon, one dray or truck, one *coupé*, one hack or carriage, for one or two horses, by the use of which a cartman, drayman, truckman, huckster, peddler, hackman, teamster, or other laborer habitually earns his living. * * *" These provisions correspond to subdivisions 3 and 6 of section 219 of the old practice act. That section was frequently amended. See Laws 1851, pp. 85, 86; Laws 1854, pp. 62, 63; Laws 1862, p. 573; Laws 1863-64, p. 523; Laws 1869-70, p. 384; Laws 1871-72, p. 864. And the section of the Code of Civil Procedure was amended in 1876 and in 1878. But in all these changes the sixth subdivision has always required that the party must "habitually" earn his living by the use of the animals claimed to be exempt. And this requirement has been held to be imperative. *Dove v. Nunan*, 62 Cal. 400. It cannot possibly be contended that the debtor here habitually earned his living by the use of the colts in question; and therefore this subdivision may be dismissed from consideration. The other provision has for all purposes of the present case been substantially the same as it stands at present; most of the changes being in the latter half of the subdivision. And, while the language is not absolutely clear, it has been held, and we think correctly, that it relates exclusively to persons engaged in farming. *Brusie v. Griffith*, 34 Cal. 305; *Robert v. Adams*, 38 Cal. 383, 384. The finding of the court was, in substance, that for 18 months prior to the seizure the plaintiff was not engaged in the business of farming. And we cannot say upon the record that this finding is not sustained by the evidence. It is certainly incumbent upon a party who brings a suit for the recovery of property, upon the ground that it is exempt, to show affirmatively that he is entitled to the exemption. The evidence here, however, is disjointed and vague; and we cannot say with any reasonable certainty that the plaintiff proved himself to be engaged in farming within the meaning of the provision. We therefore advise that the judgment and order denying a new trial be affirmed.

we concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are affirmed.

77 Cal. 204

PEOPLE *ex rel.* WALLEN *v.* MORRIS. (No. 11,626.)

(Supreme Court of California. October 20, 1888.)

1. PUBLIC LANDS—PURCHASE OF SCHOOL LANDS—PAYMENT IN WARRANTS.

A purchase of school land, by application to the land-office, at \$1.25 per acre, in gold coin, accompanied by payment of 20 per cent. of the purchase money, followed by the issue of a certificate of purchase, in conformity with Pol. Code Cal. (Hittell's,) § 3494, cannot be completed by payment in land-warrants, under section 3502, enacting that \$2 per acre state school-land warrants shall be receivable in payment for school land, but that such payment shall be to the register, and the warrants canceled before the certificate is issued; and a patent issued on such payment, under the latter section, will be set aside.

2. SAME—CANCELLATION—RETURN OF WARRANTS.

Such a patent, in the absence of fraud in its procurement, will not be annulled, unless the state returns or tenders the surrendered warrants.

Commissioners' decision. Department 1. Appeal from superior court, Lake county; RODNEY J. HUDSON, Judge.

Action by the state of California *ex rel.* Ezra Wallen against Henry S. Morris, to set aside a patent for school lands. Judgment for plaintiff, and defendant appeals.

Fox & Kellogg and *Eugene W. Britt*, for appellant. *Geo. A. Johnson*, Atty. Gen., and *R. W. Crump*, for respondent.

FOOTE, C. This action was brought to set aside a patent from the state of California of certain school lands of the 500,000-acre grant made by the congress of the United States to the state. Judgment was given in favor of the plaintiff, from which, and an order denying him a new trial, the defendant appeals. According to the findings, one John T. Harrington, on the 10th day of January, 1876, filed in the office of the state surveyor general an application to purchase the lands in controversy. Before this application was granted, one Mullan having disputed Harrington's right to buy the lands from the state, the contest between them was referred, as by law required, to the district court of the Seventh judicial district for determination. Judgment was there given in favor of Harrington as having the better right to purchase the land from the state, a certified copy of which was filed in the surveyor general's office. Afterwards, on the 21st day of April, 1877, the surveyor general approved Harrington's application, and issued to him a certificate of purchase for the lands. This was a cash purchase for gold coin, made under and by virtue of section 3494 of the Political Code, (Hittell's,) which is as follows: "The unsold portion of the 500,000 acres granted to the state for school purposes, the sixteenth and thirty-sixth sections, and lands selected in lieu thereof, must be sold at the rate of \$1.25 per acre, in gold coin, payable 20 per cent. of the principal within fifty days from the date of the certificate of location issued to the purchaser; the balance, bearing interest at the rate of 10 per cent. per annum in advance, is due and payable within one year after the passage of any act by the legislature requiring such payment, or before if desired by the purchaser." Within 50 days of the approval of his application, 20 per cent. of the purchase money was paid by Harrington, together with interest due by law. After the certificate was issued it was duly assigned in writing by Harrington to Smith, by Smith to Barger, by Barger to Hyde, by Hyde to Rice, by Rice to the defendant. Rice paid the accruing interest to November 15, 1883, and afterwards assigned the certificate to the defendant. On the 4th day of June, 1884, the defendant surrendered to the register of the state land-office

certain school-land warrants at two dollars per acre, which were issued under an act of the legislature approved May 3, 1852, entitled "An act to provide for the disposal of the 500,000 acres of land granted to this state by act of congress," etc. Upon the surrender of the warrants for cancellation the register accepted them as payment in full for the balance due upon the land, and issued to the defendant the state's patent therefor. According to the agreed facts in the statement, plaintiff admits that if the final payment by defendant in surrendering the school-land warrants was a valid and legal payment for said lands, then the state has received full payment therefor, but denies the validity or legality of such payment.

The transaction seems to have been made in good faith, under the supposition that such payment might lawfully be made and received. Section 3502 of the Political Code, under which this matter was attempted to be concluded, reads thus: "School-land warrants, issued by authority of the state, are receivable in payment of the purchase money of any part of the 500,000 acres of land granted to the state for school purposes. Such payment must be made to the register, and the warrants canceled, before the certificate of purchase is issued." Thus it will be seen that the purchase was initiated under the terms of section 3494 of the Political Code, (Hittell's.) The certificate of purchase issued thereunder was valid and good against both Mullan and the state, and compelled the surveyor general to issue it. Nor is it permissible in this proceeding to call in question the evidence on which the judgment was based in favor of Harrington in the action of *Harrington v. Mullan*, as having the better right to purchase the land, or the rulings of the court in that action on matters of law. Section 3416, Pol. Code, (Hittell's;) *Laugenour v. Shanklin*, 57 Cal. 70; *Batchelder v. Willey*, 64 Cal. 44. It is manifest that the defendant had a right to conclude his purchase of the land described in the certificate which he held. But it seems that he did not complete the purchase in the manner required by law; for, as we have seen, it was not attempted originally by Harrington to buy the land with \$2 per acre school-land warrants, but under the section of the Political Code, *supra*, prescribing the terms of a sale for gold coin at \$1.25 per acre. The \$2 per acre warrants were only paid as part and final payment upon a purchase made on the basis of gold coin at \$1.25 per acre, and they were not paid to the register, and canceled before the certificate of purchase was issued, but long after. The register seems to have misconstrued the law governing the matter, and to have allowed the purchase to be concluded under a statute different from that under which it was initiated, and in a manner not contemplated by it. Therefore the patent was issued without lawful authority.

Nevertheless, there is no fraud or deception charged in the complaint, and none appears in the record, nor has any offer been made by the state to the patentee to return the warrants which he has paid in good faith. Such being the case, defendant cannot be deprived of his patent, unless he receives back from the state what he has paid under an erroneous view of the law entertained by the register and himself. *People v. Bryan*, 73 Cal. 377, 14 Pac. Rep. 893; *U. S. v. White*, 9 Sawy. 131, 17 Fed. Rep. 561, and cases cited. And unless some statute prevents, which has not been called to our attention, the certificate of purchase is valid, and the purchase may be completed by complying with the provisions of section 3494 of the Political Code, under which it was initiated. For these reasons we advise that the judgment and order be reversed, and the cause remanded.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded.

77 Cal. 198

Ex parte AH MEN. (No. 20,442.) *Ex parte* AH FONG. (No. 20,443.)
Ex parte AH SHIN. (No. 20,444.) *Ex parte* AH MOW. (No. 20,445.)

(Supreme Court of California. October 20, 1888.)

1. CONTEMPT—PROCEDURE—AFFIDAVIT—CONTENTS.

In California a contempt is prosecuted in the proceeding out of which it arises; and therefore under Code Civil Proc. Cal. § 1211, requiring an affidavit of the facts constituting the contempt, it is unnecessary, on the violation of an injunction, to set forth the pendency of the proceeding in which it issued, or the provisions of the order; but it is sufficient if the affidavit alleges the acts done in violation of it.

2. SAME—FINAL JUDGMENT—CONCLUSIVENESS—REVIEW—HABEAS CORPUS.

After final judgment in proceedings to punish for contempt, where the court had jurisdiction of the subject-matter, alleged irregularities, that defendant was arrested in one county by the deputy sheriff of another, or that he was arrested in the night without an indorsement of authority therefor on the warrant, or that the warrant did not show on its face facts authorizing the arrest, or that he was given a fictitious name in the warrant, and was not otherwise described, cannot be inquired into on *habeas corpus*, the judgment of the court being conclusive, under Code Civil Proc. Cal. § 1222, especially where it recites that defendant was duly brought into court pursuant to the warrant, and that the person proceeded against by the fictitious name answered by his true name.

3. SAME—WARRANT CONTAINING FICTITIOUS NAMES—AMENDMENT

Where a complaint states that the true names of defendants are unknown, and prays an amendment alleging their true names when discovered, and they do not appear, and an injunction directed to them under fictitious names is served on them, and a warrant for arrest for its violation describes them as the persons who had been served therewith, a judgment against them in their true names, in the proceedings for contempt, stating that their true names were found at the hearing, is valid.

In bank. Applications for writs of *habeas corpus*.

Cross & Simonds, for petitioners. *E. A. Forbes* and *A. L. Hart*, for respondent.

PATERSON, J. Petitioner claims that he should be discharged from custody for the following reasons: *First*, because the affidavit on which the warrant was issued was insufficient to give the court jurisdiction to order the arrest of petitioner; *second*, because the petitioner was arrested under a general warrant of arrest in Nevada county by the deputy sheriff of Yuba county; *third*, because he was arrested in the night-time, and without an indorsement on the warrant of arrest to authorize the arrest at that time; *fourth*, because the warrant of arrest did not show upon its face facts authorizing the arrest; and, *fifth*, because the petitioner is not named in the warrant of arrest, the only name used in the warrant being a fictitious name, and there being no other designation or description of the person to be arrested.

1. The affidavit on which the warrant of arrest was issued alleges, in substance, that, since the service on the defendants of the injunction which had been issued on the 16th day of January, and served on defendants on the 30th day of the same month, said defendants, John Doe and others, have been working and operating the mine described in the complaint by the hydraulic process, in willful and gross disobedience of the orders and processes of the court. It describes particularly the manner in which the mine had been operated, and alleges that large quantities of material had been deposited into Deer creek, tributary to the Yuba river, in violation of the writ of injunction. These allegations, we think, were sufficient. Section 1211 of the Code of Civil Procedure provides that, "when the contempt is not committed in the immediate view and presence of the court or judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees, arbitrators, or other judicial officer." In this state, although contempt of court is a specific criminal offense, and a judgment of conviction thereof the same as a judgment in a criminal case,

(*Ex parte Hollis*, 59 Cal. 408,) the practice has always been to prosecute a matter of contempt in the cause or proceeding out of which it arose, and not as a separate proceeding, with a title of its own. It is therefore unnecessary in the affidavit to set forth the pendency of the cause or proceeding, or the provisions of the order which has been violated. The court takes judicial notice of those matters, and it is quite clear, we think, that the facts constituting the contempt, or the facts stated by the referee, within the meaning of section 1211, *supra*, are sufficiently stated if the acts done in violation of the order or writ are set forth. The most that can be said against the affidavit is that it is inartificially drawn. In determining on *habeas corpus* whether the court had jurisdiction, we must distinguish between a complaint or affidavit which charges no offense at all, and one which, though inartificially drawn, intimates the existence of the facts necessary to constitute the offense, and indicates a purpose to declare thereon. *Ex parte Kearny*, 55 Cal. 228.

2. It would be sufficient to say, in answer to the other grounds assigned as reasons for the discharge of the petitioner, that, if the facts are as represented, and could be considered here, they show irregularity in the obtaining of jurisdiction, but do not show such a want of jurisdiction as would authorize his discharge on *habeas corpus*. The petitioner was actually taken before the court below, and given an opportunity to defend himself against the charge made in the affidavit. We have already held that that affidavit was sufficient for the issuance of the warrant. The court had jurisdiction of the subject-matter, and, however irregular the proceedings taken to obtain jurisdiction of the person, its judgment is final and conclusive. Section 1222, Code Civil Proc., provides that "the judgment and orders of the court or judge, made in cases of contempt, are final and conclusive." The fact that the process has not been served by the proper person, or at the proper place or time, or that the warrant or order upon which a prisoner has been arrested is void, and the arrest unlawful, will not render the judgment void, and subject to a collateral attack. *Ex parte McGill*, 6 Tex. App. 498; *Dorente v. Sullivan*, 7 Cal. 279; *Peck v. Strauss*, 33 Cal. 685; *Owens v. Gotzian*, 4 Dill. 438; *Ex parte Kellogg*, 6 Vt. 511; *Freem. Judgm.* § 126. After final judgment of conviction the jurisdiction of the court cannot be questioned by an inquiry into the manner in which the accused was brought before it; and this is true, even though the prisoner has been kidnapped and forcibly brought before the court from a foreign jurisdiction. *People v. Rowe*, 4 Park. Crim. R. 253; *U. S. v. Lawrence*, 13 Blatchf. 306; *Ex parte Scott*, 9 Barn. & C. 446; *State v. Smith*, 1 Bailey, 283; *State v. Brewster*, 7 Vt. 118; *State v. Ross*, 21 Iowa, 467. In the last-named case it was said: "The liability of the parties arresting them [the defendants] without legal warrant for false imprisonment or otherwise, and their violation of the penal statutes of Missouri, may be ever so clear, and yet the prisoners not be entitled to their discharge." See, also, *Mahon v. Justice*, 8 Sup. Ct. Rep. 1204, where the cases bearing upon this question are thoroughly reviewed by Mr. Justice FIELD. Nearly all of the objections urged against the validity of the judgment convicting petitioner of a contempt are answered by the recitals in the judgment itself. If the record were silent as to the jurisdictional facts, jurisdiction would be presumed; but the judgment itself recites all of the facts necessary to the exercise of jurisdiction by the court. It appears upon the face of the judgment that the injunction was duly issued and served, and that the same has ever since remained in full force and effect; that after service upon the defendants the acts alleged in the affidavit were committed by the defendants in violation of the injunction, and in contempt of the authority of the court. It recites that the petitioner was "duly and regularly brought into court pursuant to said warrant of attachment;" that the person sued and served as James Doe in said action, and proceeded against by said name, answered that his true name was Ah Men. The matters thus adjudicated are conclusive, and no evidence *dehors* the record can

be received to impeach them. Freem. Judgm. § 619; *Ex parte Sternes, ante*, 275, (filed September 28, 1888.)

3. The fact that the true names of the defendants in the action were unknown was alleged in the complaint, followed by a prayer that when discovered the complaint might be amended by alleging their true names. The injunction seems to have followed the complaint, and was directed to the defendants under said fictitious names, but it was actually served upon the defendants. No answer was filed by them, nor did they make any appearance in the action. They continued, however, to do the things which they were by the writ of injunction enjoined and restrained from doing. In the affidavit for the warrant of attachment the defendants were described as persons who had been served with the injunction theretofore issued. At the hearing the court found the true name of petitioner to be Ah Men, and it is so stated in the judgment. This is sufficient.

With the question of injustice or wrong that may have been done to this petitioner by the procedure against him we have nothing to do. The only inquiry before us is whether the court had jurisdiction of the person and of the subject-matter. We think that the petitioners should be remanded to the custody of the sheriff of Yuba county; and it is so ordered.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; THORNTON, J.

77 Cal. 208

McCUSKER v. WALKER. (No. 11,640.)

(Supreme Court of California. October 22, 1888.)

LIMITATION OF ACTIONS—WRONGFUL ATTACHMENT—RUNNING OF THE STATUTE.

The statute of limitations runs on a cause of action for maliciously suing an attachment from the time of the wrongful act; and the limitation of two years provided by Code Civil Proc. Cal. § 339, subd. 1, in case of actions upon a contract, obligation, or liability, not founded on an instrument in writing, applies in such case, rather than the three years limitation of section 338, subd. 3, in case of actions for taking, detaining, or injuring any goods or chattels, including actions for the recovery of personal property.

Commissioners' decision, Department 1. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

Action by Tillatha G. McCusker against Thomas Walker for the wrongful suing of an attachment. Judgment for plaintiff, and defendant appeals. Code Civil Proc. § 338, subd. 3, prescribes a limitation of three years in case of "an action for taking, detaining, or injuring any goods or chattels, including actions for the recovery of specific personal property." Section 339, subd. 1, prescribes a two-years limitation in case of "an action upon a contract, obligation, or liability, not founded upon an instrument of writing."

A. S. Kittredge, for appellant. N. A. Dorne and T. H. Laine, for respondent.

BELCHER, C. C. In January, 1881, the defendant herein, Thomas Walker, purchased certain real property at a sale under a decree of foreclosure of mortgage, and in due time received the sheriff's deed therefor. The plaintiff herein, Tillatha C. McCusker, was a party to the foreclosure suit, and was in possession of the property when the sale was made, and up to the time when the sheriff's deed was executed. On the 27th day of August, 1881, Walker commenced an action against McCusker to recover the sum of \$1,200, the alleged value of the use and occupation of the property during the six months allowed for redemption. At the time of commencing his action Walker filed an affidavit and undertaking, and procured a writ of attachment to be issued, under which certain personal property of McCusker was, on the same day, seized and taken into his possession by the sheriff. In September following.

McCusker moved the court to dissolve the attachment, on the ground that the alleged indebtedness was not on a contract, express or implied, for the direct payment of money. This motion was denied in October, and an appeal from the order was taken to this court. On the 28th day of June, 1884, the order was reversed, (65 Cal. 360, 4 Pac. Rep. 206,) and on the 22d day of August following an order was entered in the court below dissolving the attachment. This action was commenced on the 24th day of August, 1884, to recover damages alleged to have been sustained by the plaintiff, in consequence of the wrongful issuance of the attachment in the case of *Walker v. McCusker*. It is alleged in the complaint that "plaintiff in said action willfully, maliciously, wrongfully, and unlawfully, and without probable cause, made application to the clerk of said court for a writ of attachment against the property of this plaintiff; * * * and the writ was improperly, irregularly, wrongfully, and maliciously, and without probable cause, issued." It is further alleged that the plaintiff was a farmer, and that the property attached "was used in and was necessary to her said business of farming; and thereby the business of plaintiff was utterly broken up, and said property and the use thereof was lost to plaintiff, and her credit was destroyed, to her damage in the sum of \$10,000; that the property so attached was of the value of \$6,000, and has been by reason of said attachment wholly lost to plaintiff, to her damage in the further sum of \$6,000." The prayer is for damages in the sum of \$16,000, and for costs. The defendant answered, and, among other defenses set up, alleged that the cause of action was barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure. The trial was by a jury; and the plaintiff introduced evidence showing, among other things, that the value of the property attached was, at the time of the levy, about \$2,250. When the plaintiff rested her case, the defendant moved for a non-suit on the ground that it appeared from the plaintiff's evidence that the attachment was levied on the 27th of August, 1881, and this action was not commenced till the 24th of August, 1884, and that her cause of action was therefore barred by the statute of limitations. The court denied the motion and the defendant reserved an exception. The defendant then introduced evidence tending to show that the value of the property attached was, at the time of the levy of the attachment, about the sum of \$1,450, and that on the 20th of March, 1884, judgment in the said suit of *Walker v. McCusker* was entered in favor of the plaintiff, and against the defendant, for the sum, including interest and costs, of \$1,197.50. The jury returned a verdict for plaintiff for \$3,214.40, on which judgment was entered. The defendant moved for a new trial, and has appealed from the judgment and an order denying his motion, and now insists that plaintiff's cause of action was barred in two years after the levy of the attachment, and that the court erred in not granting his motion for non-suit.

The question is, does the two-years limitation provided by subdivision 1 of section 339 of the Code of Civil Procedure apply, or the three-years limitation provided by subdivision 3 of section 338? It is clear, we think, that the *gravamen* of the action is the alleged suing out and levying the writ of attachment maliciously and without probable cause. Apt words are used to describe a cause of action for malicious prosecution, and they must be presumed to have been used by design; the words, "and without probable cause," having been added by an amendment made at the trial. The averments as to the injury done to the plaintiff's business and credit, and as to the value and loss of the property taken, were evidently inserted to furnish a basis for proof of damages. The plaintiff might have brought an action for the taking and detention of her property, but she elected to sue for the malicious prosecution of a process of law, and apparently chose the latter form of action because greater damages could thereby be recovered. Civil Code, § 3294. But where the gist of an action is a malicious prosecution, the statute begins to run

when the wrongful act is done, and the limitation is two years. In *Sharp v. Miller*, 57 Cal. 431, the action was brought to recover damages for the malicious suing out of a writ of attachment, and levying it upon the real property of plaintiff; and it was held that the action was barred after two years from the time of the levy. So in *Wood v. Currey*, Id. 208, the action was brought to recover damages for maliciously causing a writ of execution to be issued on a judgment which had been satisfied, and levying it upon the plaintiff's real property; and it was held that the two-years limitation applied, and that the action was barred. See, also, *Sharp v. Miller*, 54 Cal. 329; *Taylor v. Bidwell*, 65 Cal. 489, 4 Pac. Rep. 491. We do not consider this case distinguishable in principle from the cases cited. Here, as there, the gist of the action was the malicious act of the defendant, and whether the levy was upon personal or real property is immaterial. Nor was the plaintiff's right of action postponed till the attachment was dissolved. The issuance of the writ was not a judicial proceeding, but a ministerial act on the part of the clerk, which he was bound to perform on the filing of the statutory affidavit and undertaking. Sections 538, 539, Code Civil Proc. Plaintiff might have commenced her action immediately after the writ was levied, and a motion to dissolve it was not necessary. The damages caused by the wrongful act had not all been sustained at that time, but the resulting damages might have been recovered.

In our opinion the action was barred, and the court should have granted the defendant's motion for nonsuit. It follows that the judgment and order should be reversed, and the cause remanded for further proceedings.

I concur: FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for further proceedings.

77 Cal. 284

NALLEY *et al.* v. McDONALD. (No. 11,528.)

(Supreme Court of California. October 25, 1888.)

APPEAL—REVIEW—GRANTING NEW TRIAL BY TRIAL COURT.

The appellate court, in reviewing an order granting a new trial, is not confined to the reasons given by the trial court in an opinion filed; but, if the order can be justified on any of the grounds on which the motion was based, new trials for insufficiency of the evidence being largely discretionary with the trial court, it will be affirmed.

In bank. Appeal from superior court, Mendocino county; ROBERT MCGARVEY, Judge.

Action by A. B. Nalley and E. H. Barnes, and William W. Melton, Robert W. Melton, James B. Melton, and Clymena Melton, minors, by said Nalley and Barnes, their guardians *ad litem*, against George H. McDonald, executor of the will of Anna McDonald, deceased, upon a promissory note. Verdict for plaintiffs set aside by the court, and plaintiffs appeal.

Henley & Oates, for appellants. *J. T. Rogers*, for respondent.

McFARLAND, J. The jury found a verdict for the plaintiffs, and a judgment was rendered thereon. Defendant made a motion for a new trial, and the court granted it. From the order granting a new trial plaintiffs appeal.

The basis of the action was a lost claim against the estate of Anna McDon-

ald, deceased. Plaintiffs sought to prove that the claim was properly verified; that it was presented to A. C. McDonald, executor of the estate, who indorsed his allowance thereon; that the said executor volunteered a promise to take the claim to the county-seat, and procure its allowance by the probate judge; and that the claim had been lost or destroyed, and could not after a sufficient search be found. Defendant contended that there was an insufficiency of evidence to establish either of these asserted facts, and included such insufficiencies in his specifications of the particulars in which the evidence was insufficient. On the 19th of January, 1886, the judge of the court below filed a short opinion, in which he gave as the main reason for granting the new trial the failure of the evidence to show the loss of the claim. On the next day the order granting the motion for new trial was made, in which, after a reference to the statement on the motion, is a recital that "after a full consideration of said statement the said motion for a new trial is on this day granted." Counsel for appellants contend that in passing upon the correctness of the order this court can consider only the reasons given for it in the said opinion of the judge. But it is clear, as contended by counsel for respondent, that the order should be affirmed if it can be justified on any of the grounds upon which the motion for a new trial was based. And the evidence was not so convincing upon any of the points contested, including the one mentioned in the opinion of the judge, as to warrant us in overturning the conclusion reached by the court below. A motion for a new trial, on the ground of the insufficiency of the evidence to support the verdict, is addressed to the sound discretion of the trial court; and when, on such a motion, the court below has granted a new trial, the order granting it will not be disturbed unless there has been a clear abuse of discretion. And it does not appear to us that there has been such an abuse of discretion in the case at bar. Order appealed from affirmed.

We concur: PATERSON, J.; WORKS, J.; THORNTON, J.; SHARPSTEIN, J.

77 Cal. 253

McCORMICK v. SHERIDAN. (No. 11,839.)

(Supreme Court of California. October 23, 1888.)

FORCIBLE ENTRY AND DETAINER—DEFENSES—POSSESSION.

Plaintiff in forcible detainer had no paper title to the land in controversy, which was uninclosed, but had possession of a portion only, which he farmed during the preceding year, and had left some furniture in a house on it, and hay and implements in the barn. During harvest time he lived on the land, but afterwards returned to his former residence. Defendant, claiming to pre-empt the land, built a small house, and moved onto it, but took no possession of the improved portion. Held, that a verdict for defendant was proper.

Commissioners' decision. In bank. Appeal from superior court, Alameda county; E. M. GIBSON, Judge.

Action for the possession of a quarter section of land in Alameda county, brought by Frank McCormick against Martin Sheridan. Verdict for defendant, and plaintiff appeals.

Shafter, Parker & Waterman, for appellant. Mich. Mullany, for respondent.

BELCHER, C. C. This is an action of forcible detainer to recover possession of 160 acres of land. It is alleged in the complaint that on the 5th day of December, 1884, and for five days prior thereto, the plaintiff was in the peaceable and actual possession and occupation of the N. W. $\frac{1}{4}$ of section 17, in a certain described township; that on the said 5th day of December, and in the night-time, the defendant unlawfully entered upon said land, and took possession of the same; and that on the 22d day of the same month plaintiff made a demand that defendant surrender to him the possession of the land.

but defendant neglected and refused, for the period of five days after such demand, to surrender possession of the same, and still holds and continues in possession thereof. The answer denies that on the 5th day of December, 1884, or on all or any of the five preceding days, plaintiff was in the peaceable or actual possession or occupation of the land in controversy; denies that defendant unlawfully entered upon or took possession of the land; and alleges that it was public land subject to pre-emption, and that defendant was a qualified pre-emptor, and entered upon the land with the intention and for the purpose of pre-empting the same under the laws of the United States. The case was tried before a jury, and a verdict returned for defendant, on which judgment was entered. The plaintiff then moved for a new trial, and, his motion having been denied, appealed from the judgment and order.

No errors of law are assigned, but it is argued that the verdict was not justified by the evidence. The record is somewhat voluminous, but the material facts may be briefly stated as follows: The plaintiff claimed to have held the quarter-section in question for several years under a lease, but when asked by defendant to produce the lease declined to do so. The land had never been inclosed. There was a small house on it in which was some furniture, and a barn in which was some hay. There were also on the place some farming utensils. Plaintiff had cultivated some of the land, and in the year 1884 had raised some hay and some wheat and barley upon it. The hay was stored in the barn; and the wheat and barley, as soon as threshed, were hauled away. In the spring of 1884 plaintiff summer-fallowed a part of the land, and he estimated the number of acres summer-fallowed at from 30 to 40, while the defendant, and another witness called for him, estimated the number at only 4. Plaintiff owned the S. W. $\frac{1}{4}$ of section 18, in the same township. This quarter section was inclosed, and on it plaintiff raised hay and grain, and kept all his horses, cattle, and hogs, and had a dwelling-house and barn. Plaintiff was residing in this house on section 18 when the time came to harvest his crops on section 17. He then went with his wife and children to the house on the last-named section, and remained there till the harvesting was completed. He then returned to the house on section 18, and lived there till about the 13th or 14th of December. On the 5th of December, some time after sundown, defendant entered upon the disputed quarter section, and erected a small cabin, in which he took up his residence, and was living when this action was commenced and the trial had. There is no evidence to show that he did anything to disturb the plaintiff's rights, except that on one day he set fire to and burned a little stubble and straw. One of the plaintiff's witnesses testified that he owned 34 acres of the quarter section in question, but what part of it he did not say, and it was not pretended that plaintiff had any lease from him. About a week after the defendant's entry the plaintiff returned with his family to the house on the disputed land, and continued to reside there up to the time of the trial. In reference to this the plaintiff testified. "It was on the 14th of December, and on the second Sunday after Sheridan came there, that we moved back into the house on section 17. I have been plowing on section 17 since Sheridan came, and have been and am now living with my wife and all my children in my house on section 17. Sheridan has not interfered with us." Upon these facts it is difficult to see how the verdict could have been other than it was. To maintain an action of this kind the plaintiff must show that within five days before the unlawful entry by defendant he was in the peaceable and actual possession of the demanded premises. Sections 1160, 1172, Code Civil Proc. To constitute such a possession of agricultural land it is not absolutely necessary that the land be inclosed; but, if not, it must appear from the other facts and circumstances shown that the plaintiff was exercising exclusive dominion and control over it. Here the quarter section was not inclosed, and there was nothing to show that plaintiff had ever exercised any exclusive dominion and control, except over those parts of it occupied by his buildings and used by

him for the purposes of raising hay and grain. But the defendant never took possession of or interfered with the buildings or the hay and grain land. And the plaintiff, according to his own testimony, was in full possession of all that part of the property when he commenced his action and when it was tried.

It results, we think, that the judgment and order should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and orders are affirmed.

77 Cal. 247

GIESKE v. ANDERSON. (No. 11,466.)

(Supreme Court of California. October 23, 1888.)

PARTIES—NECESSARY PARTIES—SUIT BY ONE FOR GENERAL BENEFIT.

Under Code Civil Proc. Cal. § 382, providing that, when a question is "one of a common or general interest of many persons," one or more may sue for the benefit of all, the treasurer of a fire association, being the representative of its members, may sue an ex-treasurer, who is himself a member, for funds in his hands belonging to the association.

Commissioners' decision. In bank. Appeal from superior court, Marion county; E. B. MAHEN, Judge.

Action by Henry C. Gieske against William N. Anderson under Code Civil Proc. Cal. § 382, providing that, when a question is "one of a common or general interest of many persons," one may sue for the benefit of all. Judgment for plaintiff, and defendant appeals.

F. M. Angellotti, for appellant. *Henry McCrea*, for respondent.

FOOTE, C. This action was instituted under section 382 of the Code of Civil Procedure. The complaint alleges, among other things, that the plaintiff was, on the 27th day of October, 1885, duly elected treasurer of the San Rafael fire department, an association composed of 40 or more persons, formed and existing for the purpose of protecting the property of the citizens of the town of San Rafael against fire; that the defendant, as a former treasurer of that association, had certain moneys placed in his hands in trust, and with the understanding that he would pay over the same upon the demand or order of that association, or to any treasurer thereof who might be elected or appointed by said association as his successor; that the defendant, ever since the 22d day of December, 1885, has been and still is in possession of the trust funds; that on the 29th day of October, 1885, by order of said association, a written order to pay over the money then in his possession was drawn on the defendant by the president of the association, etc., and that the plaintiff, as treasurer thereof, presented that order to the defendant, and demanded that he pay over the money to the plaintiff as treasurer of the association; that the defendant refused, and still refuses, to comply with that demand. A general demurrer was interposed, to the effect that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and, the defendant declining to answer, judgment as prayed for was given in favor of the plaintiff. The facts stated in the complaint show that the question involved in the controversy was one of general interest to many persons, that is, all the members of the association, as against their former treasurer, who, it is alleged, holds trust funds belonging to the association which he agreed to pay over to his successor, and refuses to do so. All the parties to the controversy are before the court; the association by its treasurer appearing for all its members, except the alleged defaulting ex-treasurer. We do not see how his rights as a member of the association can be affected by being compelled to pay over to his successor trust funds which belong to the association, which should be in the custody of its treasurer, and which the defendant agreed to pay over

when demand was made, and now repudiates his promise. The demurrer was properly overruled, and we advise that the judgment be affirmed, and the defendant be made to pay 10 per cent. damages in addition to the costs of this appeal, which was evidently taken merely for delay.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed, and the defendant is hereby ordered to pay 10 per cent. damages in addition to the costs of this appeal.

WORKS, J., (*concurring*.) I concur in the judgment on the ground that the plaintiff named shows his individual right to recover for the benefit of the association, but do not wish to be understood as agreeing to the proposition that this case is within section 382 of the Code of Civil Procedure, authorizing one person to sue for the benefit of himself and others. The facts alleged attempting to show such right, should be treated as surplusage.

77 Cal. 217

MALONE v. DEL NORTE COUNTY *et al.* (No. 11,585.)

(*Supreme Court of California.* October 23, 1888.)

1. APPEAL—ASSIGNMENT OF ERRORS—SUFFICIENCY.

Where, in the assignment of errors, it is asserted that the decision is against law, and no particulars are specified in which the evidence is insufficient, the evidence cannot be considered on appeal.

2. TRIAL—BY COURT—ISSUES NOT PASSED ON.

Where the facts found sustain the judgment, it is immaterial that some of the issues presented were not found upon.

Commissioners' decision. In bank. Appeal from superior court, Del Norte county; JAMES E. MURPHY, Judge.

Action by John Malone against the county of Del Norte and L. S. P. Marsh, on an assignment of a portion of a debt due from the county to Marsh on a contract for the erection of a court-house. The court below found that no valid contract was made by the county for the erection of a court-house, for the reason that no notice of the letting of the contract was given; that Marsh commenced the erection of the building, but abandoned it on December 29, 1884, and was paid the full amount due him for work done up to that time; that on September 16, 1884, Marsh was indebted to plaintiff in the sum of \$2,600, and agreed that the county should pay him that amount, of which facts the county had no knowledge; and that no claim was ever presented to the county in accordance with the provisions of the act of March 14, 1883. The action was accordingly dismissed, with costs, and the plaintiff appealed.

R. G. Knox and J. D. H. Chamberlin, (*P. Reddy and W. H. Metson*, of counsel,) for appellant. Geo. A. Johnson, Atty. Gen., L. F. Coburn, and L. F. Cooper, for respondents.

FOOTE, C. This action was brought by the plaintiff, as the assignee of an indebtedness alleged to be due by virtue of a certain agreement, claimed to have been entered into between the county of Del Norte and L. S. P. Marsh, the assignor, as a contractor for the building of a court-house. The court below gave judgment in favor of the county of Del Norte, from which an order denying a new trial this appeal is prosecuted. The argument of the appellant in favor of the reversal of the judgment and order seems to be almost entirely based upon the proposition that the evidence is insufficient to justify the findings. But in the assignment of errors he simply asserts that the decision is against law, but fails to specify the particulars in which the evidence is alleged to be insufficient to sustain the decision. Therefore, we cannot ex-

amine the evidence as it appears in the bill of exceptions, and "must accept as conclusively established the facts set out in the findings." *Polack v. Gurnee*, 66 Cal. 267, 5 Pac. Rep. 229, 610. Conceding, without deciding, that some of the issues "are not found upon, such issues are immaterial in view of the facts found. The facts found sustain the judgment, and there was and is no necessity to go further, and find upon other issues." *Robarts v. Haley*, 65 Cal. 402, 4 Pac. Rep. 385; *McCourtney v. Fortune*, 57 Cal. 617; *Porter v. Woodward*, Id. 535. No prejudicial error appearing, we advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

77 Cal. 235

ZIRKER v. HUGHES. (No. 12,575.)

(Supreme Court of California. October 23, 1888.)

COUNTIES—ACTIONS AGAINST—SPLITTING CLAIMS—JUDGMENT—RES ADJUDICATA.

The assignee of a claim against a county for \$952.77 presented it to the board of supervisors for allowance, and it was allowed for the amount of \$640.77 only. He then sued and recovered judgment upon a portion of his original claim. *Held*, that such judgment was a bar to further proceedings to enforce the claim, as allowed by the board, under Laws Cal. 1883, p. 313, § 44, allowing suit by a claimant dissatisfied with the amount allowed him, as such suit must be for the whole amount.

Commissioners' decision. In bank. Appeal from superior court, Merced county; C. H. MARKS, Judge.

Petition by Adolph Zirker for a writ of *mandamus* to compel R. N. Hughes, auditor of Merced county, to draw a warrant upon the treasurer of Merced county in favor of the petitioner. The petition was denied, and the petitioner appeals.

R. H. Ward and *Frank H. Farrar*, for appellant. *J. W. Breckinridge*, (*Breckinridge & Peck*, of counsel,) for respondent.

HAYNE, C. Application for a writ of mandate against the auditor of Merced county to compel him to draw a warrant upon the treasurer in favor of petitioner for \$640.77. The petitioner was the holder by assignment of a claim against the county for \$952.77. This claim was presented by him to the board of supervisors for allowance, and was allowed by them for the amount which petitioner claims here, viz., \$640.77, and no more. The petitioner then sued the county in the justice's court for \$299.99, (said amount being a part of his said claim,) and recovered judgment for that sum and costs, which judgment was paid by the county. He then brought the present proceeding for a warrant for the \$640.77, for which his original claim had been allowed. The defendant pleaded the judgment of the justice's court as a bar to the proceeding, and the trial court sustained this plea, and rendered judgment accordingly. We think this was right. A claimant who is dissatisfied with the amount allowed him must sue the county within six months. Laws 1883, p. 313, § 44. The suit must be for his whole claim. It is an old and well-settled rule that a party having an entire demand cannot split it up into separate causes of action. If the petitioner could split his demand into two parts he could split it into 952 parts, in which case the costs alone would amount at the rate of the suit above mentioned to over \$4,000. If he undertake such a course, the judgment in the first suit is, when properly pleaded, a bar to the rest. The other matters do not require special notice. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

77 Cal. 239

VULICEVICH v. SKINNER. (No. 11,124.)

(Supreme Court of California. October 23, 1883.)

1. FRAUDS, STATUTE OF—CONTRACT FOR GROWING FRUIT.

A contract for the sale of growing fruit is not within the statute of frauds, and need not be in writing.

2. TRIAL—INSTRUCTION—ASSUMPTION OF FACTS.

In an action for money alleged to have been received to plaintiff's use, but which defendant testifies was paid on a contract for the sale of fruit, it is error to charge, in speaking of the payment, that "my understanding was that that completed the contract," as this instruction assumes the statement of defendant to be true.

Commissioners' decision. In bank.—Appeal from superior court, Santa Cruz county; F. J. McCANN, Judge.

Assumpsit by Marco Vulicevich against Henry Skinner for money received to plaintiff's use. The jury returned a verdict for defendant for damages for breach of a contract on which the money was alleged to have been paid, and the plaintiff appeals.

Chas. B. Younger, for appellant. *John Flournoy and Goldsby & Jeter*, for respondent.

FOOTE, C. This action was brought to recover the sum of \$600, for money claimed by the plaintiff to have been received by the defendant for the former's use. The answer admits the reception of the money, but denies that it was received by the defendant for the plaintiff's use. It sets up a claim that the plaintiff bought defendant's entire crop of fruit for the year 1882 for the sum of \$3,000, and that the sum of \$600 sued for in the action by the plaintiff was in reality paid to the defendant as part of the purchase money for the crop of fruit; and, further, it states that after this purchase by the plaintiff he refused to receive any part of the crop of fruit, and that the defendant has thereby suffered damage in the sum of \$900. The cause was tried by a jury, who returned a verdict in favor of the defendant for \$600. From the judgment rendered thereon, and an order refusing a new trial, the plaintiff appeals.

He makes the point that the crop of fruit growing upon the trees and vines was real property, and that the alleged contract of sale was void under the statute of frauds as not being in writing, and that the court wrongfully charged the jury upon the matter. We cannot concur with this view. "Contracts for the sale of growing periodical crops—*fructus industriales*—are not within the statute of frauds, and therefore need not be made in writing. After some vacillation, this has become the settled doctrine. *Marshall v. Ferguson*, 23 Cal. 65." *Davis v. McFarlane*, 37 Cal. 636.

It is further argued in favor of the reversal of the judgment that the court in its charge to the jury said in its third instruction: "My understanding was that that completed the contract." The record shows that the court had just stated the materiality of the defendant's claim in evidence that the \$600 was paid him as a part of the purchase price for the fruit. The instruction virtually assumes this statement of the defendant to be true as a matter of fact, and informs the jury that the payment referred to completed the contract. This instruction to the jury charged them with respect to a matter of fact, and was erroneous. We therefore advise that the judgment and order be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

77 Cal. 246

FISCHER v. TRAVELERS' INS. CO. (No. 11,475.)

(Supreme Court of California. October 23, 1888.)

INSURANCE—ACCIDENT INSURANCE—DEATH OF INSURED BY VIOLENCE.

No recovery can be had on an insurance policy which provides that the company shall not be liable if the death or injury "may have been caused by intentional injuries inflicted by the insured or any other person," where the insured was shot and killed by a third person, though without provocation, and while peaceably and lawfully engaged in his ordinary business.

Commissioners' decision. In bank. Appeal from superior court, Santa Clara county; F. E. SPENCER, Judge.

Action by Pedronilla Fischer against the Travelers' Insurance Company on an insurance policy. A demurrer to plaintiff's complaint was sustained, and she appeals.

J. S. Wallis and Laine & Johnston, for appellant. *J. H. Campbell* and *F. H. Howard*, for respondent.

FOOTE, C. This action was brought by the plaintiff to recover on what is ordinarily denominated an "accident insurance policy." According to the facts set out in the complaint, the insured, who was the husband of the plaintiff, "while peaceably, lawfully, and quietly engaged in his ordinary business as butcher, in his office at Mountain View, in said county of Santa Clara," was shot through the body with a pistol, without provocation, by one George Langley, from which shot and wound thereby inflicted alone, Fischer, the insured, died in a few hours. The complaint was demurred to as not stating a cause of action, the demurrer was sustained, and, the plaintiff declining to amend, a final judgment was given for the defendant, from which this appeal is taken. It is provided in the policy involved in this controversy, among other things, that the company issuing the policy shall not be responsible thereon, if the death or injury for which indemnity is sought "may have been caused by * * * intentional injuries inflicted by the insured or any other person." It is evident that the injuries inflicted in this instance, causing the death of the insured, were not inflicted by himself; but, according to the facts set out in the complaint, were caused by the act of one George Langley, without provocation. We do not agree with counsel that the proviso refers to killing in some brawl which the insured draws upon himself, or intentionally engages in. We think it clear that the word "intentional" refers to intention on the part of the person inflicting the injury, and on his part only. It is not distinctly alleged that there was such intention here, and it might be a question whether or not the rule as to construing pleadings against the pleader would cover the defect. But the counsel for the appellant does not press this point, but has argued the case upon the assumption that the complaint charges an intentional killing. If it does, the demurrer was properly sustained. We therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

77 Cal. 286

CRESCENT CITY WHARF & LIGHTER CO. v. SIMPSON et al. (No. 11,649.)

(Supreme Court of California. October 26, 1888.)

1. COURTS—ADMIRALTY JURISDICTION OF STATE COURTS—INJUNCTION.

A state court has jurisdiction to enjoin the removal and destruction of anchors, moorings, and buoys appurtenant to a wharf on navigable waters; the act conferring admiralty and maritime jurisdiction on the United States district court expressly saving "to suitors in all cases the right of a common-law remedy where the common law is competent to give it."

2. INJUNCTION—PLEADING—ALLEGATION OF INSOLVENCY.

A complaint for an injunction which alleges that irreparable damage is threatened, in that a part of a wharf, which is real estate, is about to be wrongfully taken away, need not allege insolvency of defendant.

3. LANDLORD AND TENANT—LEASE BY TOWN—AUTHORITY TO EXECUTE.

A town's authority to execute a lease is shown *prima facie* by its corporate seal, affixed to the lease by the proper officer.

4. SAME—SEAL—ACCEPTANCE BY LESSEE.

It is not necessary to the validity of a lease that the lessee affix his seal thereto. His acceptance is shown by claiming under it, occupying and maintaining the premises, and paying rent.

Appeal from superior court, Del Norte county; JAMES E. MURPHY, Judge.

Action by the Crescent City Wharf & Lighter Company to enjoin A. M. Simpson, Joseph G. Wall, and the Crescent City Wharf & Dock Company from removing certain moorings appurtenant to a wharf alleged to belong to plaintiff, and for damages. The court granted an injunction, and awarded damages, and defendants appeal.

L. F. Cooper, L. F. Coburn, and Daniel Titus, for appellants. *Wm. H. Hart and R. G. Knox, (Aylett R. Cotton, of counsel,)* for respondent.

FOOTE, C. This action was brought for the purpose of obtaining an injunction against the defendants restraining them from taking up certain moorings, alleged to be the property of plaintiff, and to recover damages for the removal of certain of said moorings. The court below granted an injunction as to the removal of some of the moorings, and as to portions of others, and awarded damages in the sum of \$100 for the taking away of a buoy and anchor belonging to a mooring of the plaintiff. From the judgment and an order denying a new trial the defendants have appealed. Their first point is that the court below should have sustained their demurrer to the complaint, because, as they allege, that tribunal had no jurisdiction of the action, and that the complaint did not state facts showing any equities, and was ambiguous and uncertain. The facts set out in the complaint appear to be, among others: That the plaintiff had leased from the proper authorities of the town of Crescent City a certain portion of the water front of that place, on navigable waters, upon which had been built and was being maintained by the plaintiff a wharf used for the unloading and loading of ships and other watercraft; that in connection with the wharf, and as necessary and appurtenant to it, the plaintiff had in its possession and under its control certain moorings, anchors, and buoys which were affixed and attached to the ground, earth, and rock constituting the bottom of the bay or navigable waters where the wharf was erected; that such moorings, anchors, and buoys, in "annexion" with the wharf, were in daily use by the plaintiff, and that the wharf could not be utilized without them; that the defendants wrongfully and maliciously removed one of the anchors, moorings, and buoys, and threaten to and would remove the rest of them unless they should be enjoined from so doing; that the injury already done amounted to the sum of \$15,000, and that the injury threatened could not be estimated, and was irreparable.

Upon this state of facts we think there can be no doubt but that the state court had jurisdiction. Conceding, for the purposes of the case, that the federal court would have jurisdiction of such a case, the state court has concurrent ju-

risdiction; the action being *in personam*. Hen. Adm. p. 39, § 19; *The Lottawanna*, 21 Wall. 558. The act conferring admiralty and maritime jurisdiction on the United States district court expressly saves "to suitors in all cases the right of a common-law remedy where the common law is competent to give it."

We do not think that the objection based upon the alleged uncertainty or ambiguity of the statements of the complaint is well taken.

It is further contended that the complaint was defective in not alleging the insolvency of the defendants. Yet it stated that irreparable damage was threatened in this: That a part of the wharf which is real estate was about to be wrongfully taken away,—that is, the inheritance was threatened to be removed, and a trespass threatened in the nature of waste. When such facts are alleged in a complaint, it is not necessary, in order to obtain an injunction, to allege the insolvency of the defendant. *Richards v Dower*, 64 Cal. 63. The demurrer was therefore properly overruled. It is further claimed by the appellants that the judgment should be reversed, because, as is asserted, the lease under which the plaintiff held was improperly admitted in evidence, for the reason that the officers had no authority to execute it. But the corporate seal appears to have been affixed by the proper officer, and that is sufficient *prima facie* to show the authority. *Association v. Bustamente*, 52 Cal. 192. It was not necessary to the validity of the lease that the lessee should affix his seal thereto. His acceptance was abundantly shown by claiming under it, and occupying and maintaining the wharf and its appurtenances, and paying rent. The other points made are without merit; and, no prejudicial error appearing in the record, we advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

77 Cal. 250

CAMPBELL *et al.* v. WALLS. (No. 11,411.)
(*Supreme Court of California.* October 23, 1888.)

APPEAL—REVIEW—PRESUMPTIONS.

Where the transcript shows no evidence on the subject of the alleged erroneous rulings, the presumption is that they were correct.

Commissioners' decision. In bank. Appeal from superior court, Lake county; RODNEY J. HUDSON, Judge.

Action to recover possession of a lot of land, brought by Charles Campbell and others against Benjamin Walls. Judgment for defendant, and plaintiffs appeal.

E. W. Britt, for appellants. *A. E. Noel*, (*R. W. Crump*, of counsel,) for respondent.

BELCHER, C. C. The plaintiffs brought this action to recover the possession of a lot of land situated in the town of Lower Lake, in Lake county, and described in their complaint as "commencing at the north-west corner of Main and Mill streets, in said town of Lower Lake, and running thence north, along Mill street, 160 feet; thence west 16 feet; thence south, along the east line of lot 2, in block 2, in said town, 160 feet, to Main street; thence east 16 feet, to place of beginning." The defendant, by his answer, denied the plaintiff's ownership of the lot, and set up title in himself. The court below found that the plaintiffs were not the owners or entitled to the possession of the lot, and gave judgment for the defendant; from which, and from an order denying them a new trial, plaintiffs appealed. It is claimed for the appellants that the findings were not justified by the evidence, and this is the only question

presented for review. The plaintiffs deraigned their title through a deed made to Jonathan H. Campbell, their father, in April, 1869. That deed was made by the admitted owner of the disputed and adjacent property, and described the land conveyed as a lot in the town of Lower Lake, "commencing on Main street at the south-west corner of lot No. 2, in block No. 2, in said town; running thence east 16 feet, to Mill street; thence north, with Mill street, 160 feet; thence west 16 feet, to the north-west corner of said lot No. 2, in block No. 2, in said town; thence south 160 feet, to the place of beginning." They also introduced in evidence a plat of the town of Lower Lake, taken from the office of the county recorder, and proved that it had been in that office for more than four years, and was the only plat of the town to be found there. The plat showed that block No. 2 was bounded on the east by Mill street, and on the south by Main street, but did not show the location or size of lot No. 2, or that any part of the block had ever been designated as lot No. 2. In support of his claim of title to the disputed premises, the defendant introduced in evidence a grant, bargain, and sale deed, made by Jonathan H. Campbell to one Charles Corum, in June, 1868, conveying a lot in the town of Lower Lake, described on a plat or survey of the town "as the east part of lot 2, in block 2, according to said survey, as follows, to-wit: Commencing at the south-east corner of said lot 2, of block 2; thence west 60 feet, (exclusive of the public road on the east side of said lot;) thence north from the section line 160 feet; thence east 60 feet; thence south 160 feet, to the section line between sections 2 and 11, to place of beginning." This deed was acknowledged and recorded on the day of its date. Defendant also introduced a deed from Corum to himself made in July, 1876, and conveying the same premises. The plaintiff objected to both of those deeds on the ground that they did not embrace the premises in suit; but the court overruled the objection and admitted them in evidence. It is said in the brief filed for appellants that the demanded premises lie between lot 2 and the east line of the block; and that the points in the calls of the deed, under which his clients claim title, described as "the south-west corner of lot No. 2," and "the north-west corner of said lot No. 2," should have been described as the south-east and north-east corners of the lot, and that the descriptions found in the deed were probably written by mistake. On the other hand, it is said in the brief for respondent that lot 2 covers all of the south-eastern quarter of the block.

Now, if the respondent is right in his statement as to the location of lot 2, it is evident that the demanded premises were included in the deed from Campbell to Corum, and that when Campbell received his deed in 1869 the title to the property, if conveyed by that deed, at once vested in Corum, his former grantee, and is now vested in respondent. Turning to the transcript, we find no evidence upon the subject of these statements, and nothing from which we can determine as to which statement is true. But the burden is cast upon an appellant to show by the record affirmatively and clearly that error was committed by the trial court; and, in the absence of such showing, the presumption is that the rulings of the court were correct and its action proper. We find nothing in this record to justify us in saying that the court below clearly erred in reaching its conclusions. If such evidence was given, it should have been brought up in the transcript. Not being there, the loss, if any, must be borne by the appellants. We therefore advise that the judgment and order be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed

77 Cal. 257

BURLING v. THOMPkins. (No. 11,747.)

(Supreme Court of California. October 23, 1888.)

1. PUBLIC LANDS—TITLE DERIVED FROM STATE—PRIVITY OF TITLE.

Defendant settled on certain land, claiming it belonged to the United States, two years after plaintiff had made application to purchase it from the state, which claimed it as school land. Defendant offered to enter the land under the United States homestead law, but the register refused the entry, and informed him that the land was not subject to entry. Defendant alleged that he was misled by such statement, and prevented from prosecuting his claim at that time, but did not excuse his subsequent delay of 15 years. *Held*, that defendant was not in such privity with the title of the United States as would enable him to attack a patent from the state.

2. EJECTMENT—PLEADING—DESCRIPTIO PERSONÆ.

A complaint in ejectment entitled "B. B. Administrator of the Estate of W. B., deceased," and alleging ownership and right of possession in plaintiff, containing no allegations respecting his representative character, is not demurrable for ambiguity, or uncertainty; but the omission of the word "as" renders the words added to the title *descriptio personæ*, and the action is by plaintiff in his individual capacity.

3. SAME—TITLE TO SUPPORT—PATENT TO GRANTEE IN REPRESENTATIVE CAPACITY.

One suing in his individual capacity is entitled to recover on a patent issued to him in a representative capacity.

In bank. Appeal from superior court, Santa Cruz county; F. J. McCANN, Judge.

Ejectment by Benjamin Burling against Daniel D. Thompkins. Judgment for plaintiff, and defendant appeals.

W. D. Storey and Z. N. Goldsby, for appellant. Mesick & Maxwell, for respondent.

PATERSON, J. Ejectment. In the title of the cause the plaintiff is styled "Benjamin Burling, Administrator of the Estate of William Burling, deceased." The complaint contains no allegations respecting his representative character, being in the ordinary form, alleging ownership and right of possession in the plaintiff. To this complaint the defendant filed a demurrer, which was overruled. The ground of demurrer is that it cannot be ascertained from the complaint whether the plaintiff is suing as administrator in his representative capacity, or as an individual in his own right. The words quoted created no uncertainty or ambiguity. If words, showing simply the official capacity of the party, are added directly to his name in the title of the cause, as in the case at bar, without the word "as," they will be regarded as a mere *descriptio personæ*. The allegations of the complaint show whether the action is brought by or against a person *en autre droit*. *People v. Houghtaling*, 7 Cal. 350; *Bank v. Van Rensselaer*, 6 Hill, 241.

The answer denies generally and specifically all of the allegations of the complaint; pleads in bar of the cause of action set up in the complaint the provisions of sections 318, 319, 343, Code Civil Proc.; and, for a further answer, equitable defense, and cross-complaint, alleges that prior to the month of August, in the year 1868, one Bennett settled upon the land in controversy, and made valuable improvements thereon, claiming the right to occupy the same as a homestead under the laws of the United States; that while the land was so occupied by Bennett—February, 1870—defendant purchased his improvements and possessory right, and immediately moved upon the land, and has continued to occupy the same with his family ever since, claiming and holding the same for the purpose of settlement and cultivation as a homestead under the homestead laws; that the land in controversy was listed to the state of California as land in lieu of school lands under the laws of the United States, on or about November 15, 1871; that there was no basis for the listing of said land to the state of California, there being no sixteenth or thirty-sixth section in lieu of which the lands in controversy were listed and taken by said state;

that in August, 1868, while Bennett was in possession of the land, William Burling made application to purchase the land under the laws of the state, and falsely and fraudulently made affidavit that the land was not occupied by any other person than himself, and that there were no improvements except his own on the land, nor was there any claim to said land adverse to his own; that Burling died in July, 1877; that on the 30th of March, 1878, the heirs of said William Burling, deceased, received a patent for said land from the state of California, which was based upon the false and fraudulent application above referred to; that when said patent was issued the state had no title to the land, the same having failed by reason of the erroneous and baseless listing above mentioned; that all the right, title, and interest that plaintiff has is derived from and rests upon said pretended patent of the state; that William Burling never occupied the land, nor any part thereof; that in the year 1870, while he was in possession of the land, defendant went to the United States land-office, and offered to make the proper application to enter the land under the homestead laws, and to pay the fee required in such cases, but the register of the land-office refused to permit him to make such application, and informed him that the land was not subject to entry under said homestead laws, and that defendant was misled by said statement, and was thereby prevented from prosecuting his homestead claim at that time; that the defendant still continues to claim the land as a homestead under said homestead laws, and was about to take proper steps to assert and perfect his claim when this action was commenced, and will do so as soon as possible; that the land now is, and was at the time that this action was commenced, public land of the United States, and subject to entry under the homestead laws, but for the pretended title resting upon said fraudulent application. The demurrer to this cross-complaint, on the ground that said complaint does not state facts sufficient to constitute any defense or any cause for affirmative relief, was sustained and leave given by the court to amend, but no amendment was made.

We think the demurrer was properly sustained. The facts alleged fail to show that defendant is in such privity with the paramount source of title as to authorize him to attack the validity of the patent. The cases are somewhat divergent upon the question as to what constitutes such privity with the title of the United States as will enable a party to attack a patent collaterally, but we think no case can be found—certainly no case has been cited—which extends the privilege so far as it is sought to be exercised herein. The defendant went upon the land in 1870, two years after Burling made his application to purchase from the state. In the same year he made his offer to enter the land under the homestead laws, and pay the fee required in such cases. It is alleged that the register then refused to permit the defendant to make such entry, and informed him that the land was not subject to entry under the homestead laws. This is followed by an allegation that the defendant was misled by said statement, and was thereby prevented from prosecuting his homestead claim at that time. There is nothing to show why an application was not made at some subsequent time,—no excuse for the delay of 15 years which occurred between that date and the time of the commencement of this action. In all the cases cited by appellant except one, (*Hollinshead v. Simms*, 51 Cal. 158,) the parties claiming the right to attack the validity of the patent had—where it was in their power so to do—filed a declaration in the United States land-office. This, of course, was sufficient to connect them with the paramount source of title. In *Hollinshead v. Simms*, the court said: "Nor does Simms seem to have been lacking in diligence in the assertion of his claim." That cannot be said of the defendant herein. In *Kile v. Tubbs*, 23 Cal. 443, it appeared that the plats of the United States surveys had not been sent to the land-office. It was therefore out of the power of the defendant to file his notice of claim to pre-emption, and the court held that, having done all in his power, the defendant lost no rights acquired under the pre-emption

laws. The defendant does not claim to have any privity with the state. We think that the refusal of the register of the United States land-office to allow him to make proper application and pay the fee required does not, under the circumstances, establish any privity with the United States. If the land at the time such offer was made was subject to entry, the refusal of the register to allow him to enter the land could not have prevented him from prosecuting his homestead claim, because the defendant had a remedy by appeal, which would have placed him in privity with the paramount source of title. In support of the propositions discussed we cite the following authorities: *Moore v. Wilkinson*, 13 Cal. 478; *Doll v. Meador*, 16 Cal. 295; *Burrell v. Haw*, 40 Cal. 373; *Damrell v. Meyer*, Id. 166; *Bank v. Hynes*, 50 Cal. 202; *Thomas v. Lawlor*, 53 Cal. 405; *Kentfield v. Hayes*, 57 Cal. 411.

Section 2 of the act of congress of March 1, 1877, provides that, "if there be no such sixteenth or thirty-sixth section, and the land surveyed therefor shall be held by an innocent purchaser for a valuable consideration, such purchaser shall be allowed to prove such facts before the proper land-office, and shall be allowed to purchase the same at \$1.25 per acre. * * *" Under this provision, conceding that the state patent is void for the reason that the state had no title as alleged by the defendant, the plaintiff had a preferred right to purchase from the United States, unless, after knowledge of the facts, he neglected to furnish the proof and make the payment required by the act. The patent is valid upon its face. It provides that "the United States of America, in consideration of the premises, and in conformity with the several acts of congress in such case made and provided, have granted unto the said Benjamin L. Burling, administrator, and to his successors, the said tract above described." The plaintiff was not called upon to support the validity of his patent with proof of the fact that it had been issued to him—if such be the fact—under the provisions of section 2, *supra*. It devolved upon the defendant to allege and to show that under no circumstances were the officers of the land department authorized in issuing the patent to the plaintiff. Speaking of the power of the land department, and the conclusiveness of its patents, Mr. Justice FIELD, in *Smelting Co. v. Kemp*, 104 U. S. 646, said: "The doctrine as to the regularity and validity of its [the land department's] acts, where it has jurisdiction, goes so far that if, in any circumstances under existing law, a patent would be held valid, it will be presumed that such circumstances existed."

It is contended by the appellant that, if the designation of the plaintiff as administrator, etc., in the caption of the complaint, be merely *descriptio personæ*, then the plaintiff, having sued in his individual capacity, is not entitled to recover upon a patent issued to him in his representative capacity. The legal title was vested in Burling by the patent, and entitled him to a recovery in this action. Whether this legal title was held in trust for others is not a proper subject for inquiry in this case. *Bonds v. Hickman*, 32 Cal. 202. The matters we have discussed cover all the points made by the appellant under his assignments of errors, and it is therefore unnecessary to notice them further. Judgment and order affirmed.

We concur: SEARLS, C. J.; McFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.

(77 Cal. 220)

In re Cook's Estate. (No. 12,200.)

(*Supreme Court of California.* October 23, 1883.)

1. DIVORCE—RENDITION OF JUDGMENT—ENTRY AFTER DEATH OF PLAINTIFF.

The rendition and entry in the minutes of a judgment of divorce on default, without findings, are effectual to dissolve the marriage from the time thereof; and the entry of the judgment *nunc pro tunc* after plaintiff's death, on petition of her second husband, without notice to the divorced husband, is not error. Reversing 17 Pac. Rep. 923.

2. EXECUTORS AND ADMINISTRATORS—PETITION FOR DISTRIBUTION AND ACCOUNTING.

It is improper to include, in a petition for final distribution of a decedent's estate, a prayer for an accounting against one who is alleged to have come to the possession of property of the estate, and not to have accounted for it.

THORNTON, J., dissenting.

The report of the case on the original hearing will be found in 17 Pac. Rep. 923.

H. C. McPike and James M. Seawell, for appellant. Tilden & Tilden, Eugene N. Deuprey, L. M. Hoefler, and James G. Carson, for respondents.

McFARLAND, J. After a more mature consideration of this appeal, upon rehearing, we are satisfied that the court below was in error, and that the decree appealed from must be reversed. The appeal is taken by William E. Miller, assignee of William W. Richards, from a decree of distribution, by which the estate of the deceased was distributed, one-half to her mother, Mary A. Strasberger, and the other half to Theodore T. Cook, who was adjudged to be the surviving husband of the deceased. As the deceased left no issue or father, one-half of her estate went to her mother and the other half to her surviving husband; and the question to be determined was whether the said Theodore T. Cook, or the said William W. Richards, was such surviving husband. Upon the trial of this issue, Cook proved that he was married to the deceased (whose maiden name was Emma Strasberger) on the 26th day of December, 1873. It was alleged and claimed on the part of said Richards and his assignee, Miller, that the deceased was divorced from said Cook; that afterwards, on May 30, 1880, she was legally married to the said Richards, and that Richards, from the date last named, was, and continued to be, her lawful husband until her death. To maintain this issue on his behalf, Miller offered in evidence a certain judgment roll, duly authenticated. To the introduction of this judgment roll Cook objected upon the grounds that the decree of divorce therein contained was entered on petition of said Richards, who was a stranger to the record; "that there is no foundation for the same, and that it is not a decree;" that it was entered after the death of the plaintiff to the action, and without notice; that there were no findings to support it; and that the papers constituting the judgment roll are immaterial, irrelevant, and incompetent. The court sustained the objections, and appellant excepted. The appellant then offered to prove the marriage of the deceased to Richards after the alleged divorce, and the assignment by the latter of all his right and interest in the estate in California and in the hands of the administrator to Miller. This offer was objected to upon substantially the same grounds as above stated, and the objection was sustained. These two rulings are assigned as error, and present the point involved.

The judgment roll offered in evidence shows, substantially, these things: The deceased, Emma Cook, commenced an action in March, 1880, in the superior court of San Francisco against the said Theodore T. Cook, to obtain a divorce. The complaint was sufficient in form and substance, and averred willful neglect as the cause of action. Summons was duly issued March 20, 1880, and was personally served on the defendant on the same day in the city and county of San Francisco. The defendant not answering or appearing, default was entered against him on the 6th of April, 1880. The decree contained in said judgment roll was entered on the 8th day of September, 1885, *nunc pro tunc*, as of the 23d day of April, 1880. It recites that the action came on regularly for hearing on the 6th of April, 1880; that the issuance and service of the summons and the default of defendant appearing, the case was referred to F. W. Lawler, a referee, to take proof of all the material allegations, and report the same to the court; and that said referee made his report. The said decree proceeds as follows: "The report of said referee having been finally filed in this action, and this action having been finally submitted

on the 23d day of April, A. D. 1880, and this court having then fully considered the same, and ordered that a decree be entered therein in favor of said plaintiff dissolving the bonds of matrimony, then, on said 23d day of April, A. D. 1880, and theretofore existing between the said plaintiff, Emma Cook, and the said defendant, Theodore T. Cook, on the ground of willful neglect, which said judgment of said court was duly rendered in open court by this court on said 23d day of April, A. D. 1880, and then and there entered in the minutes of said court; and this court, upon petition of William W. Richards, filed herein on the 4th day of September, A. D. 1885, having on the 7th day of September, 1885, ordered, adjudged, and decreed that the said decree of divorce ordered by said judgment of said court to be entered in favor of said plaintiff as aforesaid, on said 23d day of April, A. D. 1880, be forthwith entered by the clerk of this court *nunc pro tunc* as of said 23d day of April A. D. 1880, and that the judgment roll in this action be forthwith made and filed by the clerk of this court *nunc pro tunc* as of said 23d day of April, A. D. 1880,—it is now, therefore, considered, ordered, adjudged, and decreed by this court," etc. The decree then proceeds to dissolve the bonds of matrimony between the parties as of April 23, A. D. 1880. The deceased, Emma Cook, who was the plaintiff in said action, died in the month of November A. D. 1883, and, of course, was not living at the date of the entry of this decree. And counsel for respondent contends—*First*, that the action taken by the court on April 23, 1880, and recited in said decree, was not in any sense or for any purpose a judgment, and had no effect whatever upon the marriage relations of the parties; and, *second*, that the decree of September, 1885, was of no avail, because at the time of its entry one of the parties was dead.

The deceased, no doubt, considered that she was divorced on April 23, 1880, and could lawfully enter into a second marriage. It is averred in the petition of Richards that the said Theodore T. Cook also entered into a second marriage before the death of the deceased; and, although there is no proof on that subject in the record, yet it may be fairly presumed, from his apparent acquiescence in the second marriage of the deceased until after her death, that he also supposed that a divorce had taken place, and that he could lawfully marry again if he so elected. If, therefore, the question here presented were a doubtful one, the leaning of the court should be in favor of the validity of the second marriage, and against the implication of bigamy. We think, however, that former decisions of this court have, with sufficient clearness, solved the problem here involved against the contention of respondent. In those decisions a plain distinction is established between the rendition of judgment and its entry in the judgment-book. In *Gray v. Palmer*, 28 Cal. 416, the question was whether an appeal from a judgment had been taken in time,—the statute then requiring the appeal to be taken within one year after "the rendition of the judgment." In that case the judgment had been rendered more than two months before it had been entered by the clerk; and the appeal had been taken within a year after the entry, but not within a year after the rendition, and the court held that the appeal was too late. Justice SAWYER, in delivering the opinion of the court, says: "After a careful review of these and other sections of the practice act, we cannot resist the conclusion that the terms 'rendition' and 'entry' are used in different senses, and to express the idea appropriate to those words, respectively; and that there is a rendition of a judgment before it is actually entered in the judgment-book. Different stages of the proceeding are recognized by the statute as initial points from which other proceedings may be taken, or other rights acquired. Thus the right of appeal attaches, and the time for taking it commences to run, from the rendition of the judgment by the court; the right to issue execution from the time of the entry of the judgment rendered; and the judgment lien upon real estate attaches from the docketing of the judgment rendered and entered." And again: "Upon the construction given by us there are not two final judgments, as is argued by

appellant. The clerk enters the judgment rendered by the court. The court pronounces the judgment, and the clerk performs the ministerial duty of entering it. The judgment rendered is the judgment entered." In *Casement v. Ringgold*, 28 Cal. 335, it was held (at a time when the statute provided for stated terms of court) that when the court had pronounced a judgment it became the judgment of the court of the term at which it had been rendered, and that the clerk could perform the ministerial duty of entering it in the judgment-book after the expiration of the term. And the opinion in this case refers to *McMillan v. Richards*, 12 Cal. 467; and *Hutchinson v. Bours*, 13 Cal. 52, in which cases the entry of a judgment by the clerk is referred to as a mere ministerial act. The same doctrine is clearly stated in *Peck v. Courtis*, 31 Cal. 209; *Genella v. Relyea*, 32 Cal. 159; *McLaughlin v. Doherty*, 54 Cal. 519; and in other cases decided by this court. And in *Estate of Newman*, 16 Pac. Rep. 887, (decided by this court March 1, 1888,) the very point here involved seems to have been definitely settled. The only difference between that case and the one at bar is that in the former the decision of the court—that is, the rendition of the judgment—was in writing, and signed by the judge of the court and filed with the clerk. But, as we shall see, those circumstances gave no additional significance or validity to the rendition of the judgment. One of the questions in the *Newman case* was, when did the judgment of divorce take effect as between the parties? And the court say: "The decree was signed by the judge on October 19th, and was filed by the clerk on October 22, 1885. Thus rendered, it was binding on the parties and privies, although not entered until January 5, 1887. The clerk could not, by his failure to perform a ministerial duty, abridge the rights of any party interested."

If it were necessary to refer to general authorities, it would be found that their drift is the same way. Freeman, in his work on Judgments, states the essence of the cases as follows: "Expressions occasionally find their way into reports and text-books, indicating that the entry is essential to the existence and force of the judgment. These expressions have escaped from their authors when writing on matters of evidence, and applying the general rule that in each case the best testimony which is capable of being produced must be received, to the exclusion of every means of proof less satisfactory and less authentic. The rendition of a judgment is a judicial act; its entry upon the record is merely ministerial. * * * That which the court performs judicially, or orders to be performed, is not to be avoided by the action or want of action of the judges or other officers of the court in their ministerial capacity." Section 38. In *Telegraph Co. v. Patterson*, 1 Nev. 151, which was a well-considered case, the question was, what constitutes a judgment? And the court say. "This motion seems to be based upon a misapprehension of what constitutes a judgment; and counsel seem to have confounded the judgment itself with the entry or record thereof. The judgment is a judicial act of the court; the entry is the ministerial act of the clerk. The judgment is as final when pronounced by the court as when it is entered and recorded by the clerk, as required by statute. * * * The decision of the court is the judgment; the entry by the clerk is the evidence of it." The current of English and American authorities is to the same point.

In some of the cases decided by this court and cited above, the judge, at the time of the rendition of the judgment, had prepared a written decision, generally in the form of a decree, and had, in some instances, filed it with the clerk; and counsel for respondent contends that those cases are not authority here, because in *Cook v. Cook* no such written decision or decree had been prepared, signed, or filed. But there is no statutory provision for the signing of a judgment by the judge, either before or after entry; and his signature gives it no additional solemnity or validity. *Clink v. Thurston*, 47 Cal. 29. Where that practice is adopted it is merely to give the clerk surer means of correctly entering what has been adjudged. But when, after the trial and final sub-

mission of the case, the court pronounces a judgment in apt language which finally determines the rights of the parties to the action, and leaves nothing more to be done except the ministerial act of the clerk in entering it, and especially when what the court has pronounced has been entered in the minutes, then the judgment has been rendered, and the rights of the parties established. And such was the case in *Cook v. Cook* whether we take the recitals in the decree entered in 1885, or the entry in the minutes in 1880, as stated in the petition of Richards. In *Peck v. Courtis*, *supra*, no form of judgment had been written or signed by the judge. In that case the court say: "As to the final judgment from which an appeal is taken it appears from the record that 'the cause having come on to be heard before the court on the 22d day of December, 1863, upon the report of the referees, and the court having been sufficiently advised thereon, it was ordered, adjudged, and decreed by the court that the said report of said referees be confirmed, and that judgment be entered according to said report, and that said partition be effectual forever.' The judgment thus rendered on the 22d day of December, 1863, was not in fact 'entered' in the judgment-book by the clerk till July 25, 1864, some six months afterwards. But an appeal from a final judgment must be taken 'within one year after the rendition of the judgment.' The time begins to run from the time when the judgment is rendered, not from the time when it is entered. The rendition and entry of a judgment are entirely different things—the one is to be performed by the court, and must be first in order of time, and the other by the clerk." 31 Cal. 209. In *Genella v. Relyea*, 32 Cal. 160, the court say: "The court announced its judgment, and the order for judgment was entered in the minutes of the court on the 15th of August, 1865. The judgment was therefore rendered, and the time for taking an appeal commenced to run, on that day." In *Telegraph Co. v. Patterson*, 1 Nev. 155, above cited, the court, on rehearing say: "When a judge orders a judgment in a cause, and that order is entered in the journal or minutes of the court, and no further facts are to be ascertained to determine the exact amount and character of that judgment, but there simply remains the clerical duty of entering in the judgment-book that which the court has determined and ordered to be entered, this, in our opinion, is a final judgment from which an appeal lies." Counsel for respondent contends that the case of *Macnevin v. Macnevin*, 63 Cal. 186, is in conflict with the other cases above cited. That case is very meagerly reported, and the precise point under discussion here was apparently not argued by counsel, or considered by the court. The court below in that case announced its decision in favor of defendant, and then made an order vacating certain allowances which it had granted plaintiff for alimony and counsel fees. From this order plaintiff appealed before there had been any entry of the general judgment in the case; and this court held that the order was not appealable as an order made after final judgment. But at that time the Code had been changed so as to provide that an appeal from a final judgment could not be taken until after entry; and all that the court can be considered as having decided in the case was that, as an appeal from a judgment could not be taken until after its entry, therefore, for the purpose of an appeal, no order could be considered as an order made after final judgment which had not been made after the entry of the judgment. In *Condee v. Barton*, 62 Cal. 1, also relied on by respondent, when the court had announced its findings of facts, and its conclusion of law upon said facts that plaintiffs were not entitled to judgment, plaintiffs immediately moved that the conclusion of law be set aside, and that judgment upon the facts found be given for plaintiffs. Thereupon the court ordered that the entry of judgment be stayed until said motion could be heard, and upon the hearing of the motion the court ordered judgment for plaintiffs. Upon appeal this court held that the course adopted by the court below was not erroneous. But it can hardly be said that in that case the court had rendered any judgment at all, because the

retraction was concurrent with the announcement of the first conclusion, and the intended judgment was expressly held in abeyance to await further consideration. And the concluding sentence in the short opinion of this court in that case must be considered with reference to the facts of the case. No such facts appear in *Cook v. Cook*. None of the other cases cited by respondent from this court are in point. The fact that the decree was entered upon the petition of Richards is of no significance. It was the duty of the court to have the judgment entered, no matter by whom its attention was called to the subject. The mere absence of findings would not render a judgment void in any case; and in a case of default findings are not necessary, and form no part of the judgment roll. Code Civil Proc. § 670; *Mulcahy v. Glazier*, 51 Cal 626; *Fox v. Fox*, 25 Cal. 587.

There was no necessity for any notice to Theodore T. Cook before the entry of the judgment. It was the duty of the clerk at any time after the rendition of the judgment to enter it. And the judgment having been rendered in the life-time of the plaintiff Emma Cook, there was no error in entering it after her death. There are abundant English and American authorities to this point; but there is no need of citing them here, because this court has so held expressly in *Franklin v. Merida*, 50 Cal. 289. That case was an action of ejectment. On the 2d of October, 1869, the court made the following order for judgment in favor of plaintiff, and it was entered by the clerk in his book of minutes of the court: "This cause having been heretofore tried before the court without a jury, and submitted for consideration and decision, it is now ordered that plaintiff in this cause have judgment against the defendants for the possession of the premises described in the complaint, together with costs of suit." No further entry was made by the clerk until the 1st day of October, 1874,—five years afterwards,—when he entered up and recorded a formal judgment. An execution, or writ of restitution, was issued on this judgment, and the successors in interest of the defendant Merida were put out. They moved to be restored to the possession; and upon the hearing of that motion it appeared that when the judgment was entered the plaintiff Franklin was dead, and that the judgment had been entered, and the writ issued, at the request of one Van Nest, to whom the title to the land had come through mesne conveyances from said Franklin, deceased. It appeared, also, that the judgment was entered on October 1, 1874, as of that date, and not *nunc pro tunc* as of October 2, 1869, and thereupon the attorney for Van Nest moved to amend the judgment so as to make it appear to be entered as of October 2, 1869, and in like manner to amend the writ of restitution, and the court below allowed the said motions to amend, but denied the application of the successors of the defendant to be restored to possession. Upon appeal the point made was that the judgment was entered after the death of the plaintiff. But this court took the opposite view, and in its opinion uses this language: "There was no necessity for an amendment of the judgment. It was rendered October 2, 1869, in the life-time of plaintiff, and recorded October 1, 1874, after his death. Nor was there any necessity to amend the writ of execution; for though it erroneously recited that the judgment had been rendered on the 1st day of October, 1874, still it otherwise correctly referred to the judgment in such a manner as to identify it. In these respects the order below was erroneous; but we think that, under the circumstances, the motion to restore the defendants to possession was correctly denied. The writ, though issued after the death of judgment plaintiff, and in his name, was, in point of fact, issued and executed at the instance of and for the benefit of Van Nest, who is conceded to be the successor of the judgment plaintiff. Had he, as such successor in interest, applied regularly for the writ in the first instance, the court would have awarded it to him. What has been done is therefore correct in substance, though irregular in point of procedure. It is hardly worth while to turn Van Nest out, when it is clear that he must be immedi-

ately put back into possession." This case is determinative, not only of the point immediately under discussion, but of nearly every point made by respondent in the case at bar. The entry of the judgment in *Cook v. Cook*, on September 8, 1885, was proper, and, perhaps, necessary, in order to furnish the requisite proof of the judgment when it was sought to be introduced as evidence in another proceeding. (It may be well to observe that in the case of a statutory judgment, entered by the clerk upon the rendition of a verdict by a jury, it may be fairly contended that the only judgment is the judgment actually entered by the clerk.)

Our conclusion is that under the circumstances here presented the judgment in the said case of *Emma Cook v. Theodore T. Cook* was rendered on the 23d of April, 1880, and that the divorce between said parties must be held to have been of that date; and that consequently the court below erred in sustaining the objections to the introduction of said judgment roll, and in excluding evidence of the marriage of said Emma Cook and said Richards after said 23d day of April, 1880. Of course, we have no commendation for the neglect of the clerk to enter the judgment in *Cook v. Cook* immediately after it was pronounced, or for the failure of the attorney of the plaintiff in that action to see to it that the judgment was then entered. But many of the most perplexing questions presented here arise out of the want of care, or the want of capacity, of attorneys and other officers of courts. It is the duty of the court, however, to protect the rights of litigants, even against the incapacity of their agents, except where such incapacity has placed those rights beyond the reach of legal justice.

2. The decree of distribution was made in this case on the petition of the administrator. In his petition, after stating what property of the estate there was in his hands, the payment of debts and taxes, and all other matters showing that the estate was in condition to be finally distributed, he further alleges that the deceased left certain other property in the state of New York which came into the hands of the said William W. Richards, which, he alleges, Richards never accounted for; and prays that Richards be cited to account for such property, and that if Richards be adjudged entitled to any portion of said estate, that he be charged with said property left by deceased in said state of New York. To the petition the appellant Miller demurred generally, upon the ground that an action for an accounting against Richards could not properly be united with a petition for final distribution; and specially, to that part which seeks to require Richards to account for the New York property, for want of jurisdiction, etc. The court overruled the demurrer, and found that Richards received certain property left by deceased in New York; but, as the court found that Richards was not an heir, no mention is made of the matter in the decree. We think that the demurrer should have been sustained. We do not see how a petition which goes upon the theory that the administration is ready to be closed, and the estate is in a condition to be finally distributed, can properly include averments and a prayer which start the estate upon a fresh career of litigation; even assuming that the court might have jurisdiction over property left by the deceased in New York, and that in a proceeding for the final distribution of the estate the probate court had jurisdiction to determine such equities as are asserted in the petition, and that the administrator could take a part in favor of one heir as against another. The decree and order appealed from are reversed, and the cause remanded for further proceedings in accordance with this opinion.

We concur: SEARLS, C. J.; PATERSON, J.; SHARPSTEIN, J.

THORNTON, J. I dissent, and adhere to my opinion heretofore filed.

77 Cal. 305

FABRETTI *et ux.* v. SUPERIOR COURT OF SANTA CLARA COUNTY. (No. 12,163.)

(Supreme Court of California. October 29, 1888.)

1. APPEAL—FROM INFERIOR COURTS—QUESTIONS OF LAW.

In California, an appeal on questions of law and fact from a justice's judgment, there having been no trial on issues of fact, must be entertained and decided by the superior court as on questions of law alone.

2. SAME—REHEARING.

The court having thus decided the appeal, a subsequent order on a petition for a rehearing, a proceeding not authorized by Code Civil Proc. Cal. § 980, prescribing the powers of the superior court on appeal, which order sets aside its decision on the ground that it had no jurisdiction, is *coram non judge*, and void.

In bank. Application for a writ of mandate to superior court, Santa Clara county; SPENCER, Judge.

Application by Fabretti and wife for a writ of mandate to compel the superior court of Santa Clara county to entertain and decide an appeal from a justice's judgment.

John Reynolds and W. B. Hardy, for petitioners. Wm. P. Veuve, for respondent.

PATERSON, J. In the case of *Lotti v. Fabretti et ux.*, in the justice's court of Santa Clara county a demurrer to the complaint was overruled by the court; and, the defendants having failed to answer, judgment was rendered in favor of the plaintiff therein. From this judgment the defendants appealed to the superior court on questions of law and fact. No statement of the case was filed. The appeal was properly considered by the court and by the parties as an appeal on questions of law alone. *Railroad Co. v. Superior Court*, 59 Cal. 471; *Myrick v. Superior Court*, 68 Cal. 98, 8 Pac. Rep. 648. The appeal was duly taken on the 5th day of October, 1886. After argument upon the matters contained in the appeal, the court, on September 23, 1886, filed its decision in writing, affirming the judgment of the justice's court, with costs, and a formal judgment in accordance therewith was entered in the superior court in favor of Lotti against Fabretti *et ux.* on the 31st day of December, 1886. On the 3d day of January, 1887, defendants filed a petition for a rehearing and a motion for a new trial; and an order was made by the court staying all proceedings on the judgment until the determination of said motions. The court thereafter granted said petition for a rehearing of the cause; and, the cause being again submitted after reargument by counsel for the respective parties, the court, on the 13th of April, 1887, made the following order therein. "In this cause the court having permitted a reargument, and upon full consideration now orders, adjudgets, and determines that this court has no jurisdiction to either reverse or affirm the judgment of the justice appealed from. It is therefore ordered that the judgment of affirmance heretofore entered in this cause, December 31, 1886, be vacated and set aside, and that this court will proceed no further in this cause on appeal." The learned judge of the court below seems to have based the conclusion stated in his order upon the decisions of this court in *People v. County Court*, 10 Cal. 19, and *Funkenstein v. Elyntter*, 11 Cal. 328; but those cases were decided under section 366 of the practice act, which was omitted from the Code; and it is now settled that if the appeal be taken upon questions of law and fact, when there has been no trial upon issues of fact in the justice's court, the superior court must entertain and decide the appeal as upon questions of law alone. *Railroad Co. v. Superior Court*, *supra*, *Curtis v. Superior Court*, 63 Cal. 435. The action first taken by the court upon the appeal was correct. It passed upon the merits of the appeal, and its judgment thereon is final and conclusive, unless set aside within a reasonable time in some mode authorized by law. A petition for a rehearing is a proceeding unknown to

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the law, or to the practice of the superior court. Section 980, Code Civil Proc. A superior court can set aside its judgment upon an application under section 473 Id., or on motion for a new trial. Neither of these modes was applicable in the case before us, because the judgment was not taken against the defendants therein through their mistake, inadvertence, surprise, or excusable neglect, and there was no issue of fact tried or to be tried, and no trial, within the meaning of section 656, Id. Hayne, New Trial & App. §§ 1, 2, 3. If the court had refused to determine the question or point of law upon which the appeal was taken, and had attempted arbitrarily to divest itself of jurisdiction by a dismissal of the appeal, its order would have been void, (*Hall v. Superior Court*, 68 Cal. 24, 8 Pac. Rep. 509; *Carlson v. Superior Court*, 70 Cal. 628, 11 Pac. Rep. 788;) and its order, attempting to do indirectly what it could not do directly, is, we think, equally invalid. The order is in effect a dismissal of the appeal. It shows upon its face an attempt by the court to divest itself of jurisdiction. The parties were entitled to the judgment of the court upon the merits of the appeal. The court gave them the benefit of its judgment; but subsequently, upon an erroneous conclusion as to its own powers, attempted to set aside its judgment by an order made upon a petition for a rehearing. The order, we think, was *coram non judice*, and void. Of course we must not be understood as saying that the superior court has not the power to set aside any order or judgment it may have made inadvertently or through mistake; but in all cases the order must be made within a reasonable time. *Ex parte Gilmore*, 12 Pac. Rep. 800. The prayer of the petitioners is denied.

We concur: SEARLS, C. J.; MCFARLAND, J.; SHARPSTEIN, J.

77 Cal. 241

BYRNES v. HATCH, Sheriff. (No. 11, 736.)

(*Supreme Court of California*. October 23, 1888.)

1. SALE—DELIVERY—CHANGE OF POSSESSION.

The mortgagor of a crop of hay after hauling it to a warehouse at the request of the mortgagee, it being stored as the property of the latter, transferred it to him by bill of sale in settlement of the mortgage, and he afterwards sold it to plaintiff. Held that the transfer by the mortgagor was sufficient within Civil Code Cal. § 3440, declaring every transfer of personal property, if made by the person in possession or control of it, not accompanied by an immediate delivery, and followed by an actual change in the possession, void, as against his creditors, etc., and that the creditors of the mortgagee alone could question the sufficiency of the transfer to plaintiff.

2. REPLEVIN—EVIDENCE.

In replevin for a crop of hay, which had been sold by the mortgagor to the mortgagee, and by the latter to plaintiff, and on which defendant had levied as the property of the mortgagor, the mortgage and note secured by it are admissible as evidence to show the consideration for the sale by the mortgagor.

Commissioners' decision. In bank. Appeal from superior court, San Mateo county; E. F. HEAD, Judge.

Replevin by James D. Byrnes against J. H. Hatch, sheriff of San Mateo county. From a judgment for plaintiff, defendant appeals. Civil Code Cal. § 3440, provides that "every transfer of personal property * * * is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the thing transferred, to be fraudulent, and therefore void, against those who are his creditors," etc.

Geo. W. Fox, for appellant. Edw. F. Fitzpatrick, for respondent.

BELCHER, C. C. This action was commenced to recover the possession or value of 73½ tons of hay. The defendant, as sheriff of San Mateo county, lev-

ied a writ of attachment, issued against one Pullen, upon the hay; and he justified the taking on the ground that it was then the property of Pullen, and subject to seizure and sale in payment of his debts, and that the plaintiff's claim thereto was false and fraudulent, and was made for the purpose of hindering, delaying, and defrauding the creditors of Pullen. The court below found all the facts, and rendered judgment in favor of the plaintiff. The defendant moved for a new trial, and, his motion having been denied, appealed from the judgment and order. The material facts of the case are as follows: The hay in question was wheat hay, and was raised and harvested by Pullen in 1884. In March of that year Pullen borrowed of one McDermott \$400, and gave him his promissory note for that amount, bearing 1 per cent. per month interest, and a mortgage to secure the payment of the note on all the crop of hay and grain then standing and growing on a certain described farm. In September following Pullen borrowed of McDermott \$150 more, for which he also gave his promissory note. When all the hay had been harvested, by direction of McDermott, Pullen hauled it to a warehouse a few miles distant, and stored it there. It was placed in one end of the warehouse by itself. In October, shortly after the work of hauling and storing was completed, Pullen executed and delivered to McDermott a bill of sale of the hay for the agreed price of \$12 per ton. This satisfied the two notes for borrowed money, and left \$284 due Pullen, which McDermott at once paid him. As the hay was being hauled to the warehouse, and after it was all stored and he had obtained his bill of sale, McDermott told the warehouseman that it was his hay, and to place it in his name on the books. The warehouseman knew of and recognized his ownership of the hay, and on one occasion asked him why he did not sell it. No books were kept at the warehouse, and no written entries were made or receipts issued for property stored there. In December, McDermott sold the hay to the plaintiff, and executed and delivered to him a bill of sale of it. On the next morning after the sale the parties went into the warehouse, and McDermott then pointed out the hay to the plaintiff, and told him he delivered him possession of it. The warehouseman had no notice of this sale until after the action in which the attachment was issued was commenced.

1. The contention of appellant is that the facts shown were insufficient to justify the finding that the plaintiff was the owner and in possession of the property in question when it was attached; and in support of this position it is said that the lien of the crop mortgage continued only so long as the crop remained on the land of the mortgagor, (citing section 2972, Civil Code, and *Waterman v. Green*, 59 Cal. 142,) and that neither the transfer from Pullen to McDermott, nor that from McDermott to the plaintiff, was accompanied by such an immediate delivery, and followed by such an actual and continued change of possession, as is required, by section 3440 of the Civil Code, to pass title as against creditors. We do not think this contention can be sustained. The testimony tended to show that the hay was hauled to the warehouse by Pullen at the request of and as the agent for McDermott; and, this being so, we are not prepared to say that McDermott did not have a lien on the hay, after it was placed in the warehouse, for the full amount of money represented by his note and mortgage. But, however this may be, the transfer afterwards made to McDermott was, in our opinion, sufficient to meet the requirements of the section of the Code cited, and to pass the title as against the creditors of Pullen. Whether the transfer to the plaintiff was accompanied by an immediate delivery, and followed by an actual and continued change of possession, it is not necessary to inquire. The transfer was good as between the parties to it, and only the creditors of McDermott could raise the question of its sufficiency.

2. The court found that the hay was worth \$12 per ton, and estimated it at that value in making up the judgment. It is admitted for appellant that the testimony as to the value of the hay was conflicting, but he insisted that the

finding is against the preponderance of the evidence. There was ample testimony, in our opinion, to sustain the finding.

3. The plaintiff offered, and, against the objection and exception of defendant, the court admitted, in evidence, the notes and crop mortgage executed by Pullen to McDermott. Afterwards the defendant moved to strike this evidence out, on the ground that the exhibits were irrelevant and immaterial; but the court denied the motion, holding that they were at least admissible for the purpose of showing in part the consideration for which the bill of sale between the same parties was executed. These rulings are assigned as error, but we think them proper. In deraigning his own title to the hay, the plaintiff had the right to show all the facts and circumstances tending to show title in McDermott. The exhibits objected to constituted a part of these facts, and were clearly relevant and material to the plaintiff's case. The other points do not require special notice. We find no material error in the record, and therefore advise that the judgment and order be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(77 Cal. 293)

PEOPLE v. DODEL. (No. 20,447.)

(Supreme Court of California. October 27, 1888.)

ASSAULT—WITH DEADLY WEAPON—INSTRUCTIONS—INTENT.

On indictment for an assault with a knife, where the testimony shows a want of ability, attempt, or intent to strike, the refusal of the court to charge that, to constitute an assault, the defendant must have the intent, the ability, and must have made the attempt, to strike, and that, where the assault is charged to have been committed with a deadly weapon, there must have been an attempt to strike with or use the deadly weapon, is error, and is not cured by an instruction that "included in this charge [of an assault with a deadly weapon] is also that of assault, which is an unlawful attempt, coupled with the present ability, to commit a violent injury on the person of another. In an assault which is commonly called a 'simple assault,' if there is no present purpose and no present ability to do an injury, there would be no assault."

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; D. J. TOOHY, Judge.

Indictment against X. Dodel for an assault with a deadly weapon. The jury rendered a verdict of guilty, and the defendant appeals.

Atty. Gen. Geo. A. Johnson, for the State. Davis Louderback, for appellant.

BELCHER, C. C. The defendant was convicted of the crime of an assault with a deadly weapon, and has appealed from the judgment and an order denying him a new trial. The assault was charged to have been committed by defendant with a knife, which he held in his hand, upon the person of one Borgwardt. It appears from the evidence that defendant went into a saloon, kept in the basement of a building in the city of San Francisco, where Borgwardt was employed to assist the barkeeper. After some words defendant drew a knife from his hip pocket, but whether he did this while standing backed up against a post in the center of the room, or while he was going up the stairs leading out of the saloon, does not clearly appear. But the testimony all shows that after the knife was drawn defendant was not at any time near enough to Borgwardt to strike him with it, and that he moved away from Borgwardt, and not towards him; and the testimony fails to show directly that defendant made any attempt to strike with or use his knife. Counsel for defendant presented 12 instructions, and asked that they be given to the jury, but the court refused them all. Two of these instructions read as

follows: "To constitute an assault the defendant must have the intent to strike, the ability to do so, and must have made the attempt to strike." "And where, as in this case, the assault is charged to have been committed with a deadly weapon, there must have been an attempt to strike with or to use the deadly weapon." These instructions stated obviously correct rules of law, and the charge of the court, given at its own instance, did not embrace them in substance or effect. In our opinion, they should have been given, and the court clearly erred in refusing to give them. In justification of the refusal, the attorney general cites from the charge of the court the following clause: "Included in this charge is also that of assault, which is an unlawful attempt, coupled with the present ability, to commit a violent injury on the person of another. In an assault which is commonly called a 'simple assault,' if there is no present purpose, and no present ability, to do an injury, there would be no assault." But this, instead of curing the error committed by the refusal, seems rather to have aggravated the wrong done by it to the defendant; for it in effect told the jury that, in case of a simple assault, there must be present purpose and present ability to do an injury, in order to constitute the offense, leaving them to infer that the rule did not apply to an assault with a deadly weapon. It is very doubtful whether some of the other instructions refused were covered by the charge; but, without passing upon the other points presented, we advise that, for the error above noted, the judgment and order be reversed, and the cause remanded for a new trial.

I concur: HAYNE, C.

I concur in the conclusion reached: FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

3 Cal. Unrep. 24

CITY OF EUREKA v. CROGHAN. (No. 11,695.) *

(Supreme Court of California. October 27, 1888.)

DEDICATION—PUBLIC STREET—ACCEPTANCE.

The conveyance of a tract of land within the corporate limits of a town, by deed describing the tract as bounded by the lines of certain designated streets, if projected, and as being the N. W. $\frac{1}{4}$ of a certain designated block, as laid down on the official map of said town, together with five years' use of the projected streets by the public, constitutes a complete dedication of such streets to public use, without a formal acceptance by the town.¹

Commissioners' decision. Department 1. Appeal from superior court, Humboldt county; J. J. DE HAVEN, Judge.

Ejectment by the city of Eureka against Barney Croghan to recover a tract of land claimed by said city as a street. Judgment was rendered for plaintiff, and defendant appeals.

E. M. Wilson, (*Horace L. Smith*, of counsel,) for appellant. *S. M. Buck*, for respondent.

FOOTE, C. This is an action of ejectment, brought by the city of Eureka to recover from the defendant a piece of land which it is claimed is a street of said city. The principal point made by the defendant for the reversal of the judgment and order refusing a new trial is that the findings are not supported by the evidence. It is claimed that the dedication was not attempted to be made, and, if attempted, was revoked, and after revocation was never formally accepted by the city. The case of *Hayward v. Manzer*, 70 Cal. 476, 13 Pac. Rep. 141, cited by the appellant as being in favor of his contention

¹See note at end of case.

*Reversed in banc. See 22 Pac. 693, 81 Cal. 524.

here, is not in point. The facts in that case were materially different from those involved here. The language of the judge below, in reviewing the facts showing a dedication of the land in controversy here as a street, is so decisive that we quote and adopt it: "The question to be decided in this case is whether or not the land described in the complaint has been dedicated to public use as a street. (1) On April 7 1870, John Cushing, who was then the owner of the land in controversy, together with other land, executed to one Leary a deed of land thus described: 'Commencing at a point distant, in a southerly direction, 600 feet from the N. W. corner of block 108, as laid down on the official map of the town of Eureka, made by J. S. Murray, and filed in the office of the county recorder of said county, July 28, 1859, said point of commencement being the N. W. corner of a block of land bounded on the north and west by Tenth and F streets, if said streets were projected; thence running south along the east line of F street, if said street were extended southerly, 120 feet; thence easterly at right angles with said F street, 120 feet; thence northerly, and parallel with F street, 120 feet; thence westerly, along the south side of Tenth street, 120 feet to the place of beginning,—being the north-west quarter of the block,' etc. What is the legal effect of this deed? Does it or did it operate as a dedication of the land adjacent on the north, as a street, under the well-known rule, more than once announced by the supreme court of this state, that, where a lot is sold as fronting on or bounded by a certain space designated in the conveyance as a street, the use of such space as a street passes as appurtenant to the grant, and vests in the grantee, in common with the public, the right of way over such street? *Breed v. Cunningham*, 2 Cal. 369; *People v. Blake*, 60 Cal. 499. If the deed can be construed as conveying a parcel of land bounded on the north by a line which would be a continuation of Tenth street if such street were extended, then it could not be said that it described the land sold as fronting on or bounded by a street. But we must look at every part of the description, and not alone to the words 'if said streets were projected,' in order to grasp the true meaning and legal effect of this deed. In it we find other words of description having no doubtful signification. The point of commencement is stated to be the 'N. W. corner of a block of land bounded,' etc.,—then giving the calls; thence to the place of beginning. The land conveyed is further described as the 'north-west quarter of the block.' These words, taken in connection with the other words of the deed, are controlling, and fix its meaning definitely. This was a sale of land within the corporate limits of a town, now city. When we speak of a block of land in a town or city, reference is always made to a square or parcel of land inclosed by streets, whether occupied by buildings or composed of vacant lots. The words, as applied to land in a town, has no other meaning. Calling this land the north-east quarter of a block necessarily carried with it the assertion that it was the north-west quarter of a tract of land surrounded by spaces known as 'streets.' I think the deed must be construed as bounding the land therein described on the north side by a street or space of the same width, and what would be a continuation of Tenth street, if the municipal authorities should extend or open the same; and, so far as the grantor was concerned, operated as a dedication of the land to the public, he being at the time the owner of such space." It also appears in evidence that, for more than five years prior to the obstruction of this street by the defendant, it had been uninclosed, and had been used as a street by the public for all the purposes for which they had occasion to do so. To make the dedication complete, no formal acceptance by the city of Eureka as a corporation was necessary. *San Leandro v. Le Breton*, 72 Cal. 175, 13 Pac. Rep. 405, and cases cited. We are of opinion that no prejudicial error is shown by the record, and advise that the judgment and order be affirmed.

I concur: BELCHER, C. C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

NOTE.

DEDICATION—OF STREET—ACCEPTANCE BY PUBLIC. A deed, describing the land conveyed as bounded by a street, also conveyed all the interest of the grantor in the land in said street. The street had never been opened, and was covered by buildings, of which the grantor, and the grantee after him, had possession. Held, in proceedings to acquire title for the public, that there had been no dedication of the land in the street. In re One Hundred and Sixtieth St., 1 N. Y. Supp. 237. The act of dividing up a parcel of land into lots, streets, and alleys, and selling lots with clear reference to a map or plan representing such divisions, is an immediate and conclusive dedication of such streets and alleys to the use of the purchaser and of the public. *Schneider v. Jacob*, (Ky.) 5 S. W. Rep. 350, and cases cited in note.

To make a highway by dedication there must be the assent of the owners of the land to its appropriation for a public highway, and its use by the public for such purpose, and for such a length of time, that the public accommodation and private rights might be materially affected by an interruption of the enjoyment. The owner's intention to dedicate must appear, and the acceptance of such dedication, by using it, on the part of the public, must also appear. Where these two facts concur, the dedication is complete. *Union Co. v. Peckham*, (R. I.) 12 Atl. Rep. 130; *City v. Williams*, (Tex.) 6 S. W. Rep. 860. The dedication of a public highway may be presumed from use. *Howard v. State*, (Ark.) 2 S. W. Rep. 331. A presumption of acceptance may be drawn from common user of the highway, and from actual assumption of care and control over it by the public authorities. *State v. Eisele*, (Minn.) 33 N. W. Rep. 785. Uninterrupted use of a public road for 10 years will create a presumption of dedication; but a much shorter period will be sufficient where the act of the owner from which the dedication is inferred is clear and unequivocal, and accompanied, or immediately followed, by public use. *Rube v. Sullivan*, (Neb.) 37 N. W. Rep. 666. The fact that lots embraced in a platted subdivision are assessed as such by the municipality does not show an acceptance by such municipality of the streets laid out in the plat, where there is strong evidence in the case that there was no acceptance. *Hamilton v. Railroad Co.*, (Ill.) 15 N. E. Rep. 854.

On the general subject of the dedication and acceptance of a highway, see *Price v. Town of Breckenridge*, (Mo.) 5 S. W. Rep. 20, and note; *Railroad Co. v. Lee*, (Tex.) 7 S. W. Rep. 857; *Miller v. Town of Aracoma*, (W. Va.) 5 S. E. Rep. 148; *Cotter v. City of Augusta*, (Ga.) 6 S. E. Rep. 180; *State v. Birmingham*, (Iowa.) 38 N. W. Rep. 121; *City of Chicago v. Stinson*, (Ill.) 17 N. E. Rep. 43; *City of Chicago v. Hill*, id. 46; *Spir v. New Utrecht*, 2 N. Y. Supp. 426.

77 Cal. 236

BROWN v. ANDERSON. (No. 11,401.)

(Supreme Court of California. October 23, 1888.)

1. CONTRACT—CONSTRUCTION.

Plaintiff agreed to sell to defendant, for a gross sum, "all the prunes and other fruits that may grow or be produced during the year 1884," on a certain farm. Held, that there was no undertaking on the part of plaintiff that the crop should be of any particular quantity.

2. SAME.

A portion of the purchase price was to be paid "when the crop is taken off at the end of the year." Held, that the end of the fruit season was meant, and not the end of the calendar year.

Commissioners' decision. In bank. Appeal from superior court, Santa Clara county; D. BELDEN, Judge.

This was an action on contract, brought by S. H. Brown against J. Z. Anderson. There was a trial to the court, and judgment for plaintiff in the sum of \$1,734.38. Defendant appeals.

T. H. Laine, for appellant. J. F. Wendell, for respondent.

HAYNE, C. Action to recover a balance due on a contract for the sale of fruit. The material portions of the contract were as follows: "I have sold to J. Z. Anderson, of San Jose, all the prunes and other fruits that may grow or be produced during the year 1884 upon about fifty acres of land purchased by me of A. G. Higgins, and situate in Santa Clara county, for the full sum or price of \$2,666.23, payable as follows: \$100 on this date, \$900 on or before January 1, 1884, and the balance when the crop is taken off at the end of the year. * * * I am to cultivate and take good care of the trees, and Anderson is to have the privilege of entering upon said land for the purpose of pick-

ing, drying, and caring for the fruit, and removing the same. * * *

The defendant made the first payments, but on July 30, 1884, gave written notice that he rescinded the contract. This attempted rescission was based upon the charge that the plaintiff had not performed his covenant to take good care of the trees. But the finding is that this charge was not true; that the plaintiff "properly cultivated" the orchard, and "well and skillfully pruned" the trees. The court further finds that the crop "proved an almost total failure. There should have been in an ordinary season eight tons of prunes. There was not in fact over two tons." The defendant never picked or cared for the fruit, or removed any part thereof, except a few cherries. The action was commenced on October 29, 1884, to recover the last payment. The trial court rendered judgment in favor of the plaintiff, and the defendant appeals from the judgment upon the findings.

We think the judgment was right. It is apparent that there was no undertaking on the part of the plaintiff that the crop should be of any particular quantity. The contract was simply that defendant should have all the fruit "that may grow or be produced during the year 1884." He took his chances as to quantity. And it is not necessary to consider whether there was any implied warranty as to quality, because no inferiority of quality was shown. For all that appears to the contrary, the two tons of prunes of which the finding speaks may have been of excellent quality. If this were not the case, the defendant should have proved it. But the fact does not appear; and the learned counsel for the appellant makes no point in relation to inferiority of quality in his brief. The case, therefore, stands thus: The plaintiff did what he was required to do by the contract, and the defendant refused to receive the crop, although it was what he had bargained for.

It is argued for the appellant, however, that the action was premature; that the contract provided that the payment sued for was to be made "when the crop is taken off at the end of the year;" and that the crop was not taken off, and that the "end of the year" had not arrived when the suit was brought. But the provision was that the defendant should pick, dry, and care for the fruit, and remove the same. It was his duty to take off the crop, and it is perfectly clear that he cannot rest his defense upon his own neglect of duty. The question, then, is whether the "end of the year" had arrived when the suit was brought. In this regard the argument for the appellant assumes that the contract means a "calendar" year. But we do not think so. A year is a period of time; and it does not necessarily mean the period commencing with the 1st day of January and ending with the 31st day of the succeeding December. When the term is used in a contract its meaning is to be determined from the connection in which it is used, and the subject-matter of the contract. *Knodel v. Baldridge*, 73 Ind. 54. In the present case the term cannot mean a calendar year, because the evident meaning is that the crop is to be taken off (by which we understand that it was to be gathered) "at the end of the year;" and the court will take notice that the end of the calendar year was long after the season for gathering the crop. As remarked by the counsel for the respondent, the parties could not have intended such an untimely "taking off;" and it would be an entirely strained and uncalled-for construction to say that they intended that the crop should be gathered and left upon the premises until the end of the calendar year. If the end of the calendar year was not intended, it is unnecessary to inquire whether the parties meant a year from the date of the contract, or the end of the cropping year or fruit season. In either view, the action was not premature. We therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

77 Cal. 218

MORROW v. GRAVES *et al.* (No. 11,455.)

(Supreme Court of California. October 23, 1888.)

1. FRAUDULENT CONVEYANCES—DEED TO CREDITOR—VALIDITY.

In an action to set aside a conveyance as in fraud of creditors, it appeared that the grantee had advanced money to and indorsed for the grantor, for which the former alleged the conveyance to have been made; that he did not record his conveyance for nine months afterwards; that he knew nothing of the land, or its value, that he received some rent after the conveyance, and sold the land for a less sum than it cost him, according to his own statement. He knew that the grantor owed plaintiff, but did not know how much. The grantor and grantee were very intimate friends. There was evidence of the grantee's admissions that he held a deed for grantor's land, and that the latter owed him nothing; but such statement, if made, might as well have applied to another transaction prior to and unconnected with the one in question. *Held*, that the finding that the deed was for valuable consideration, and not fraudulent, was sustained by the evidence.

2. SAME—FAILURE TO RECORD DEED.

In such case it is immaterial that the deed, though made before, was not recorded until after the levy of plaintiff's attachment on the land in question.

3. SAME—RIGHTS OF BONA FIDE PURCHASERS FROM FRAUDULENT GRANTEE.

Though the deed in question were fraudulent and void as to creditors, the conveyance by the fraudulent grantee to his co-defendants, for valuable consideration without notice of the fraud, would be valid, as upon the record the title stood in their grantor, although they were aware of the levy of the attachment lien.¹

Commissioners' decision. In bank. Appeal from superior court, Alameda county; N. HAMILTON, Judge.

Action by Robert F. Morrow against Robert N. Graves, W. W. Wynn, and S. Anspacher, to set aside an alleged fraudulent deed made by one D. M. Tyrrell to said Graves. On the 23d day of August, 1882, Tyrrell conveyed to Graves a tract of 160 acres of land in Alameda county, by deed recorded in May, 1883. Upon the trial Graves testified that Tyrrell was indebted to him in about the sum of \$1,511; that at different times in 1881 and 1882 he paid for Tyrrell, according to a previous agreement, different sums, to the Quijotoa Mining Company, on assessments for stock subscribed for by Tyrrell, of which Tyrrell repaid \$1,000, leaving \$1,511 still due, for which, and \$200 cash then paid Tyrrell by Graves, the land was conveyed. He also testified that the certificates of stock owned by Tyrrell were in his possession, left with him merely to keep. The \$1,000 repaid him by Tyrrell was paid by stock sold by Graves on Tyrrell's order. At the time of the trial the shares of stock, of which Tyrrell had \$25,000, were worthless. Graves further testified that he was indorser for a note of \$1,000 owed by Tyrrell, and that there was a mortgage on the same land to secure the note; that he took the deed in full of Tyrrell's entire indebtedness at that time, without inquiring whether the land, of which he knew nothing, was worth the money or not; and that the note was indorsed August 19, 1882. He received, after the conveyance, \$40 rent from a tenant on the land. A. K. Masten testified that he acted as agent in procuring the \$1,000 loan for which Mr. Graves indorsed; and also, at the instance of Graves, sold the land for him to Wynn and Anspacher, acting wholly for Graves, without any direction or consultation with Tyrrell. The price of the land was \$2,000, Graves agreeing to assume the mortgage. The purchasers paid the money to Graves. Wynn and Anspacher knew of the attachment, but there was no evidence that they knew of the fraud, if any, in the conveyance. W. L. Lyle testified that Graves told him that Tyrrell had such confidence in him that he (Graves) held a deed to Tyrrell's ranch, which Tyrrell had never asked him for, though Tyrrell did not owe him anything. On cross-examination, the witness stated that this conversation occurred in October, 1881, and that he did not remember whether it was a deed or mort-

¹ A bona fide purchaser from a fraudulent grantee will be protected, *Halverson v. Brown*, (Iowa,) 38 N. W. Rep. 123; also a purchaser with notice from one without notice, *Roll v. Rea*, (N. J.) 12 Atl. Rep. 905.

gage that Graves spoke of. Mr. Graves also testified that there had been business transactions before between them, in which Tyrrell owed him; and that in 1879 Tyrrell mortgaged the same land to him for \$3,000, but repaid him before the stock assessments were paid, creating the indebtedness for which the deed was made. Plaintiff's debt against Tyrrell was about \$9,000, and Graves knew that Tyrrell owed him, but did not know how much, or the particulars. It was admitted that Graves and Tyrrell were bosom friends, having unbounded confidence in each other. All this evidence was on behalf of the plaintiff, and no other was introduced, except the note, mortgage, and deeds referred to. The court found for defendants, and rendered judgment accordingly. Plaintiff appeals.

Ben Morgan, for appellant. *H. A. Powell*, for respondents.

HAYNE, C. Action to set aside certain deeds as in fraud of plaintiff's rights as a judgment creditor. The debtor, one Tyrrell, who was the owner of the property, conveyed it to the defendant Graves by a deed which was made before the commencement of the plaintiff's attachment suit against Tyrrell, but not recorded until afterwards. After the recording of the deed, Graves, for valuable consideration, conveyed to the defendants Anspacher and Wynn. Judgment passed for the defendants, and the plaintiff appeals. The court below found that the deed to Graves was for valuable consideration, and not for the purpose of hindering, delaying, or defrauding the creditors of Tyrrell; and we cannot say upon the record that this finding is not sustained by the evidence. The fact that this deed was not recorded until after the plaintiff's attachment proceedings against Tyrrell is immaterial. *Plant v. Smythe*, 45 Cal. 161; *Hoag v. Howard*, 55 Cal. 564. But if it were otherwise,—if the deed to Graves be assumed to have been in fraud of the rights of creditors,—the objection would not reach the deed to Anspacher and Wynn. At the time of this deed the title stood of record in the name of Graves. They purchased from him for valuable consideration, and are not shown to have had any notice of the alleged fraudulent character of the deed to Graves. Knowledge of the existing attachment lien in the case of *R. F. Morrow v. D. M. Tyrrell*, is quite a different thing; for the title did not then stand in the name of Tyrrell. We therefore advise that the judgment and order denying a new trial be affirmed.

We concur: **BELCHER, C. C.; FOOTE, C.**

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

77 Cal. 213

PEOPLE v. CARTY. (No. 20,381.)

(*Supreme Court of California. October 23, 1888.*)

1. STENOGRAPHERS—CERTIFICATE.

Under Pen. Code Cal. § 869, subd. 5, providing that the short-hand reporter shall transcribe into long-hand his short-hand notes, and certify and file them, and that they shall be certified as being a correct statement of the testimony and proceedings in the case to entitle them to be admitted in evidence, a certificate merely that the document is a "correct transcript of the short-hand notes taken by me herein," without further stating that the notes are correct, is insufficient, and the defect cannot be supplied by parol.

2. SAME—PRESUMPTION.

The certificate of an official short-hand reporter, which is insufficient under such statute, is not aided by any presumption as to the correctness of official action.

3. SAME—ADMISSION OF NOTES IN EVIDENCE.

Where a short-hand reporter testifies, merely in aid of his certificate, that the notes taken by him are correct, and does not refresh his memory from them, and testify as to what occurred when the notes were taken, the evidence contained in them should be excluded.

4. CRIMINAL LAW—TRIAL—ABSENCE OF PROSECUTING WITNESS—DEPOSITION.

Where a subpoena for the prosecuting witness, with a return showing that he cannot be found in San Francisco, is offered, and after a delay of seven days, for additional search, subpoenas issued to eight other counties, with returns showing that the witness cannot be found, are offered, sufficient foundation is laid for the introduction of the witness' deposition taken before the committing magistrate.

5. SAME—ARGUMENT OF COUNSEL.

It is proper for the court to refuse to permit counsel for defendant in a criminal case to argue the law in his opening to the jury.

6. SAME—FORMER JEOPARDY.

A conviction for manslaughter reversed on appeal does not sustain pleas of former acquittal and once in jeopardy, on a retrial for murder.¹

SEARLS, C. J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; D. J. MURPHY, Judge.

Indictment of Luke Carty for murder. Defendant was convicted of manslaughter on the first trial, but on appeal the judgment was reversed. 3 Pac. Rep. 609. On a subsequent trial defendant was again convicted, and brings this appeal. Carl Anderson was the prosecuting witness; and as a foundation for the introduction of his deposition, taken before the committing magistrate, a subpoena, with a return, showing that he could not be found in San Francisco, was offered. Trial was then postponed seven days for further search, and on resumption thereof eight subpoenas issued to other counties, with returns showing that the witness could not be found, were offered. The court admitted the deposition. T. R. Harold was a witness for defendant, and his deposition was excluded. Defendant pleaded once in jeopardy and former acquittal; and to sustain these showed his former conviction of manslaughter, reversed by the supreme court, but the pleas were overruled. Defendant was convicted; whereupon he appeals.

Henry E. Highton, for appellant. *Geo. S. Johnson*, Atty. Gen., for respondent.

HAYNE, C. The defendant was convicted of manslaughter, and sentenced to five years' imprisonment in the state prison, and he brings this appeal. Upon the trial the prosecution offered in evidence the short-hand reporter's transcript of his notes of the testimony of one Anderson, given at the examination before the committing magistrate. The certificate attached to this transcript was as follows: "I hereby certify that the foregoing is a full, true, and correct transcript of the short-hand notes taken by me herein. ERNEST A. GIRVIN. Official Short-Hand Reporter of Police Judge's Court Number Two." Among the objections taken to this document, one was that it was not properly certified. The reporter was then called as a witness, and testified that the document was a correct transcript of the notes taken by him of the testimony and proceedings at the examination before the magistrate. There was no attempt to have him refresh his memory from the writing, and then testify as to what occurred at the examination. His testimony relates merely to the correctness of the document. After hearing what he had to say on this subject, the court overruled the objections, and admitted the transcript, and the defendant excepted. We think this was error. The provision of the statute is that the reporter shall "transcribe into long-hand writing his said short-hand notes, and certify and file the same;" and that "when written out in long-hand writing, and certified as being a correct statement of such testimony and proceedings in the case, shall," etc. Pen. Code, § 869, subd. 5. What this statute requires the certificate to state is plainly written. It must state that the transcript is "a correct statement of such testimony and proceedings." In other words, there must be an affirmation by the re-

¹As to what will support a plea of former jeopardy, in general, see *People v. Bentley*, (Cal.) 18 Pac. Rep. 799, and note; *Ex parte Fenton*, (Cal.) *ante*, 267, and note; *Com. v. Fitzpatrick*, (Pa.) 15 Atl. Rep. 466, and note.

porter, not merely of the correctness of the transcribing from the original notes, but also that such notes were correct. The certificate before us relates simply to the correctness of the transcribing. Its language is that the document in question is "a full, true, and correct transcript of the short-hand notes taken by me herein." There is no affirmation that such notes were correct, and we are left to guess at what the notes were. Beyond the fact that the notes were taken "herein"—by which we understand that they were taken at the examination before the magistrate—we can gather nothing as to their character. For all that appears to the contrary, they may have been purely or partly a freak of the reporter's imagination. It is not upon such evidence as this that a man can be deprived of his life or liberty. The attempt to supply the defects in the certificate by parol evidence did not help the matter. The statute requires a written certificate. It says the reporter shall "transcribe into long-hand writing his said short-hand notes, and certify and file the same." Now, if in any case there could be an oral "certificate," it is perfectly manifest that such a thing could not be "filed." The provision of the statute being for a written certificate, the trial court was not authorized to hold that an oral one would do as well.

The argument of the attorney general that the reporter was an officer, and that the correctness of official action is to be presumed, proves too much. If allowed to prevail, it would do away with the necessity of any certificate whatever, in the face of a statute which explicitly requires one.

It is to be observed that there was no attempt to have the reporter, who was there on the stand, refresh his memory, and then testify as to what occurred at the examination, which would have been a perfectly practicable course. See Code Civil Proc. § 2047; and compare *Reid v. Reid*, 73 Cal. 209, 14 Pac. Rep. 781. The deposition was introduced as of itself sufficient to show the testimony of Anderson, and there was no other evidence thereof. The case of *People v. Cunningham*, 66 Cal. 672, 4 Pac. Rep. 1144, and 6 Pac. Rep. 700, 846, is not at all in conflict with the foregoing. In that case the opinion places the admissibility of the testimony "upon the admissions of the defendant's counsel;" and the admissions referred to are shown by the record in that case (which we have examined) to be, among other things, that "the reporter, if present, would testify to what was in his written notes as his recollection of said witnesses' statements then made." "The presence of said reporter was waived. The written notes were admitted to be his recollection of said testimony." See page 67 of the record in *People v. Cunningham*. Upon this admission no question as to a certificate could arise, and the briefs in the case show that no such question was argued. The opinion, therefore, does not touch upon the question before us, and, besides this, it was not concurred in by a majority of the court.

As to the other matters argued, we think the action of the court was correct. Sufficient foundation was laid for the introduction of the testimony of Anderson. There was no sufficient showing of diligence as to Harold. The court properly refused to permit counsel to argue the law to the jury in his opening address; and it properly overruled the plea of once in jeopardy and former acquittal. *People v. Keefer*, 65 Cal. 235, 3 Pac. Rep. 818. We therefore advise that the judgment and order denying a new trial be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying a new trial are reversed, and the cause remanded for a new trial.

SEARLS, C. J., dissenting.

77 Cal. 263

GRANT v. HEVERIN *et al.* (No. 11,166.)

(Supreme Court of California. October 24, 1888.)

TRUSTS—ASSIGNMENT BY TRUSTEE—SUIT BY ASSIGNEE—PARTIES.

Where a bond is assigned at the instance and request of a third person, who pays the consideration, the assignee holds in trust for him and his estate, and a subsequent assignee occupies the same relation, and is the real party in interest to sue on the bond. Overruling *Grant v. Heverin*, 18 Pac. Rep. 647. THORNTON, J., dissenting.

In bank. On rehearing. For former opinion and statement, see 18 Pac. Rep. 647.

M. C. Hassett, for appellants. *Mich. Mullany*, for respondent.

SHARPSTEIN, J. That John Hughes, if he had not assigned the undertaking sued on in this action, might have maintained an action against the defendants, is not disputed; but, before any action was brought on it, Hughes assigned it to Mullany, and Mullany to the plaintiff herein. The assignment from Hughes to Mullany was made at the instance and request of John Grant, since deceased, who paid the consideration thereof. After the death of John Grant, Mullany assigned to the plaintiff, who occupies, in our opinion, the same position that Mullany would have occupied if he had not assigned. We think that Mullany held the assignment before the death of John Grant in trust for him, and after his death in trust for his estate; and that the plaintiff, since the assignment to her, has held it in trust for such estate. And yet we think the plaintiff is entitled to maintain an action upon the undertaking as "the real party in interest." Pomeroy says: "It is now settled by a great preponderance of authority, although there is some conflict, that if the assignment, whether written or verbal, of anything in action, is absolute in its terms, so that by virtue thereof the entire apparent legal title vests in the assignee, any contemporaneous, collateral agreement by virtue of which he is to receive a part of the proceeds, 'and is to account to the assignor or other person for the residue, or even thus is to account for the whole proceeds, or by virtue of which the absolute transfer is to be made conditional upon the fact of the recovery, or by which his title in any other similar manner is partial or conditional,' does not render him any the less the real party in interest. He is entitled to sue in his own name, whatever collateral arrangements have been made between him and the assignor respecting the proceeds. The debtor is completely protected by the assignment, and cannot be exposed to a second action brought by any of the parties, either the assignor or other, to whom the assignee is bound to account." Pom. Rem. § 132. Accepting this, as we do, as a clear and correct explication of the law, we cannot do otherwise than hold that the plaintiff was the real party in interest in the undertaking sued on in this action. That being so, no material error was committed by the court below, and it follows that the judgment and order should be affirmed. Judgment and order affirmed.

We concur: SEARLS, C. J.; MCFARLAND, J.; PATERSON, J.

THORNTON, J. I dissent. I adhere to the opinion drawn by me in this case when in department 2. The evidence shows clearly that Mullany had no interest in the undertaking assigned to him but to hold it for John Grant. He thus became John Grant's trustee or agent, and, if either, he could not assign without the consent of Grant. I know of no rule of law which empowers an agent without authority of his principal to substitute another agent in his place, or a trustee by his conveyance or assignment to put another person in his place as trustee without the consent of the beneficiaries. Mrs. Grant, the plaintiff, was not an innocent purchaser. The evidence on Cal. Rep. 16-19 P.—63

this point is clear and distinct that she paid nothing for the thing assigned to her. She could not then be an innocent purchaser, but took with notice of all outstanding equities. Mullany could maintain the action, but his assignee could not. As to the question of pleading that the plaintiff is not the real party in interest, it is set up in the answer of the defendant Mallon that the plaintiff is not the real party in interest, and that Mullany is. The answer in this regard is sufficient. The citation from Pomeroy on "Remedies and Remedial Rights," § 132, applies as between Hughes, Mullany's assignor, and Mullany. In my judgment it has no application between Mullany and the plaintiff.

77 Cal. 287

HILL v. FINIGAN. (No. 9,992.)

(Supreme Court of California. October 24, 1888.)

1. PLEDGE—CONVERSION BY PLEDGEE—RATIFICATION.

In an action by a pledgeor against a pledgee for conversion of the pledged property, by selling it without public notice, and purchasing it himself, the defense being that the plaintiff did not elect to avoid the sale within a reasonable time after being informed thereof, and instruction that if plaintiff did not, within a reasonable time after learning thereof, object to said sale, he thus ratified it, and the jury should find for defendant, is not erroneous, though in strictness a ratification implies affirmative action; as the effect of the instruction is that, if plaintiff did not in a reasonable time elect to disaffirm the sale, he thereby lost his right to do so, and the verdict should be for defendant.

2. SAME—ELECTION BY PLEDGEOR.

In such case an instruction that if the jury believe the property was offered at public auction without notice, and purchased by defendant for a fair price, that a higher price was not then and there obtainable, and that if plaintiff, knowing the facts, made no objection to the sale, but commenced negotiations with defendant for a repurchase of the property, he thus ratified the sale, and they should find for defendant, is correct, as such facts sufficiently manifest plaintiff's election to treat the sale as valid.

3. SAME.

Such an instruction does not invade the province of the jury in directing them to draw the inference of ratification from the enumerated facts, as, under the circumstance, the word "ratification" means only an election not to disaffirm the sale by which plaintiff was bound; and such an election is a legal inference, and not a conclusion of fact.

4. SAME—PLEDGEOR'S IGNORANCE OF THE LAW.

Whether such an instruction should have been qualified by a statement that a knowledge of the law governing plaintiff's rights in the premises was an essential element of a ratification is immaterial, as there was no evidence of ignorance of the law, and the contrary is presumed.

5. SAME—DISAFFIRMANCE.

The evidence of plaintiff himself being that in a day or two after the sale, upon defendant serving him with a statement thereof, he disaffirmed it, and denied defendant's right to sell the stocks and diamonds, it was not prejudicial error to instruct that the conversion, if any, took place at the time the statement was served, ignoring plaintiff's right to elect whether he would treat the sale as a conversion, and assuming that the conversion did take place then; such an assumption being in plaintiff's favor, as it was necessary that he elect to disaffirm the sale within a reasonable time, and, had the evidence been undisputed that the conversion did not occur until some two months later, when a formal demand and refusal was made, the trial court might properly have instructed, as a matter of law, that plaintiff did not elect to disaffirm the sale in time.

6. SAME.

Nor was it error to assume in said instruction that plaintiff had been served with a statement of account of the sale by defendant, as it was undisputed that he was served with a statement, although plaintiff denied the receipt of the same statement testified to by defendant, admitting the receipt of another near the same time, and of similar import.

7. TROVER AND CONVERSION—DAMAGE—PRESUMPTION.

An instruction that the presumption under Civil Code Cal. § 3336, that the detriment to personal property by its conversion is its value at the time, or, if the action is prosecuted with reasonable diligence, the highest market value of the property

at any time between the conversion and the verdict, is disputable, is harmless error to plaintiff, if error at all, where there is no evidence tending to rebut such presumption.

In bank. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Action by John Hill against P. A. Finigan for the conversion of certain stocks and diamonds pledged by plaintiff to defendant. Verdict, and judgment for defendant. Plaintiff appeals. For opinion on former appeal, see 62 Cal. 439. Civil Code Cal. § 3336, provides that the detriment to personal property by its conversion shall be presumed to be its value at the time of conversion, with interest; or, if the action be prosecuted with reasonable diligence, the highest market value at any time between the conversion and the verdict, without interest, at the option of the injured person.

Stanly, Stoney & Hayes, for appellant. *Garber & Bishop*, for respondent.

PER CURIAM. Action for damages for the conversion of certain mining stock and diamonds. This property was pledged to secure the payment of money advanced by defendant at the request of plaintiff. Payment not having been made, the pledgee caused the property to be sold to satisfy the debt. The grounds of objection to the sale are that, although notice of the sale was given to the pledgeor, none was given to the public, and that the pledgee himself was the purchaser at the sale. The defense was that the want of notice to the public was at the pledgeor's request, and to save him from expense, and that he did not elect to avoid the sale within a reasonable time, but, upon being informed of the facts, ratified and confirmed it. The jury found a verdict for the defendant, and the plaintiff appeals. The principal points made for the appellant relate to the instructions.

1. It is claimed that the court erred in giving the following instruction: "If the jury find from the evidence that prior to June 13, 1878, Hill agreed with Finigan that the sale should be made without other or further notice to the public, or to him, than such as Hill already had, and that Finigan thereupon caused the sale to be made, and became a purchaser thereat, and that afterwards Hill, upon being informed of the fact that Finigan had purchased the property at such sale, did not, within a reasonable time, object to such purchase by Finigan, then you will find that Hill ratified the sale, and it thereby became valid and binding, and your verdict will be for the defendant." The argument against this instruction is, in the first place, that ratification is a fact, and that therefore it was improper for the court to tell the jury that they should infer it from other facts; and, in the second place, that such other facts were not sufficient to support the inference which the court undertook to draw. But we think the instruction was proper. The substance of it was that if the jury believed that there was unreasonable delay they must find a verdict for the defendant. This included everything that was necessary for them to know in this regard. It was not necessary to tell them why this was so, and, if there was any inaccuracy in stating the grounds of the rule laid down for their guidance, it was manifestly harmless. It is therefore immaterial to consider whether it is strictly accurate to say that unreasonable delay would amount to a ratification. We are inclined to think that in strictness a ratification implies some affirmative action, and that, if any reason were to be given to the jury for the explicit and positive directions embodied in the instruction, it would have been better to have said that the pledgeor had a right of election to treat the sale as invalid, and that he would lose this right by failing to exercise it within a reasonable time. But it is unnecessary to express an opinion upon this. The direction to find a verdict for the defendant, if they believed that there was unreasonable delay, excluded the possibility of misapprehension on their part, and we think it was correct as a matter of law. The sale being voidable merely, there must be some period within

which the pledgeor must make his election as to whether he will avoid it or not. He cannot wait for the whole period of the statute of limitations, speculating upon the changes of the market. *Hayward v. Bank*, 96 U. S. 611. And this is a rule of law, and not an inference of fact. The learned counsel for the appellant will hardly contend that the pledgeor can wait an unreasonable time, and, if not, why is it not proper to tell the jury so? What constitutes an unreasonable time is doubtless a question which may involve many elements. Possibly it would be advisable in many cases for the judge to enlarge somewhat upon the elements of this question, but, if the appellant had desired this, he should have requested instructions in relation to it. In some cases the facts might be such as to render it proper for the judge to instruct the jury as a matter of law that the delay was unreasonable; and, if the facts here had been undisputed, we think it would have been proper to have done so in this case. If it were undisputed that the pledgeor had remained silent for nearly two months after being informed of the facts, and until the stocks had risen to the very high price at which they were on the 7th of August, we think that the judge should have instructed the jury as a matter of law, that the delay was unreasonable, and that they must find for the defendant. But, as is stated below, the pledgeor testifies that a day or so after the sale, when he was presented by the defendant with a statement of account, he disaffirmed the sale, and announced his intention to treat it as invalid. And in view of this, and of this only, we think the submission of the question to the jury was proper.

2. It is contended that the court erred in giving the following instruction: "If you find from the evidence that the defendant caused the property pledged to him to be offered for sale at public auction, but without notice, and if at such sale the property was bid in by the defendant for fair market prices, and that higher prices were not obtainable at the time and place of sale, and if you further find that the plaintiff, upon being informed of such sale, made no objection thereto, but commenced to treat with the defendant for the purchase from defendant of a portion of the property, you will find that the plaintiff ratified the sale, and your verdict will be for the defendant." The argument against this instruction is similar to that against the preceding one, viz., that ratification is a fact, and that, therefore, it is improper to tell the jury that they should infer it from other facts; and that, if this were not so, the facts stated in the instruction were not sufficient to support the conclusion which the court directed the jury to draw, for the reason that the element of the pledgeor's knowledge of the law was omitted. But we think the instruction was proper. It is perfectly true that our laws do not permit the judge to instruct the jury as to what inference of fact they are to draw. But whether or not a particular conception is of a "fact" or a "conclusion of law" is generally a matter of relation. In one connection a word or phrase may stand for a fact, while in another the same word or phrase may designate a conclusion of law. *Levins v. Rovigno*, 71 Cal. 273, 12 Pac. Rep. 161; *Turner v. White*, 73 Cal. 300, 14 Pac. Rep. 794. And although a finding that a party "ratified" a given transaction might in some cases be sufficient as a finding of fact, yet in the present instance all that we understand the instruction to mean, and all that the jury could have understood from it, is that, if they believed that the plaintiff did certain things, those things amounted to a sufficient election to treat the sale as valid, and that having once made his election he was bound by it. The sufficiency of the election was a matter of law, and the binding force of it was a matter of law. Suppose that evidence had been introduced to the effect that the pledgeor had expressly said to the pledgee: "I know that the sale was invalid because no public notice was given, and because you were the purchaser, and that I can have it set aside; but, knowing this, I elect to treat it as valid, and hereby ratify and confirm it." We think that in such case there could be no doubt but that it would

have been proper for the court to have told the jury that, if they believed that he so said, there was a sufficient election to treat the sale as valid, and that he could not afterwards retract it, and if the facts enumerated in the instruction were of equivalent effect, we think it was not an invasion of the province of the jury to say so.

The question, then, is whether the facts enumerated in the instruction were sufficient, as a manifestation of the pledgeor's election, to treat the sale as valid; and we think that they were. It is to be observed that the instruction does not put a case of mere silence on the part of the pledgeor. It is possible that mere silence (irrespective of lapse of time) would not amount to an election or ratification. But here there was something more than silence. The instruction requires not only that there should be a failure to object, but also that he should have commenced to treat with the defendant for a portion of the property. If he did this with knowledge of his rights, we think it was sufficient. It was not necessary that the ratification should have a consideration or the elements necessary to make a new contract. *Hill v. Finigan*, 62 Cal. 439. In *Child v. Hugg*, 41 Cal. 520, the pledgeor, on being presented with an account of the sale, admitted its correctness, and "approved" of the sale, and promised to pay the balance due; and it was held that these things constituted a ratification. In *Treadwell v. Davis*, 34 Cal. 605, a pledge of property by one who had no right to do so was held to be ratified by the owner's saying, when informed of it, that "he was glad the arrangement had been made." In *Earle v. Grant*, 14 R. I. 229, after an invalid sale, the pledgeor was present with the pledgee and the purchaser, and saw the purchaser pay a dollar to the pledgee, and joined with them in drinking in celebration of it; and it was held that these circumstances constituted a ratification. Possibly there would have been no ratification if the pledgeor, while offering to buy the property, should protest against the sale, although offering to buy it for the sake of peace. But that question does not arise; for the instruction requires, not only that the pledgeor should have commenced to treat for the purchase, but also that he should have "made no objection" to the sale.

It remains to be considered whether the pledgeor's knowledge of the law should have been enumerated as one of the elements of the ratification. There certainly are decisions which hold that knowledge of the law is essential to a ratification. See *King v. Lagrange*, 50 Cal. 332; *Cockerell v. Cholmeley*, 1 Russ. & M. 425. And for the purposes of this case we shall assume, without deciding, that knowledge of the law was necessary. But there is nothing in the record to show that the pledgeor did not know the law, and the presumption is that he did know it. Now, if the pledgeor had expressly admitted at the trial that he did know the law at the time he commenced to treat for the purchase of the diamonds, it would seem to be clear that he would not have been injured by the failure to enumerate that element in the instruction; and we think that the un rebutted presumption has, for this purpose, the same force as an admission.

3. It is urged that the court erred in giving the following instructions, viz.: "A conversion of personal property takes place whenever one person assumes the ownership or control of another's property, in contravention and against the rights of such other person, and against his consent. That may be implied." "And if the jury find from the evidence that, on the day when plaintiff was served with the account of sale by the defendant, Finigan assumed the ownership and control of the property described in the complaint, and denied Hill's right or title to the same, and set up right or title himself, then you will find that the conversion of the property took place on said — day of June, 1878, or whatever day it was that the account of sale was rendered to him by Finigan, if you find the conversion took place at all." Two objections are made to these instructions, which we shall consider separately.

(a) It is said that they ignore the pledgeor's right of election; that while it is true that the pledgeor could have elected to treat the illegal sale as a conversion, yet that he did not do so, but elected to place the conversion at the time of the formal demand and refusal on the 7th of August. There are authorities which say that in case of a sale like the one involved here, where the pledgee is the purchaser, there is no conversion unless the pledgeor elects to treat it as such, (see *Bryan v. Baldwin*, 52 N. Y. 235; *Jones, Pledges*, § 571,) and, for the purposes of this decision, we shall assume that such is the law. But if the pledgeor's story is to be believed, he did elect to treat the sale as invalid at the time mentioned in the instruction. He says that a day or so after the sale the pledgee gave him a statement of account, and that he then "told him I did not recognize that sale, and that he had no right to sell my stocks and diamonds, and that I did not approve of it," and that he refused to buy back the diamonds; and said: "I will make you give up those diamonds yet." This seems to us a complete disaffirmance of the sale; and it is so characterized by the appellant's counsel himself, for he said on the oral argument, with reference to the story of his client: "He swore that promptly on the presentation of this account * * * he repudiated the sale, and said he would make him give back his property. He disaffirmed it then. * * * He disaffirmed it right from the beginning." If he did elect to disaffirm, such election would be binding upon him. He could not, for the purpose of increasing the damages, afterwards disaffirm the disaffirmance, and elect to disaffirm again at a later date. His right to the highest damages depends, under our statute, upon his prosecuting the action with reasonable diligence, a provision which would have little meaning if he could move the initial point along to suit himself. Now, without stopping to inquire whether the appellant can have a reversal because of the assumption or ignoring of a fact which he himself swore to upon the trial, and which his counsel now insists upon as the truth, we do not think there was any prejudicial error. The ignoring of the pledgeor's election was, in effect, an assumption of its existence at the time specified in the instruction. The position of the appellant in this regard must be, in effect, that it ought to have been left to the jury to say whether or not there was an election to disaffirm at the time stated in the instruction; and that, if it had been so left to them, they might have found (contrary to the sworn statement of appellant) that the election did not take place at that time; and that by ignoring it altogether the court in effect assumed that it did occur at the time specified in the instruction, and not on the 7th of August. But the assumption, in view of the conceded facts of the case, was in favor of the appellant. As has been stated under the ground first considered, it is only by reason of the election to disaffirm, sworn to by the appellant, that the court could not declare, as a matter of law, that there had been unreasonable delay in making the election. If it had not been for that, the trial court could, and presumably would, have instructed the jury to render a verdict for the defendant on the ground of unreasonable delay in making the election; and this would have ended the case, and rendered errors in other matters immaterial. In other words, it was only by reason of the fact assumed in the instruction that the appellant could get to the jury at all; and this being so, we think that the assumption of that fact was an assumption in his favor, and that he cannot complain of it.

(b) It is said that the judge improperly assumed a fact when he charged that "if the jury find from the evidence that, on the day when plaintiff was served with the account of sale by the defendant, Finigan assumed," etc. The argument is that this assumes that the plaintiff "was served with the account of sale by the defendant." But the plaintiff admits that he was served by the defendant with a statement of account. This fact is undisputed, and hence the appellant was not injured by its assumption. His counsel, who certainly has argued the case with zeal and ability, says that the instruction

does not refer to the account above mentioned, but to another account, which the defendant says he delivered to the plaintiff, but which the plaintiff denies that he received. We are by no means certain that this is the case, or that the jury so understood it. But, assuming that the instruction refers to the latter account, there was nevertheless no injury, for the two accounts are, for all purposes which are material to the question in hand, substantially the same. The account which the plaintiff admits that he received from the defendant was received by him about the same time as the other; and it informed him (though in a more condensed mode,) that the securities had been sold, the date of the sale, and the price they brought. This, with what he admits that the defendant told him at the time, was all that it was material for him to know. The foregoing disposes also of what is claimed to have been a similar assumption in another instruction.

4. It is argued that there was error in instructing the jury that the presumption as to the measure of damages established by section 3336 of the Civil Code is a disputable presumption. We do not find it necessary to determine this question. There was no evidence tending to rebut the presumption, (unless the evidence going to defeat the plaintiff's claim altogether be considered such, in which view there was, of course, no injury,) and no question relating to it was submitted to the jury. The instruction, therefore, was purely abstract; and, in view of all the circumstances of the case, we do not see how it could have misled the jury. The assignments as to the admissibility of evidence were not pressed at the oral argument, and we do not think they require special notice.

Upon the whole record we see no prejudicial error, and the order appealed from is therefore affirmed.

77 Cal. 279

MCDONALD v. HUFF. (No. 11,064.)

(*Supreme Court of California.* October 24, 1888.)

1. VENDOR AND VENDEE—CONTRACT—DELIVERY OF DEED.

A mortgagor agreed in writing to execute a deed to the mortgagee, and leave it in escrow, to be delivered on default by him in paying an agreed sum less than the amount due, provided the mortgagee gave a receipt in full. The deed was accordingly left with a third person. Default was made, but the mortgagor demanded the deed back, and, though he did not receive it, conveyed to another, knowing the facts. The holder delivered the deed to the mortgagee's attorney, who executed a receipt of all demands against the mortgagor. *Held*, that this delivery and acceptance were binding on the mortgagor, and his grantee took no title.

2. SAME—EFFECT OF DELAY.

The mortgagor cannot complain that the delivery and release did not take place till after the time provided in the agreement.

In bank. On rehearing. For opinion on hearing in department 1 and statement of case, see 18 Pac. Rep. 243.

Archer & Bowden and *S. O. Houghton*, for appellant. *S. M. Buck*, for respondent.

WORKS, J. This cause was heard in department 1, and reversed. A rehearing was granted. Upon a careful consideration of the questions presented, and more fully argued at the hearing in bank, we are of the opinion that the judgment in department should not stand as the judgment of the court. The deed from the appellant, Huff, to respondent was, in the hands of R. H. McDonald, an escrow. *Cannon v. Handley*, 72 Cal. 133, 140, 13 Pac. Rep. 315; *Schmidt v. Deegan*, (Wis.) 34 N. W. Rep. 83. And, being so, it could not be revoked by the appellant. *Cannon v. Handley, supra*; *Knopf v. Hansen*, (Minn.) 33 N. W. Rep. 781. The depositary was not the agent of the vendor alone, but of both parties, and, as such, was bound to deliver the instrument on performance of the condition provided for in the contract under which he held it. *Cannon v. Handley, supra*; *Shirley v. Ayres*, 14

Ohio, 307; *Schmidt v. Deegan, supra*. Here were two written instruments, signed by the appellant, Huff,—one an agreement to convey on certain conditions, which was fully executed by delivery to the depository; the other a deed, made in pursuance of the agreement, and to become operative upon the happening of the conditions set forth in said agreement, and its delivery by the depository to the respondent. The first of these was binding upon the appellant from its delivery to the depository, without the signature of respondent, or any contract in writing from him. Code Civil Proc. § 1973; Civil Code, § 1624; *Rutenberg v. Main*, 47 Cal. 213, 219; *Vassault v. Edwards*, 43 Cal. 458, 464; *Moss v. Atkinson*, 44 Cal. 4. And the respondent, having agreed, verbally, to the terms of such written agreement to convey, was thereby estopped to enforce the collection of his debt until the time fixed for the payment of the money in pursuance thereof, or, in default of such payment, the delivery of the deed. *Vassault v. Edwards, supra*; *Cagger v. Lansing*, 57 Barb. 421, 424; *Worrall v. Munn*, 5 N. Y. 229; 1 Reed, Spec. Perf. § 365; *Schmidt v. Deegan, supra*. The findings of the court below show an acceptance of the deed by the attorney of the respondent, and that he, by his agent and attorney, duly executed a receipt in full of all demands against the defendant, Huff, and deposited the same with the depository for his use. This shows a sufficient delivery and acceptance of the deed, and release of the indebtedness. The fact that such delivery and release did not take place until after the time provided in the agreement is immaterial. Certainly it is not a matter about which the appellants should be heard to complain under the circumstances of this case. The title to the property in controversy vested in the respondent by the delivery of the deed to him, and, as the court finds that the appellant Herrick took his deed with full knowledge of all the facts, he obtained no title. As against him the deed from the defendant, Huff, to the plaintiff must be held to have taken effect at the date of the contract authorizing its delivery. The judgment and order denying a new trial are affirmed.

We concur: SEARLS, C. J.; MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.; THORNTON, J.

Ex parte FONG YEN YON. (No. 20,475.)

(Supreme Court of California. October 27, 1888.)

In bank. Appeal from superior court, Yuba county; PHIL. W. KEYSER, Judge.

Application of Fong Yen Yon for writ of *habeas corpus*.

Frank M. Stone, for petitioner. E. A. Forbes, Dist. Atty., for respondent.

PER CURIAM. The writ of *habeas corpus* is discharged, and petitioner remanded upon authority of *Ex parte Ah Men, ante*, 380, (No. 20,442, filed October 20, 1888.)

77 Cal. 291

CARPENTER v. SUPERIOR COURT OF SAN JOAQUIN COUNTY. (No. 12,395.)

(Supreme Court of California. October 27, 1888.)

CERTIORARI—ANSWER—JUDGMENT ON PLEADINGS.

Where on demurrer to a petition for *certiorari* it is decided that the appointment of a guardian *ad litem* for minor parties is not necessary to the validity of a judgment in a will contest, an answer that defendant court set aside such judgment for the reason that no guardian had been appointed for the minors, presents no material question of fact, and the petitioners are entitled to judgment on the pleadings.

In bank. Petition for writ of review. Motion for judgment on pleadings.

This petition was filed by Abel F. Carpenter and others for the purpose of having reviewed the action of the superior court of San Joaquin county, J. G. SWINERTON, Judge, in the matter of the estate of Charles W. Carpenter,

deceased. The will of said Carpenter was contested, the jury found against its validity, and the superior court entered judgment accordingly. A motion for a new trial was made and denied. Afterwards a motion was made by certain minors to have the judgment set aside, mainly on the ground that they had not been represented by a guardian *ad litem*. This motion the court granted, and it is to review this action of the superior court that the writ is applied for. Defendant filed a demurrer to the petition, which was overruled, the decision therein being reported *ante*, 174. Thereupon an answer was filed, and the present motion is for judgment on the pleadings.

Sawyer & Burnett, for petitioners. *Carter & Smith* and *S. D. Woods*, for respondent.

WORKS, J. The questions of law arising in this case were fully presented by a demurrer to the petition, and determined in favor of the petitioner. The respondent has filed an answer, and the petitioners move for judgment on the pleadings on the ground that "it appears from the pleadings that petitioners are entitled to the relief asked for in the petition." The answer is that the order mentioned in the petition, vacating and setting aside the verdict and judgment mentioned and set forth in said petition, was made, given, and entered, "because the minors described in said petition were not and had not been represented in the matter of the contest to revoke the probate of the will of said C. W. Carpenter, deceased, in that no guardian *ad litem* has or had been appointed to appear for and defend for said minors in the matter of said contest, and that by reason of the said failure to appoint said guardian *ad litem* for said minors the said verdict and judgment was irregular and void." The petition states the facts showing how and by whom the minors appeared and were represented. This petition was held to show that the minors were so represented that the judgment rendered was binding upon them, and the order vacating it was not effective. It was expressly held that the appointment of a guardian *ad litem* was unnecessary to the validity of the judgment. This being true, the answer presents no material fact to be tried, and the motion for judgment on the pleadings in favor of the petitioners should be allowed. It is so ordered.

We concur: SEARLS, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.

77 Cal. 330

BRODER *et al.* v. CONKLIN *et al.* (No. 12,493.)

(Supreme Court of California. November 12, 1888.)

1. TRUSTS—IMPLIED TRUST—STATUTE OF FRAUDS—PART PERFORMANCE.

One who procures an assignee in insolvency, the creditors and the debtor, to allow him to purchase the property of the debtor at a public sale for a nominal sum, by advising them as their attorney that thereby a sacrifice will be prevented, and by orally promising them to hold it and manage it till it can be sold more advantageously, comes within the exceptions to the statute of frauds on account of confidential relations and part performance, and also within Civil Code Cal. § 853, providing that a trust is presumed to result on a transfer of property to one person when the consideration is paid by another, and sections 2222 and 2224, providing also for such trust where the property is gained by fraud.¹

2. LIMITATION OF ACTIONS—RUNNING OF THE STATUTE.

The attorney not having repudiated the trust till within the period of limitation, an action to establish it against him is not barred.²

3. PARTIES—JOINDER OF.

Joinder of the creditors, the assignee, and the debtor, parties to the agreement with the attorney, as parties plaintiff, and of the attorney, his grantee, and those claiming liens on the property, as parties defendant, is proper.

4. PLEADING—COMPLAINT—PRESUMPTION.

Where a complaint to establish a trust does not show that the agreement of defendant to hold as trustee was oral, it will be presumed to have been in writing, and the question of the statute of frauds is not raised by demurrer.

5. INSOLVENCY—VERIFICATION OF PETITION.

An attorney who holds property under the deed of an assignee in insolvency cannot be heard to object that the insolvency proceedings are invalid because the petition and schedule were verified before himself as notary, while he was attorney for the debtor.

In bank. Appeal from superior court, Inyo county; JOHN A. HANNAH, Judge.

Action by John Broder, assignor in insolvency, W. A. Greenly, assignee, and R. C. Broder and others, creditors, against A. R. Conklin, purchaser of the property at assignee's sale, and Mollie Conklin, his wife and grantee, and others claiming liens, to establish a trust in favor of plaintiffs. Judgment on demurrer to complaint for defendants, and plaintiffs appeal.

R. S. Miner, Eugene R. Garber, and J. W. P. Laird, (*Langhorne & Miller*, of counsel,) for appellants. P. Reddy, (W. H. Metson, of counsel,) for respondents.

McFARLAND, J This is an action brought by John Broder and certain of his creditors and their successors in interest to have a trust established and declared against the defendant A. R. Conklin as to certain real and personal property, and for an accounting, etc. Other parties are made defendants, as claiming an interest in the said property, etc. The defendants A. R. Conklin and his wife, Mollie Conklin, demurred to the second amended complaint, upon the grounds that it did not state facts sufficient to constitute a cause of action; that the alleged cause of action was barred by several sections of the Code of Civil Procedure, providing for the time within which actions must be commenced; and that there was a misjoinder of parties, both plaintiff and defendant. The demurrer was sustained by the court below, and judgment entered for defendants. Plaintiffs appeal from the judgment. The complaint

¹In general, as to when equity will raise a resulting trust, see *Bowman v. Patrick*, 36 Fed. Rep. 133, and note; *Miller v. Railroad Co.*, (Ala.) 4 South. Rep. 842, and note; *Richardson v. Haney*, (Iowa,) 40 N. W. Rep. 115, and note; *Reynolds v. Sumner*, (Ill.) 18 N. E. Rep. 334, and note; *Deegan v. Capner*, (N. J.) 15 Atl. Rep. 819.

²The statute of limitations begins to run against a trust only from the time it is expressly disavowed by the trustee. *Thomas v. Merry*, (Ind.) 15 N. E. Rep. 244. No laches can be imputed to a *cestui que trust* for not asserting a resulting trust against one who acknowledges the trust relation. *Reynolds v. Sumner*, (Ill.) 18 N. E. Rep. 334. See, also, as to the running of the statute of limitations against a trust, note, *Id.*; *Price v. Mulford*, (N. Y.) 14 N. E. Rep. 298, and note.

is necessarily quite lengthy, but the main facts averred which it is necessary to state here, and which, for the purposes of the demurrer, must be taken as true, are substantially these: On March 24, 1879, the plaintiff John Broder filed his petition in insolvency in the county court of Inyo county. On May 1, 1879, William A. Greenly, one of the creditors, was appointed assignee. He qualified, and entered upon the discharge of his duties, and on May 6, 1879, took possession of all the said insolvent's estate. On May 13th the court made an order that said assignee sell all the property, real and personal, of the insolvent, at public auction, and apply the proceeds to the payment of the claims of the creditors. When the proceedings were at this stage, the defendant A. R. Conklin represented to the insolvent and his creditors that if the property should be sold at auction it would not realize enough to satisfy the creditors, and would be sold at a sacrifice; and that, if they would refrain from bidding, and allow him (Conklin) to bid the same in for a nominal sum, he would do so for the benefit of, and in trust for, said creditors, and would hold and manage it as their trustee until it could be sold advantageously at private sale. Thereupon a mutual agreement to that effect was entered into between Conklin and the insolvent and his creditors, and that after the sale said "defendant A. R. Conklin should and would hold and manage said property in trust for them until such time as it could be sold at private sale, or disposed of to better advantage and for a larger sum, and that all the rents, issues, profits, and proceeds thereof should be applied by said A. R. Conklin to the payment of the several claims of the creditors of said insolvent, and the surplus, if any, should be paid over to said insolvent, John Broder." At the time of this agreement the said Conklin was an attorney at law. He was also the attorney of said John Broder in his insolvency proceedings. He was also the attorney of said assignee Greenly; and he was also "the confidential and trusted adviser of the other creditors," who "had and reposed great and unlimited confidence in the integrity and good faith of said defendant A. R. Conklin, and trusted and believed him, and relied upon his agreement and representations and promises aforesaid, and his duty as their attorney and confidential adviser and trustee aforesaid, and allowed him to do and act in the matter as he had advised and counseled." In pursuance of this agreement Conklin was allowed to bid in the property, and did so bid it in, at the auction on June 9, 1879, at the nominal sum of \$2,500, no part of which was ever paid; and on said day the said assignee conveyed by deed all the property of said insolvent to said Conklin. The property at that time was of the value of \$32,000, and it has since become much more valuable. The said deed from said assignee was in form absolute, and did not, on its face, declare any trust; but Conklin took it under said agreement, and in trust as aforesaid. He took possession of all the property as such trustee, and acted as such until at a subsequent time he repudiated the trust. (Afterwards, about January 7, 1880, Conklin represented to the insolvent, John Broder, that the deed from the assignee was defective, and persuaded him to make another deed, and said Broder, upon representations of said Conklin, and for the purpose of carrying out said agreement as aforesaid, did execute and deliver to said Conklin a conveyance of all said property conveyed, or intended to be conveyed, by said deed of said assignee. No consideration was paid by Conklin for this second conveyance.) Between the date of the deed from said assignee and the 10th of March, 1884, he sold the personal property for more than \$8,000, and received as rents, issues, and profits of the real property over \$10,000. He paid creditors' claims to the extent of about \$1,500, and conveyed one piece of land to a creditor who held a mortgage on it, in satisfaction of his claim. On the 10th of March, 1884, the said A. R. Conklin for the first time repudiated and disavowed said trust, appropriated all the moneys collected by him as such trustee to his own use, refused to pay any claims under said agreement, and claimed in his own right all the property received by him

from said insolvent as aforesaid. And on said day he conveyed all the real property so received to his wife, the defendant Mollie Conklin, who took the same with full notice of all the facts before stated. Since said May 10, 1884, the defendants A. R. Conklin and Mollie Conklin have received rents, profits, etc., of said property to the amount of about \$7,000. Plaintiffs did not know, and had no means of knowing, prior to said May 10, 1884, of any of said fraudulent acts of defendant. (There are many other averments of facts which fill up the details of the alleged transactions between the parties, but the foregoing statement is full enough to show the sufficiency or insufficiency of the complaint.)

It does not appear upon what grounds the court below sustained the demurrer, and we are not able to see why the complaint is not sufficient.

1. With respect to the point that the agreement upon which the alleged trust rests was not in writing, it may be said that this court has held that a defendant, to avail himself of the statute of frauds, must plead it, (*Osborne v. Endicott*, 6 Cal. 154,) and, if this rule is to be adhered to, the point cannot be considered on the demurrer. But, waiving that consideration, it does not appear from the complaint whether the agreement was verbal or in writing; and it has been held by this court several times that in such a case it is not necessary to aver the contract to have been in writing, (even when the statute of frauds requires it,) and that "on demurrer we shall consider it to have been made in writing." *Brennan v. Ford*, 46 Cal. 14; *Miles v. Thorne*, 38 Cal. 339; *Wakefield v. Greenhood*, 29 Cal. 598; *Vassault v. Edwards*, 43 Cal. 458; *McDonald v. Association*, 51 Cal. 210. Therefore no question as to the statute of frauds was raised by the demurrer. But, as the case may possibly be tried on issues raised by an answer, it is proper to say that, in our opinion, the facts averred in the complaint, if true, created a trust, as claimed by plaintiff, even though the agreement was not in writing. It is difficult to distinguish this case from *Sandfoss v. Jones*, 35 Cal. 481, except that in the latter case the trustees furnished part of the purchase money, while in the case at bar, Conklin did not furnish any of it, and that there was no peculiarly confidential relation, such as that of attorney and client, between the parties. In that case Bartram, being the owner of a large amount of real and personal property, with which he carried on the lumber and hotel business, and having been attached by his creditors, made a verbal agreement with J. and B., by which the latter agreed to take possession in their own names of all the property; to purchase it at sheriff's sale for the benefit of Bartram, and to advance their own money if necessary for that purpose; to conduct the business; and, when they had been repaid out of its proceeds their own debts and advances, to reconvey to Bartram, etc. J. and B. entered upon the execution of this agreement, and in due time all the claims against Bartram, including those of J. and B., were extinguished, with money chiefly, if not wholly, derived from the property and business. Then J. and B. undertook to repudiate the trust, and retain the property as their own. Thereupon Sandfoss, assignee of Bartram, commenced an action very similar to the case at bar, and the lower court, as in the case at bar, sustained a demurrer to the complaint. But on appeal this court reversed the judgment. SANDERSON, J., in delivering the opinion of the court, says: "Whether they (J. and B.) paid for the real estate wholly or in part with Bartram's money, or their own exclusively, is immaterial. In either event, their agreement was not within the statute of frauds, and was not, therefore, void, because it was not in writing. If the real estate was paid for by Jones and Blanchard with the money of Bartram, there was a resulting trust in favor of the latter, which a court of equity will declare and enforce, for such a trust is expressly excepted from the operation of the statute of frauds." We have noticed this case somewhat in detail, because, with respect to the somewhat complicated subject of trusts, it is more satisfactory to compare a case at bar

with other adjudicated cases than to undertake to restate general rules in abstract language. See, also, *Bayles v. Baxter*, 22 Cal. 575; and *Millard v. Hathaway*, 27 Cal. 119. In *Brison v. Brison*, 17 Pac. Rep. 689, (recently decided by this court,) it was held that a wife can be compelled to reconvey to her husband land which he had conveyed to her upon her oral promise to reconvey the same when requested; and that a trust would have arisen from the confidential relation of the parties, even if there had been no fraudulent intent on the part of the wife, at the time she took the deed, not to reconvey. In the opinion of the court in that case, delivered by HAYNE, C., the principles which govern the class of trusts now under consideration are very fully stated, and the leading authorities upon the subject cited; and the confidential relation of attorney and client is put in the same category with that of husband and wife. The trust in the case at bar arose by operation of law, and it comes within nearly all the usual exceptions to the rule that a trust must be declared by a written instrument. The relation between the parties was of the most confidential character,—that of attorney and client. There was a transfer of the property to Conklin, while the whole consideration was furnished by plaintiffs, in which case “a trust is presumed to result,” as declared in section 853 of the Civil Code. The property was gained or detained by fraud, etc., and there was, therefore, a trust as provided by sections 2222 and 2224 of the Civil Code; and there was part performance of the agreement.

2. It appears from the complaint that the petition and schedule in insolvency of the said John Broder was verified before his attorney, the said defendant A. R. Conklin acting as a notary public. And it is argued for said defendant that said papers should have been verified before another officer; that, therefore, the whole insolvency proceedings were invalid; that, therefore, no title passed to said defendant by the assignee's deed; and that, therefore, there could have been no trust, etc. We shall not stop to inquire into the asserted defect in the proceedings in insolvency. Defendant, while holding on to the property which he received under said assignee's deed, cannot be heard here, as against plaintiffs, to assert a defect which occurred, if at all, by his own direction as attorney for the insolvent. Moreover, if the title did not pass through the deed of the assignee, it passed shortly afterwards through the deed of the insolvent, which must be considered as a part of the whole transaction.

3. We see no reason for holding that the action was barred by the statute of limitations. Many of the arguments made upon this point by counsel for respondents are based upon asserted facts which do not appear upon the complaint. While the respondent remained in possession of the property, and before he repudiated the trust, the statute certainly did not begin to run. According to the complaint he did not repudiate the trust until the 10th of May, 1884; and before that date plaintiffs had not discovered, and did not know or have any means of knowing, any of the fraudulent acts alleged. The action was commenced within two years thereafter, and, under any correct view of the law, it was commenced in time. The second amended complaint was filed within four years.

4. We think that the parties who are made plaintiffs and defendants are not improperly joined. The judgment is reversed, with directions to the court below to overrule the demurrer to the complaint, and allow defendants a reasonable time in which to answer.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; PATERSON, J.

77 Cal. 297

SAN FRANCISCO & N. P. R. CO. v. ANDERSON. (No. 11,212.)

(Supreme Court of California. October 27, 1888.)

1. APPEAL—REQUISITES—CERTIFICATE OF BOND FILED.

Under Code Civil Proc. Cal. § 953, requiring, on appeal, a certificate of the clerk or attorneys that an undertaking in due form has been properly filed, or a stipulation of the parties waiving it, a certificate simply stating that the clerk had compared the transcript with the papers on file, and it was correct, is fatally defective, even though the undertaking was embodied in the transcript; as it is not one of those papers required by sections 950, 951, and 952 to be furnished on appeal, and therefore should not be so embodied.

2. SAME—PRACTICE—OBJECTION TO CERTIFICATE—NOTICE.

An objection to the sufficiency of a certificate made five days before the hearing in a printed brief, together with a request that the appeal be dismissed, is a sufficient compliance with rule 13 of the California supreme court, which requires such objection to be taken and notice given to the appellant in writing at least five days before the hearing.

In bank. Appeal from superior court, Marin county; E. B. MAHON, Judge.

Action by the San Francisco & North Pacific Railroad Company against William N. Anderson for the recovery of personal property. Judgment for defendant, and plaintiff appeals.

E. S. Lippitt, for appellant. *H. Wilkins*, for respondent.

WORKS, J. In this action the respondent asks that the appeal be dismissed on the ground that the clerk's certificate to the transcript is insufficient. The certificate is as follows: "I, Thomas S. Bonneau, county clerk of the county of Marin, and *ex officio* clerk of the superior court in and for said county, hereby certify that I have compared the foregoing transcript with the original papers now on file in my office, and that the said transcript is correct." Sections 950, 951, and 952 of the Code of Civil Procedure provide that the appellant must furnish copies of certain papers to this court, on appeal. Copies of such papers as are here designated must be set out in, and become a part of, the transcript. The undertaking on appeal is not one of the papers named in either of these sections, and should not be embodied in the transcript. The Code further provides: "Sec. 953. The copies provided for in the last three sections must be certified to be correct by the clerk or the attorneys, and must be accompanied with a certificate of the clerk or attorneys that an undertaking on appeal, in due form, has been properly filed, or a stipulation of the parties waiving an undertaking." This section imperatively requires a certificate from the clerk that an undertaking on appeal, in due form, has been properly filed. The certificate before us wholly fails to comply with the statute in this regard, and no stipulation waiving the undertaking is shown. The certificate is therefore clearly insufficient.

The appellant, instead of applying to this court, as it might have done, for leave to file a corrected certificate, contends against the motion to dismiss.

1. On the ground that under rule 13 of this court an objection of this kind must be taken and notified to the appellant in writing, at least five days before the hearing. The respondent has pointed out, in his printed brief, the objection to the certificate, and asks therein that the appeal be dismissed. This, being done within the time required by the rule, is a sufficient compliance with its provisions. A formal notice is unnecessary.

2. That as the undertaking on appeal is set out in the transcript, and appears to be in due form, the certificate of the clerk that the transcript is correct is a sufficient compliance with the requirement of the Code. As we have shown, the undertaking is improperly set out in the transcript, and forms no part of it. This being true, a certificate that the transcript is correct cannot be construed as certifying that a copy of a paper, not properly a part of it, is in due form, and has been properly filed. The requirements of the section of

the Code under consideration are plain and explicit, and should be complied with. It has been held by this court that it was sufficient to set out the undertaking in the transcript, and certify to its correctness. *Wakeman v. Coleman*, 28 Cal. 58. But this was under an entirely different provision. *Prac. Act*, § 346. See, as bearing on the point, *Bennett v. Bennett*, 42 Cal. 629. The objection to the certificate is well taken. Appeal dismissed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.; THORNTON, J

77 Cal. 295

VON DRACHENFELS v. DOOLITTLE *et ux.* (No. 11,419.)

(*Supreme Court of California.* October 27, 1888.)

1. QUIETING TITLE—SUIT AGAINST HOLDER OF LEGAL TITLE.

A mining claim was conveyed to defendants, who were husband and wife, the consideration being notes executed by both defendants, but paid by the wife out of her separate estate. Plaintiff recovered judgment against the husband, and purchased the land at execution sale without notice that the notes were paid by the wife. Patent was afterwards issued to the wife. Plaintiff's complaint to quiet title alleged that he was the owner, and that defendants' claim was without right. *Held*, that plaintiff cannot obtain a decree finding that the wife holds the title in trust, and ordering a conveyance to him, such relief being contradictory to the allegations of the complaint.

2. SAME.

An action under Code Civil Proc. Cal. § 738, which provides that "an action may be brought by any person against another, who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim," cannot be brought upon an equitable interest against the holder of the legal title.

In bank. Commissioners' decision. Appeal from superior court, Del Norte county; JAMES E. MURPHY, Judge.

Action to quiet title, brought by Gregor Von Drachenfels against Albert Doolittle and Maria, his wife. Judgment for defendants, and plaintiff appeals. Code Civil Proc. § 738, provides that "an action may be brought by any person against another, who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."

L. F. Cooper, (*Sawyer & Burnett*, of counsel,) for appellant. *J. D. H. Chamberlain* and *R. G. Knox*, for respondents.

HAYNE, C. This is an action under section 738 of the Code of Civil Procedure to determine an adverse claim; or, as is usually said, an action to quiet title. The complaint is in the usual form, averring, in substance, that the plaintiff is the owner of the premises, (as against all persons except the United States,) and that the defendants have some claim to the premises adverse to the plaintiff, which claim "is without any right whatever." The facts are as follows: The owners of a mining claim upon public land conveyed it to the defendants, who were and are husband and wife. The consideration "was the sum of \$1,000, payable in certain promissory notes," which were executed by both of the defendants, but which were paid, when due, by the wife out of her separate property. The plaintiff recovered a judgment against the husband, and caused execution to be levied upon the mining claim, and became the purchaser at the sale without notice of the fact that the notes were paid with the separate funds of the wife, and in due course received the sheriff's deed. After this the wife made application for a patent, and paid what was required by the government, and in due time a patent was issued to her in her own name. The court below gave judgment for the defendants, and the plaintiff appeals.

The theory advanced for the appellant is that the wife took the title in trust, and should be decreed to convey to him. But we think this relief is entirely outside the case made by the complaint. The complaint alleges that the plaintiff is the owner, and that the defendants' claim is without right.

The judgment asked for would be that the plaintiff is not the owner, and that the defendants' claim is not without right, but, on the contrary, is the legal title, and should be conveyed to the plaintiff. It is obvious that the plaintiff cannot have a judgment in direct contradiction of the material allegations of his complaint. If in any case an action to determine an adverse claim can be brought under our statute upon an equitable interest, (which we doubt; see *Frost v. Spitley*, 121 U. S. 552, 7 Sup. Ct. Rep. 1129,) it cannot be brought against the holder of the legal title.

The judgment, having been right, will not be reversed merely to allow the plaintiff to apply for leave to amend his complaint. The other points made do not require special notice. We express no opinion as to the alleged equitable right of plaintiff. We therefore advise that the judgment and orders appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

77 Cal. 300

DANIELS v. GUALALA MILL CO. (No. 11,487)

(Supreme Court of California. October 29, 1888.)

1. LIMITATION OF ACTIONS—ADVERSE POSSESSION—RUNNING OF STATUTE

Act Cong. 1877, (19 St. at Large, p. 267, § 2,) which provides that where indemnity school selections made and certified to California, shall fail by reason of the land in lieu of which they were taken not being included in the final survey of a Mexican grant, or shall be otherwise defective, "the same are hereby confirmed," covers all defects in indemnity school selections, and where land is certified to the state as school land by the United States, and patented by the state as such, but subsequently the United States cancels the selection, and patents the land to the same person, who obtained patent from the state, the second patent is void, and the statute of limitations commences to run in favor of a person holding adversely to the patentee from the date of the first patent.

2. LIMITATION OF ACTIONS—ADVERSE POSSESSION—WHAT CONSTITUTES.

A railroad company built its road lengthwise through the center of a strip of land 25 feet wide, improved the land in the usual manner of railroads with reference to their road-bed and right of way, and paid the taxes thereon. Held an adverse possession within the meaning of Code Civil Proc. Cal. § 325, which provides that land shall be deemed to be held adversely, by one having a possession not founded on a written instrument, where it has been protected by a substantial inclosure, or where it has been usually cultivated or improved for five years continuously, and the taxes have been paid, though the land was not protected on all sides by a substantial inclosure.

Commissioners' decision. Department 2.

Appeal from superior court, Mendocino county; R. MCGARVEY, Judge.

Ejectment by Nathan Daniels against the Gualala Mill Company. There was a judgment for defendant, and plaintiff appeals. Code Civil Proc. § 325, provides that land shall be deemed to be held adversely by one having a possession not founded on a written instrument, where it has been protected by a substantial inclosure, or where it has been usually cultivated or improved for the period of five years continuously, and the taxes have been paid.

J. A. Cooper, for appellant. H. A. Powell and T. L. Carothers, for respondent.

FOOTE, C. This action is in ejectment to recover a strip of land 25 feet in width, through the center of which the defendant's railroad runs lengthwise. The court below, sitting without a jury, found that the cause of action was barred by the statute of limitations. From the judgment and an order denying a new trial the plaintiff appeals. From the evidence it appears that the plaintiff claims title under a patent issued from the United States government

in 1883. If this patent was good, and the plaintiff had title to the land only through it, then the defendant could not prevail in the action. It becomes, then, a very material question in this case in what way and at what time the plaintiff did actually obtain a paramount title to the land. It is in evidence by a certain state patent, to the introduction of which no objection was made upon the trial, that the land was patented to one A. J. Delatour, May 13, 1878; that it was listed as an indemnity school selection, and selected and certified as such to the state of California in lieu of a portion of section 36, township 10 N., range 36 W., S. B. M., approved August 10, 1870, by the secretary of the interior; and the certified copy of the list was read in evidence without objection. Certain deeds were also put in evidence, without objection, showing that the plaintiff had this land conveyed to him by mense conveyances from Delatour, and that the deed to plaintiff directly was dated the 25th day of April, 1871. That afterwards, in 1882, the United States commissioner of the land office undertook to cancel the selection by the state, on the ground that it had not lost the school land for which it had obtained the indemnity land patented by it to the plaintiff; and it was shown that in 1883, after this order of cancellation, the plaintiff had obtained a patent for the land from the general government. The defendant then introduced a patent to certain parties for a Mexican land grant, dated the 1st day of March, 1870, which shows, with the map attached, that section 36, township 10 N., range 36 W., S. B. M., was included within it, and that the final survey of the *ranchito* for which the patent issued had been approved by the commissioner of the general land-office, March 1, 1870, its introduction in evidence being unobjected to. The plaintiff then introduced in evidence a certified copy of the application of A. J. Delatour to purchase of the state of California the lands described in the complaint, which is regular in form, dated April 2, 1868, duly verified; which application shows that the lands described in the complaint were duly located in lieu of the E. $\frac{1}{2}$ of section 36, township 10 N., range 36 W., S. B. M., by Leander Ransom, state locating agent, on the 27th day of May, 1868; also that a certificate of purchase to the land, dated the 24th of March, 1869, issued to A. J. Delatour from the register of the state land-office. Thus it will be seen that it was shown in evidence, without objection from the plaintiff, that there were two patents to the land in question,—one from the state, and one from the United States; so that the plaintiff cannot be heard here, at this stage of the cause, to object to the findings of the court, based upon any part of the evidence going to show the regularity or irregularity of these patents. This objection to the consideration of such evidence by the trial court should have been made at the proper time. It being certain, then, that the evidence was properly before the court, the only question is, what was its legal effect? If the first patent from the state was good, and vested a title in Delatour, then the second patent from the United States was void. Under the act of congress of 1877, commonly called the "Booth Act," to be found at page 267, 19 U. S. St. at Large, § 2, it is provided "that where indemnity school selections have been made and certified to said state, and said selections shall fail by reason of the land in lieu of which they were taken not being included within such final survey of a Mexican grant, or are otherwise defective, or are invalid, the same are hereby confirmed." The appellate court of this state held in *Hambleton v. Duhaime*, 71 Cal. 141, 11 Pac. Rep. 865, "that the use of the words, 'or are otherwise defective or invalid,' shows that the intention of congress in enacting the law was to cover any and all defects in indemnity school selections." It follows that the land in controversy having been listed and certified to the state, if the selection failed by reason of any defect or invalidity, it was made good, and such defect or invalidity cured. The state having title to the land, could and did give a valid patent to Delatour, and the patent from the United States to the plaintiff was void. Delatour, through whom the plaintiff claims, had title to the land on the date of his

state patent, viz., the 13th day of May, 1878, which was more than five years next before the plaintiff commenced this action. The defendant commenced its occupation of the land in the year 1864, more than 20 years before this action was begun. It claimed title adverse to the patentee, Delatour, under whom the plaintiff claims, by mesne conveyances, from the 13th day of May, 1878, and claimed against the plaintiff himself ever since the fall of 1874, when the plaintiff was paid \$800 for the strip of land in controversy.

It then becomes a material question in this matter as to whether the defendant can claim that it had adverse possession of the land for more than five years next prior to the commencement of this action, so as to satisfy the conditions of section 325 of the Code of Civil Procedure. The land may not perhaps have been protected on all sides by a substantial inclosure, but we think it has been improved in the manner usual by railroads, with reference to their road-bed and right of way. We think the evidence shows that all the taxes which have been assessed upon this land in the occupancy of the defendant, as a road-bed and right of way, have also been paid. It is true that the land was not assessed as a strip of land 25 feet wide in the section of land through which it ran, and that the plaintiff did pay the taxes on the land described in his complaint; but the facts do not show, nor do the findings, that the plaintiff paid any taxes on this strip of land, which he had sold to the defendant, and upon which its railroad was built, and which it occupied, and they do further show, as we think, that the defendant in paying its taxes paid on this land, as included in its tax assessment on its road-bed, all the taxes assessed against it. The plaintiff sold this land to the defendant in 1874, and received \$800 therefor. He permitted the defendant to build a costly railroad over and through it, and seems himself to have considered it as belonging to the defendant. Afterwards, when he thought his state patent was void, he again sought to get title to the land from the United States, and having, as he thought, accomplished this object in 1883, it occurred to him that his title was only good from that date, and that the defendant might be made to pay him again under his second patent for the land, as its possession had not been continuous for five years from 1883 to the commencement of this action. But inasmuch as, according to the evidence and the findings, his title was founded primarily on the state patent of 1878, this cannot be done. We perceive no prejudicial error in the record, and advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

77 Cal. 308

PEOPLE v. LENON. (No. 20,468.)

(*Supreme Court of California.* October 30, 1888.)

1. CRIMINAL LAW—APPEAL—RECORD—JUDGMENT.

Under Pen. Code Cal. §§ 1237, 1240, providing for an appeal by a defendant from a judgment of conviction, or an order denying a motion for a new trial, and defining the manner of taking such appeal, where, in the transcript and bill of exceptions, no record of the judgment appears, but only a recital from the minutes of the court that the motion for new trial was overruled, and defendant sentenced, an appeal will not lie.

2. SAME—MATTERS NOT APPARENT OF RECORD.

An appeal from an order denying a motion for a new trial will be dismissed, where the record does not show the grounds upon which the motion was made.

In bank. Appeal from superior court, Los Angeles county; H. K. S. MELVENY, Judge.

Indictment for rape. Verdict of guilty, motion for new trial denied, and term in the penitentiary fixed at 14 years. Defendant appeals.

Hugh J. & Wm. Crawford, for appellant. *Atty. Gen. Geo. A. Johnson*, for the People.

WORKS, J. The appellant was found guilty in the court below of the crime of rape. The appeal purports to be from a judgment of conviction, but no judgment appears in the record. The minutes of the court, as set out in the transcript, contain this recital: "Argument on motion for a new trial by Crawford, Esq., attorney for defendant. Motion overruled. Defendant sentenced to the penitentiary at Folsom for fourteen years." This is a mere recital in the minutes that sentence was passed, and not the judgment of the court, from which alone an appeal will lie. Pen. Code, §§ 1237, 1240. The bill of exceptions contains a statement that "defendant appealed to the supreme court from the order denying defendant's motion for a new trial, and from the final judgment of conviction," but the notice of appeal is from the "judgment rendered against him on the 14th day of May, 1888." The minutes of the court for that day show a continuance of the case until the 16th of the same month. An appeal from the order denying the motion for a new trial, if properly made, could not be effective, as the record fails to show the grounds on which the motion was made, or that such a motion was made at all. Appeal dismissed.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.; MCFARLAND, J.

77 Cal. 310

JENNESS *v.* BOWEN *et al.* (No. 12,809.)

(*Supreme Court of California.* October 30, 1888.)

1. APPEAL—REVIEW—MATTERS NOT APPARENT OF RECORD.

Under Pol. Code Cal. § 3417, providing that in a contest as to the right to purchase school land, where an order referring the question to the courts for trial is made by the surveyor general, a complaint must be filed within 60 days, if such complaint appears from its face to have been filed in time, a judgment sustaining a demurrer for failure to file in time will be reversed; though from proceedings after judgment, and from briefs of counsel, it may be inferred that the claim was not indorsed as "filed" until after the 60 days; neither such indorsement, nor the fact of the delay in filing, being in any way made part of the judgment roll.

2. SAME—APPEALABLE ORDER—MOTION TO VACATE.

Upon an appeal from a judgment, an order denying a motion to vacate the judgment cannot be reviewed.

3. SAME—REQUISITES—FILING BOND.

An undertaking on appeal is filed within the statutory limitation of five days when the fifth day falls on Sunday, and the undertaking is filed on the following day; as under Code Civil Proc. Cal. § 12, the time in which an act may be done is computed by excluding the first and including the last, unless the last day is a holiday, when it is also excluded.

In bank. Appeal from superior court, Kern county; R. E. ARICK, Judge. Action by Annette L. Jenness against J. J. Bowen and H. Maybury, to try adverse rights to purchase school lands. Judgment for defendants on demurrer, and plaintiff appeals. By Code Civil Proc. Cal. § 12, it is provided that "the time in which any act provided by law is to be done, is computed by excluding the first day, and including the last, unless the last day is a holiday, and then it is also excluded."

F. D. Nicol, for appellant. *C. C. Cowgill* and *S. F. Leib*, for respondents.

WORKS, J. This is a contest involving the right to purchase school land from the state. The contest was certified to the superior court of Kern county by the surveyor general on the 8th day of March, 1887. There is a demurrer to the complaint on the ground that "it appears therefrom that the cause of action accrued more than sixty days previous to the commencement of the action," and that it "appears from said complaint that the cause of action

therein stated is barred by section 3417 of the provisions of the Political Code." The section of the Code referred to requires the complaint to be filed within 60 days after the order of reference is made.

We may infer from subsequent proceedings appearing in the transcript, and what is said in the briefs, that the complaint was sent to the clerk by mail for filing, and reached him in time, but the fee for filing was not paid; that the clerk wrote requesting payment of the fees, which were forwarded, and when received he indorsed the complaint filed as of that date, which was after the expiration of the 60 days; but none of this appears in the judgment roll. The complaint is verified as of a date within the 60 days. There is nothing on the face of the complaint showing that it was filed too late. If we could look to the indorsement on the back of the complaint in order to uphold the demurrer, we cannot do so here, for the reason that, if there was such an indorsement, it is not made part of the record. The rule is well established that the question of the statute of limitations can be reached by demurrer only where it clearly appears upon the face of the complaint that the action is barred. Code Civil Proc. § 430; *Sublette v. Tinney*, 9 Cal. 423; *Farris v. Merritt*, 63 Cal. 118; *Harmon v. Page*, 62 Cal. 448. As there is nothing on the face of the complaint to show that the action was barred, and no evidence in the judgment roll of the time of filing, we must hold that the demurrer was improperly sustained. There was judgment rendered in favor of the defendants on the demurrer. Subsequently the plaintiff applied to the court for an order vacating the judgment, on the ground that the complaint was actually filed in time, but was indorsed "filed" as of a later date. The application was heard upon affidavits, and denied. A bill of exceptions, set out in the transcript, contains the proceedings of the court below, and the evidence given at the hearing of the motion.

The appeal is from the judgment alone. Counsel for respondents contend, and we think correctly, that we cannot consider the correctness of the order denying the motion to vacate the judgment upon an appeal from the judgment; but, while counsel contends that the matters set out in the bill of exceptions cannot be considered on the appeal taken, he asks us to refer to the same matters in order to sustain the ruling of the court on his demurrer. Such an inconsistency on the part of counsel may be pardoned, but the court cannot become a party to it. The respondent contends that the appeal should be dismissed on the ground that the undertaking on appeal was not filed within five days after the service of the notice of appeal. The notice was served June 19, 1888. The 24th, which was the last day for filing the undertaking, fell on Sunday, and the undertaking was filed on the day following. This was in time. Code Civil Proc. § 12. For the error in sustaining the demurrer to the complaint the judgment is reversed, with instructions to the court below to allow the plaintiff to amend her complaint.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.; THORNTON, J.

77 Cal. 319

KATZ v. BEDFORD *et al.* (No. 12,580.)

(Supreme Court of California. November 1, 1888.)

1 CONTRACT—ACTION ON CONTRACT—RECOVERY OF QUANTUM MERUIT.

A contract to build a cement sidewalk, "said sidewalk to be not less than 10 feet wide and ——— feet long," is not such an entire contract that the contractor cannot recover on a *quantum meruit*, a part of the work being defective.

2. SAME—DEFECTIVE WORK.

In an action for the contract price, defendants not controverting by pleading or proof the completion of the work, but alleging that a part of it was defective, the fact that a part is found to be defective will not prevent a recovery on a *quantum meruit*, on the ground that the work was not completed.

3. SAME—ACCEPTANCE—ESTOPPEL.

Defendants saw the defective work as it progressed, and when it was completed, with full knowledge of its condition, paid a part of the amount due therefor, and permitted plaintiff to go on with the work on the other side of the street, and also used some of the walk before completed, in an auction sale of lots. *Held*, that defendants are estopped from setting up the contract as entire, and thus attempting to avoid payment for any part of the work.

4. SAME—EVIDENCE.

Evidence of a conversation between the parties, as to how the work should be measured, is not incompetent, as tending to construe the written contract; it being uncertain, under the terms of the contract, whether only the top, or both the top and face of the curbing should be measured.

5. SAME.

Evidence that one of the defendants saw the work as it progressed was competent, as showing that the payment was made with knowledge of the quality of the work.

In bank. Appeal from superior court, San Bernardino county; J. M. WILLIS, Judge.

Action by E. E. Katz against Bedford Bros. to recover for laying a cement sidewalk. Judgment for plaintiff, and defendants appeal.

H. C. Rolfe, for appellants. *Harris & Gregg*, for respondent.

WORKS, J. This action is brought to recover for the making and laying of a cement sidewalk. The complaint is in two counts,—one upon a special contract, which is set out and made a part of the complaint; the other upon a *quantum meruit*. The defendants admit the execution of the contract, but deny that the work was done in the manner required and provided therein; and allege, affirmatively, that the work was not done in a substantial and first-class manner, as agreed upon. The defendants also plead, by way of cross-complaint, the making of the same contract set out in the complaint; that the plaintiff has not performed the conditions of the contract; and that he "laid the sidewalk in a bad and unworkman-like manner; and the same, as made and constructed by plaintiff, was and is of an unsubstantial, frail, and very inferior kind and quality, and not serviceable, and is crumbly and worthless, and of no use or service to defendants." Both the complaint and cross-complaint allege that the defendants paid \$1,000 on the work, and the defendants seek to recover that amount, and interest. The complaint alleges that 16,200 square feet of sidewalk was laid, which was of the value, as fixed by said contract, and was of the reasonable value, of \$2,916; leaving due the plaintiff, after deducting the \$1,000 paid, \$1,916, and interest from the time of the completion of the contract. The court finds the making of the contract; that the amount of work was done as alleged by plaintiff; that a part of the sidewalk was on one side of the street, and part on the other; that on the west side the work was done in all things as required by the contract, except as to the time, which was extended by consent of defendants; and that on the other side of the street it was not completed within the time fixed by the contract, but the variation as to time was with the consent of defendants; that as to both sides of the street, by an agreement between the parties subsequent to the making of the original contract, the width of the sidewalk was reduced from ten to nine feet. As to the east side the court finds that the plaintiff "honestly and in good faith endeavored to comply with that condition of the agreement that the walk should be laid in a most substantial manner, and should be first class in every respect; but that plaintiff did not lay the east half of the sidewalk in strict or substantial compliance with the last-named condition, in that a number of the blocks or squares of the east half of the pavement are broken and loose, and some portions of the curbing are cracked and broken, and need repair; and that it will cost about fifty-eight dollars to replace the inferior portions of the east

half of the sidewalk with first-class pavement, and to put said east half into good order, according to the terms of the contract." Judgment was rendered for plaintiff for the amount of his claim, less the said sum of \$58.

Counsel for appellants contends that the contract sued on is entire, at least so far as each side of the street is concerned, and that plaintiff cannot recover for the reason that the work was not completed. It seems to us that there are two answers to this contention, either of which must be conclusive.

1. The contract relied upon by both parties does not require the plaintiff to lay any particular quantity of sidewalk. It provides that plaintiff shall "build, make, or lay a cement sidewalk; * * * said sidewalk to be not less than 10 feet wide, and ——— feet long." It will be seen that the number of feet of sidewalk to be laid is left blank, and there is no attempt in the pleadings of either party to have the contract corrected in this respect.

2. It is not alleged in defendants' answer or cross-complaint that the contract was not completed, nor is its completion controverted at the trial. The defense is that it was not done in a workman-like manner. In such cases the rule is well established that the plaintiff may recover on a *quantum meruit* and *quantum valebat* what the work done and materials furnished were worth, where, as in this case, the parties cannot rescind and stand in *statu quo*, but one of them must derive benefit from the labor of the other. Some of the cases cited by the appellant are to this effect, and we cite them as directly against him on this point: *Bragg v. Town of Bradford*, 33 Vt. 38; *McKinney v. Springer*, 3 Ind. 59; *Hayward v. Leonard*, 7 Pick. 180, 19 Amer. Dec. 268, and note, 272. The court finds that, as to the side of the street on which the work is found to be defective, the defendant saw the work done from day to day, as it progressed; and when it was completed, and with full knowledge of its condition, paid a part of the amount due therefor to plaintiff, and permitted him to go on and do the work on the other side of the street thereafter, and made no objection to the manner in which it was done until the whole work was completed, and that before it was entirely completed they caused a part of it to be swept off, and used the same at an auction sale of lots belonging to them, and fronting thereon. Counsel for appellants claims that the court below regarded this as an acceptance of so much of the work, and contends that in this the court was in error. Whether the facts show an acceptance, strictly speaking, or not, it is clear to our minds that it was such conduct as should estop the defendants from defending against the whole contract price of the work. The allowance of the amount necessary to make the work such as the contract called for was all the defendants were entitled to, and this the court gave them. *McKinney v. Springer*, 54 Amer. Dec. 470, 479, note, 3 Ind. 59; *Hayward v. Leonard*, 19 Amer. Dec. 268, 272, 7 Pick. 181; 3 Amer. & Eng. Cyclop. Law, 920; *Swain v. Seamens*, 9 Wall. 257, 274. It may be conceded, as claimed by appellant, that part payment does not amount to an acceptance; but, taken in connection with the other facts found as to the conduct of the defendants, we think it is amply sufficient to avoid the defense attempted to be made here.

It is claimed that a part of the finding, viz., as to the sweeping of the sidewalk, and its use, is not supported by the evidence; but there is evidence directly on the point, and we will not inquire as to its weight.

The court permitted one of the witnesses to testify to a conversation between the parties with reference to the manner in which the work was to be measured. To this, counsel objected on the ground that it was testimony tending to prove what construction should be given to a part of the contract, which should be determined by the court upon an inspection of the instrument. We have examined the evidence, and do not regard it as a statement as to the proper construction of the contract, or of the understanding of the parties as to how it should be construed, but as a statement of a subsequent agreement or understanding as to the mode of measurement; it being uncertain, under the terms of the contract, whether only the top, or both the top

and face, of the curbing should be measured. There was no error in admitting the evidence.

It is further objected that it was error to allow the plaintiff to prove that one of the defendants was present, and saw the work being done, as it progressed. We see no error in admitting this testimony. It was material, as tending to show that the payment of money on the work, without objection, was with knowledge of the manner in which the work was done, and its quality. The judgment and order denying a new trial are affirmed.

We concur SEARLS, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.; PATERSON, J.

77 Cal. 315

BURLINGAME v. ROWLAND. (No. 12,764.)

(*Supreme Court of California. November 1, 1888.*)

1. SPECIFIC PERFORMANCE—PAROL PROMISE—ERECTION OF IMPROVEMENTS.

Equity will decree specific performance of a promise by a father to convey land, clearly identified, to his daughter, where the latter, acting on the faith of the promise, moved with her family upon the land, which was unimproved, moved a house upon it, erected other buildings, and cultivated the land.¹

2. EVIDENCE—COMPETENCY—ASKING FOR A CONCLUSION.

In an action by the father to quiet the title, a question asked of him, whether he had said anything to the daughter which led her to believe that she was going to obtain title, was improper, as asking for a conclusion of the witness.

3. SAME—ADMISSIONS.

Evidence that plaintiff had told a witness that he had given the property to the daughter, though the statement was not made in her presence, was competent, as showing an admission of the gift by plaintiff.

4. SAME.

The testimony of plaintiff as to whether he intended, in his conversations with the daughter, to give more than a life-estate, was properly rejected, as it could not be heard to vary the legal effect of the transaction.

5. CONTRACT—CONSTRUCTION—AGREEMENT TO CONVEY LAND AND EXECUTE DEED.

An agreement to give property absolutely, and execute a deed therefor, is an agreement to convey the whole of the grantor's estate, and not merely a life-estate of the grantee.

In bank. Appeal from superior court, Los Angeles county; A. W. HUTTON, Judge.

Action by Hiram Burlingame against D. W. Rowland to quiet title to land. Judgment for defendant, and plaintiff appeals.

P. W. Dooner, for appellant. *Winglin & Hester*, for respondent.

WORKS, J. This is an action to quiet title, the complaint being in the usual form. The answer denies the material allegations of the complaint, and sets up affirmative matter to the effect that plaintiff was the equitable owner and in possession of the property in controversy; that while so in possession he promised and agreed with his daughter, one Lillie Rowland, that if she would take possession of the property, and live upon it with her husband and family, he would give the same to her, and make her a conveyance when he was able to do so; that she and her husband took possession of the property under said agreement, and made valuable and lasting improvements; that plaintiff subsequently became the owner of the legal title to the property, and the daughter demanded a deed from him, which he declined to give; that the said Lillie Rowland has since deceased, and the defendants are her heirs, and one of them the administrator of her estate. A cross-complaint was also pleaded, setting up the same facts, substantially, and praying for a specific performance of the

¹As to when equity will decree specific performance of contracts to convey land, see *Ducie v. Ford*, (Mont.) *ante*, 414; *McC Campbell v. McFaddin*, (Tex.) 9 S. W. Rep. 138; *Stout v. Weaver*, (Wis.) 39 N. W. Rep. 375; *Blankenship v. Spencer*, (W. Va.) 7 S. E. Rep. 433, and note; *Nippolt v. Kammon*, (Minn.) 40 N. W. Rep. 266, and note.

contract. The court found for the defendants, both upon the answer and cross-complaint, and decreed that plaintiff held the title in trust for the estate of his daughter, and that he execute a conveyance to the administrator of her estate within 60 days. There was a motion by the plaintiff for a new trial, which was denied, and he appeals.

The findings of the court below are very full, and cover all the issues. It is insisted that some of the findings are not sustained by the evidence. We have gone carefully through the evidence, and are of the opinion that the findings referred to are very clearly and fully supported thereby. There does not seem to us to be any ambiguity as to the agreement. The evidence shows a plain, unequivocal promise to convey the property, which is fully identified and located. It sufficiently appears that, acting upon this promise, the daughter and her family went upon the property, which was wholly unimproved, moved a house upon it, erected other buildings, and cultivated the land. The authorities are clear that such a contract, acted upon, and partially performed, as shown here, may be specifically enforced. *Manly v. Howlett*, 55 Cal. 94, 97; *Association v. Chester*, Id. 98, 102; *Anson v. Townsend*, 15 Pac. Rep. 50; *Freeman v. Freeman*, 51 Barb. 306. The agreement proved was to give the property absolutely, and to execute a deed therefor. It is contended that this cannot be construed as an agreement to give and convey more than a life-estate, and that, therefore, the finding and judgment that the defendants were entitled to a fee-simple title is erroneous. We cannot concur in this view. The promise made must be construed as one to convey the whole of the promisor's title. It is true he owned but an equitable title at the time of making the promise, but his agreement was to convey when he could make a deed. We think the court below properly held this to be a promise to convey the fee-simple as soon as such title vested in him. The plaintiff, testifying in his own behalf, was asked this question: "Question. Did you, at any time, say anything which led her to believe she was going to obtain title, or a deed of the land from you?" The question was objected to, and the objection sustained. This is relied upon as error. The question was clearly improper, as asking for a conclusion of the witness, and the objection was properly sustained. But, if this were not so, the witness is allowed to state fully just what he did say, which rendered the ruling unimportant. A witness was asked for a conversation between the plaintiff and himself, in which the former stated that he had given the property to his daughter. This was objected to, because the statement did not appear to have been made in the presence of Mrs. Rowland, and, being after she had taken possession of the property, could not have influenced her. The evident object of the testimony was to prove an admission by the plaintiff that he had made the gift as claimed by the defendants, and for that purpose it was competent and material. The plaintiff was asked whether, by the conversations had with his daughter, he intended to give her more than a life-estate in the property. Objection being made the evidence was excluded, and properly. The question called for a conclusion as to what his intention was, which could not be heard to vary or affect in any way the legal effect of the transaction. We find no error in the record. The judgment and order denying a new trial are affirmed.

We concur: SEARLS, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.

77 Cal. 313

In re GWIN'S ESTATE. (No. 12,805.)

(*Supreme Court of California.* November 1, 1888.)

1. HUSBAND AND WIFE—COMMUNITY PROPERTY—DEVISE BY WILL.

Under Civil Code Cal. § 1402, which provides that "upon the death of the husband one-half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband" the husband's will, as against his widow, can pass title to but one-half of the community property.

2. WILL—PROBATE AND CONTEST—ELECTION BY WIDOW.

An election by a widow to take under the law, rather than under her husband's will, is not a contest of the will within the meaning of Code Civil Proc. Cal. § 1333, which provides that "if no person within one year after the probate of a will contest the same or the validity thereof, the probate of the will is conclusive."

3. SAME—EFFECT OF PROBATE—ESTOPPEL.

A widow is not estopped to make such election by causing the will to be probated and becoming the executrix thereof.

In bank. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

This is an appeal by Hachaliah P. Gwin and Theodore Gwin, devisees of John Gwin, deceased, from a decree directing distribution of the property devised by said John Gwin. The respondent, Cornelia L. Gwin, is the widow of deceased Code Civil Proc. § 1333, provides that "if no person within one year after the probate of a will contest the same or the validity thereof the probate of the will is conclusive." Civil Code, § 1402, provides that "upon the death of the husband, one-half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband."

Wm. H. Schooler, for appellants. B. F. Thomas, for respondent.

WORKS, J. John Gwin, by his will, devised and bequeathed certain real and personal property to his wife, and to his two sons all of the real property in Butte county, Cal., of which he might die seized. His wife and two others were named as executors of the will. The will was duly admitted to probate, and the persons named appointed executors on the 19th day of February, 1887. The next step in the estate appearing in the record is a notice by the widow that she declined to take under the will, and elects to take as widow, under section 1402 of the Civil Code. This notice was filed April 26, 1888, more than one year after the probate of the will. Subsequently, on the 27th day of April, 1888, a petition for distribution of the estate was filed by said widow, and on the 12th of May following decree of distribution was duly entered, by which the real estate of the deceased was declared to be community property, and one-half thereof distributed to the widow and one-fourth each to the sons. The sons, who are legatees under the will, appeal.

No objection is made to the proceedings, nor is the fact that the real estate was community property in any way questioned. The appellants contend that as the widow is named as executrix of the will, and caused the same to be probated, and was appointed and qualified as such executrix, and her election to take under the law was not made within one year, she is estopped to make such election. It is contended that the election on her part not to take under the will was, in effect, a contest thereof, and came too late under section 1333 of the Code of Civil Procedure. But this was in no sense a contest of the will, or its probate. On the contrary, the court below proceeded to settle and distribute the estate according to the terms of the will. It was found that the real estate was community property, and that, for that reason, the will, as against the widow, could only pass the title to one-half thereof. There was no error in this conclusion. Civil Code, § 1402. It is urged that the widow, having probated the will, was estopped thereby to make her election, and numerous authorities are cited to the effect that one who has taken a beneficial interest under a will is thereby held to have confirmed and ratified it. This court has held that a widow is not estopped to make her election to take under the law by causing the will to be probated, and becoming the executrix thereof. *Estate of Frey*, 52 Cal. 658. There is nothing before us to show that the widow took a beneficial interest under the will, but if she had it would not estop her from asserting her title to the one half of the community property under the circumstances of this case. *Beard v. Knox*, 5 Cal. 252,

257; *Estate of Silvey*, 42 Cal. 210, 212. There is no error of which the appellants have reason to complain. Order affirmed.

We concur: SEARLS, C. J.; MCFARLAND, J.; THORNTON, J.; PATERSON, J.; SHARPSTEIN, J.

77 Cal. 324

BRALY v. HENRY. (No. 12,402.)

(*Supreme Court of California*. November 2, 1888.)

1. WITNESS—CROSS-EXAMINATION.

Where the answer admits plaintiff's ownership of the note sued on, and the bill of exceptions recites that it is proved that the note was executed by defendant, and indorsed and delivered to plaintiff before suit, refusal to allow defendant to cross-examine plaintiff to show by him that he is not the owner of the note, is not error.

2. SAME.

Refusal to allow defendant to cross-examine plaintiff with the view of showing that the note sued on is without consideration, is not error where plaintiff has given no testimony on the point, in chief.

In bank. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

Action on a note brought by J. H. Braly against S. W. Henry. There was a judgment for plaintiff, and defendant appeals. For opinions on former appeals, see 11 Pac. Rep. 385, 12 Pac. Rep. 623, and 18 Pac. Rep. 798.

W. D. Grady, (*Goucher & Geis*, of counsel,) for appellant. Geo. A. Nourse, for respondent.

WORKS, J. This is the second time this case has been before this court. *Braly v. Henry*, 71 Cal. 481, 11 Pac. Rep. 385, and 12 Pac. Rep. 623. We refer to the former opinion for a statement of the issues presented by the pleadings. At the second trial in the court below the defendant was permitted to introduce evidence tending to show a contemporaneous agreement between the payee of the note and himself, by which he was to be credited with the quantity of hay the stack was found on measurement to fall short of the quantity estimated by the parties, and for which the note was executed. The question whether there was such a shortage is the only real controversy presented by the pleadings. The jury found against the defendant for the full amount of the plaintiff's claim, and judgment was rendered accordingly. Defendant appeals.

The record is full of objections to the evidence on the part of the defendant. There are no less than 40 specifications of error, all going to the admission or exclusion of evidence, although the evidence is very brief, taking up less room in the transcript than the objections themselves and rulings thereon. We cannot extend this opinion in like manner, by considering these alleged errors separately and in detail. Eighteen of the alleged errors are in sustaining objections of plaintiff's counsel to questions put to plaintiff on cross-examination, with the view of proving by him that he was not the owner of the note sued on, and that the same was without consideration. As to the matter of the ownership of the note the objections were properly sustained for two reasons: (1) There was no issue as to the ownership. That plaintiff was the owner of the note was admitted by the answer. (2) The bill of exceptions recites in the beginning that it is proved that the note was executed by the defendant to one Hughes, and by Hughes indorsed and delivered to plaintiff before the commencement of the suit. As to the question of consideration, the objections were properly sustained, for the reason that the witness had not given any testimony on the point, in chief, and the same were not proper cross-examination. We have carefully examined the other errors assigned, and find them to be equally without foundation. The defendant was permitted to go fully into the evidence excluded on the former trial, and the verdict of the

jury is against him. It is urged that the verdict is not sustained by the evidence, but there are no specifications of particulars in which the verdict is not sustained. Waiving this omission, we are of opinion that the evidence is sufficient to uphold the verdict. It is urged by counsel for respondent that the record is not properly before us, but we have preferred to decide the case upon its merits. Judgment and order denying motion for a new trial affirmed.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; THORNTON, J.; PATERSON, J.

77 Cal. 326

PARDY v. MONTGOMERY *et al.* (No. 11, 204.)

(*Supreme Court of California.* November 2, 1888.)

1. APPEAL—REVIEW—MATTERS NOT APPARENT OF RECORD.

The court, on appeal, cannot notice affidavits in the transcript showing, as claimed by appellant, the circumstances under which the action was dismissed by the court below, where it is not shown in any mode that such affidavits were used in that court.

2. PRACTICE IN CIVIL CASES—DISMISSAL—PRESUMPTION.

Under Code Civil Proc. Cal. § 581, giving the trial court power, under certain circumstances, to dismiss an action for want of prosecution, it must be presumed, in the absence of a showing to the contrary, that the court exercised its power in accordance with the statute.

In bank. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

This was an action by George Pardy against Charles Montgomery *et al.*, commenced June 23, 1880. An amended complaint was filed September 15, 1880. The answer was filed October 8, 1880. The cause was tried May 2, 1882, before Judge ALLEN without a jury. The court announced from the bench that the defense was sustained by a preponderance of testimony, and ordered judgment for defendants. Judge ALLEN's term expired with the year 1882. April 2, 1883, plaintiff applied to the clerk to have a judgment entered in the case for the purpose of appealing therefrom. This the clerk refused because no findings were waived nor made and filed. October 30, 1883, S. T. Birdsall was substituted as plaintiff's attorney. December 10, 1883, plaintiff served and filed a notice that he would move for a new trial. May 23, 1884, the motion was dismissed. July 29, 1884, plaintiff gave notice to set cause for trial on the ground that the issues were joined, and that the former hearing resulted in a mistrial by reason of the negligence of defendants in not having findings made and filed. August 1, 1884, defendant made a motion to dismiss the action for want of prosecution, which prevailed, and from which order the appeal is taken.

Saml. T. Birdsall and Wm. T. Baggett, for appellant. *W. S. Goodfellow*, for respondents.

THORNTON, J. We cannot take notice of the affidavits in the transcript, showing, as claimed by the appellant, the circumstances under which this action was dismissed by the court below, for the reason that it is not shown in any mode that such affidavits were used on the hearing of the application in that court. The court below had power to dismiss the action for want of prosecution, (see Code Civil Proc. § 581;) and, there being no showing to the contrary, we must presume that the court below exercised its power properly, and within the rules prescribed by law. Judgment affirmed.

We concur: SEARLS, C. J.; WORKS, J.; PATERSON, J.; SHARPSTEIN, J.

LABISH v. HARDY. (No. 11,627.)

(Supreme Court of California. November 8, 1888.)

1. HUSBAND AND WIFE—OCCUPATION OF GOVERNMENT LAND—COMMUNITY PROPERTY.
A husband and wife occupied a tract of land belonging to the United States from 1847 until 1856, when the wife died. The husband continued to occupy the land until 1871, when he received a deed to it from the town of Santa Cruz under act Cong. July 23, 1866. *Held*, that the occupation by the husband and wife during her life did not have the effect to render the land community property, or vest the wife with any ownership whatever.
2. QUIETING TITLE—PLEADING—EVIDENCE.
In an action by a daughter of the first marriage against a second wife, to whom the land had been deeded, to recover the interest, claimed by plaintiff as heir of her deceased mother, the court properly sustained objection to the introduction of evidence that plaintiff's father was indebted to her; and also properly denied her motion to amend her complaint by alleging such indebtedness.

In bank. Appeal from superior court, Santa Cruz county; F. J. McCANN, Judge.

Action to quiet title, brought by Isabella Labish against Jane Hardy. The court, at the close of plaintiff's evidence, dismissed the action, and plaintiff appeals.

W. D. Storey, for appellant. Charles B. Younger, for respondent.

SHARPSTEIN, J. Action to quiet title. The material question in this case is whether the plaintiff has any title to the premises described in her complaint. The facts upon which appellant relies as proving her title to the premises are stated in the brief of her counsel to be as follows: "In 1847 plaintiff's parents went into possession of the land in dispute, which was then public land of the United States, and continued to occupy it, together with their children, as their home until the death of plaintiff's mother, which occurred in June, 1856, at which time plaintiff was seven years old. After the death of plaintiff's mother, the father of plaintiff continued to occupy said premises as his home until his death, in 1883. In June, 1860, plaintiff's father married the defendant. In May, 1871, plaintiff's father took a deed for the premises from the corporate authorities of the town of Santa Cruz, under the act of congress, approved July 23, 1866, entitled 'An act to quiet title to certain lands within the corporate limits of the city of Benicia, and the town of Santa Cruz;' said premises then being within the corporate limits of the town of Santa Cruz, and public lands of the United States. On August 8, 1881, plaintiff's father made a deed of gift of the premises to the defendant. This deed was recorded, but was not properly acknowledged, when this action was commenced. At the time this deed was made the premises constituted all the property of plaintiff's father, and he never afterwards acquired any property. The defendant claims the premises under this deed." Counsel for appellant claims that "the rights and equities acquired by her parents through occupancy and possession of the premises constituted community property, one-half of which belonged to her mother, and at her death, by the law as then existing, descended to and vested in her children." Conceding that to be so, what rights or equities did the parents acquire through occupancy and possession of the premises prior to the death of appellant's mother, in 1856? Ten years after the death of appellant's mother, congress relinquished and granted the land to the corporate authorities of the town of Santa Cruz, in trust and with authority to convey it to the party in the *bona fide* occupancy of it at the date of the passage of said act. On May 13, 1871, the corporate authorities of Santa Cruz conveyed the premises to William H. Hardy, father of appellant, and husband and grantor of respondent. The beneficiaries under the act of congress were clearly those in the *bona fide* occupancy of land in the town of Santa Cruz at the date of the passage of said act, which was 10 years

after the death of appellant's mother. An occupancy which terminated 10 years before the passage of the act would not be a *bona fide* occupancy at the time of its passage. We are unaware of any law under which a bare occupancy of any public land of the United States vests in the occupant any rights or equities in or to the land so occupied. We think no property was acquired in the premises in controversy by either of the parents of appellant prior to the passage of the act of congress of July 23, 1866, and to constitute it common property it must have been acquired after marriage, otherwise than by gift, bequest, devise, or descent.

Holding as we do that appellant had no title, legal or equitable, to the premises, the failure of the court to find upon the issue raised by the defendant's defense of the bar of the statute of limitations, does not materially affect the substantial rights of the parties, and the error, if any, must be disregarded. We advise courts, however, in all cases to find upon the material issues raised by the pleadings. The objection to the introduction of evidence to prove that plaintiff's father was indebted to her, was properly sustained, and the motion of plaintiff to amend her complaint by alleging such indebtedness, was properly denied. Judgment and order affirmed.

We concur: SEARLS, C. J.; THORNTON, J.; MCFARLAND, J.; PATERSON, J.

79 Cal. 115

RANDALL v. DUFF *et al.* (No. 11,343.)

(Supreme Court of California. October 23, 1888.)

1. POWERS—OF ATTORNEY—SALE WITHOUT CONSIDERATION—PURCHASERS WITH NOTICE.

Under a power of attorney to sell and convey land, a conveyance without any consideration, given or agreed to be given, is a nullity; and, the owner not having been made a party to a foreclosure by mortgagees of the grantee, purchasers at the foreclosure sale, with notice, cannot maintain an action against him to quiet title.

2. LIS PENDENS—NOTICE.

Representatives of the owner having, before the foreclosure, sued the grantee to have the conveyance declared void, and filed notice of *lis pendens*, purchasers at the foreclosure sale take with notice.

3. QUIETING TITLE—FINDINGS—NOTICE.

In an action to quiet title by the purchaser at foreclosure sale, findings which show that the legal title did not pass to him unless he was a purchaser without notice, and which, instead of showing want of notice, show merely that the mortgagees had no notice when they took the mortgage, are insufficient to support a judgment for plaintiff.¹

4. SAME—STATUTE OF LIMITATIONS.

The mortgagor having no title to the land, and the purchasers at foreclosure sale taking with notice, the action by the latter to quiet title must fail, irrespective of any question whether the rights of the owner's representatives are barred by the statute of limitations.

5. APPEAL—RECORD—NOTICE OF MOTION.

Under Code Civil Proc. Cal. § 952, making an order denying a motion for a new trial a part of the record, a recital in the order that the motion was made upon grounds set forth in the notice of motion is a sufficient showing in the record that the notice was given; a recital of the contents of the motion not being necessary.

MCFARLAND, J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, Humboldt county; N. HAMILTON, Judge.

Action by A. W. Randall against Julia K. Duff and Agnes Duff, heirs at law of William R. Duff, and William L. Duff, administrator, to quiet title. Judgment for plaintiff, and defendants appeal.

¹One who takes a deed of land, with knowledge of an outstanding equitable right in a third person, takes subject to such right. *McCone v. Courser*, (N. H.) 15 Atl. Rep. 129. See, also, note, *Id.* See *Morrow v. Graves*, (Cal.) *ante*, 489, and note.

Wilson & Wilson (S. M. Wilson, of counsel) and *J. D. H. Chamberlain*, for appellants. *Horace L. Smith* and *S. M. Buck*, for respondent.

HAYNE, C. Suit to quiet title to three tracts of land. The defendants set up title in themselves, and filed a cross-complaint for affirmative relief. A preliminary objection is taken to the proceedings on motion for new trial, upon the ground that the record does not show that a notice of intention was given, and the case of *Dominguez v. Mascotti*, 15 Pac. Rep. 773, is relied upon. We think, however, that it sufficiently appears from the record that a notice of intention was given. The order denying the motion, which is a part of the record, (Code Civil Proc. § 952,) recites that the motion was made "upon the grounds set forth in defendants' notice of motion." This sufficiently shows that a notice was given. It is not necessary that the notice should be formally set out. The fact that it was given may be inferred from a recital in the statement or bill of exceptions, (*Frost v. Meetz*, 52 Cal. 670,) or from a stipulation, (*Godchaux v. Mulford*, 26 Cal. 320,) or, as in this case, from the order disposing of the motion, (*Girdner v. Beswick*, 69 Cal. 115, 116, 10 Pac. Rep. 278.) In the case of *Bank v. Hitchcock*, 18 Pac. Rep. 648, the fact that a notice had been given was inferred from a statement in the order denying the motion that "a motion for a new trial is not the proper remedy." It is true that the recital here only goes to the fact that a notice was given, without showing its contents, or that it was given in time. But it will be presumed that the grounds stated in the bill of exceptions correspond (as they should) with the grounds stated in the notice. And it has been several times held that, where it appears that a notice was given, it will be presumed to have been in time, unless the record shows the contrary. *Roussin v. Stewart*, 33 Cal. 210; *Burnett v. Stearns*, Id. 472; *Girdner v. Beswick*, 69 Cal. 115, 116, 10 Pac. Rep. 278. The case of *Dominguez v. Mascotti*, therefore, has no application, and the preliminary objection is not well taken.

Upon the merits the facts shown by the record are as follows: In 1863, one William R. Duff, who was then the owner of the property in controversy, departed from the state, leaving a power of attorney to his father, Richard Duff. William R. Duff remained away until his death, which occurred in April, 1875. During his life-time his father, assuming to act as his agent, executed conveyances of the property to one Robert P. Duff, the brother of William R. These conveyances purported to be for valuable consideration, but "were in fact made without any consideration given, or agreed to be given." The grantee mortgaged one of the pieces of the property to one William Ritchie for \$500, and the others to one Charles Fiebig for \$1,500. Neither of these mortgagees had, at the time they took their mortgages, any notice of the rights of William R. Duff, or of his successors in interest. Each of the mortgages was foreclosed after the death of William R. Duff, but his successors in interest were not parties to either of the suits. The piece covered by the Ritchie mortgage was sold directly to the plaintiff, who in due course received the sheriff's deed. The other pieces were bought in by the mortgagee Fiebig, who, after receiving the sheriff's deed, conveyed to the plaintiff. William R. Duff never knew of the conveyance to his brother Robert; and his wife and child (defendants here) first learned of it, and of the fact that it was without consideration, in December, 1880. In February, 1881, they brought a suit against Robert P. Duff and one Frank S. Duff, but not against the plaintiff here, "to have the title acquired by Robert P. Duff * * * declared to be void, and that defendants in that action held the property in trust;" and at the same time filed a notice of *lis pendens*. This notice was filed before the mortgages were foreclosed. Judgment in said action was rendered for plaintiffs, but this judgment was reversed on appeal, and the case was remanded for a new trial. See *Duff v. Duff*, 71 Cal. 513, 12 Pac. Rep. 570. Said action was pending at the time of the trial herein. Judgment in

the case before us was given for the plaintiff, and the defendants appeal. We think the judgment appealed from was erroneous.

1. The power of attorney was to sell and convey the property. It did not authorize the agent to give the property away, or to commit a fraud upon the principal by executing a conveyance which purported to be for valuable consideration, but which was in fact without any consideration "given, or agreed to be given." The grantee must necessarily have known that he did not give or agree to give any consideration for the deed, and consequently that the agent had no authority to make it. The conveyance being one which the agent had no power to make, was a nullity, (*Dupont v. Wertheman*, 10 Cal. 368.) And, such being the case, the legal title remained in the principal, William R. Duff. The case of *Duff v. Duff*, 71 Cal. 513, 12 Pac. Rep. 570, is not inconsistent with the foregoing. In that case it seems to have been argued that a court of equity had no jurisdiction because no title passed under the agent's deed. The court, however, said that there was fraud, and that that was sufficient to give the jurisdiction. See page 533. But we see nothing in the opinion to the effect that the title passed to Robert P. Duff, although the suit seems to have been framed on that theory. We do not see how it can be held that the title passed under the agent's deed without overruling *Dupont v. Wertheman*, which we think was rightly decided.

2. But, although the legal title remained in William R. Duff, the apparent title was in Robert P. Duff; and Ritchie and Fiebig having lent their money to him, and taken their mortgages without notice of the facts, were, so far as their securities were concerned, purchasers without notice for a valuable consideration. But purchasers of what? Not of the legal title; for under our system a mortgage does not convey the legal title. They simply took liens upon the property to secure the sums lent by them. Their mortgages conferred upon them the right, by proper proceedings, to have the legal title sold to satisfy their claims. But to that end it was necessary to bring suits of foreclosure against the parties who had the legal title. The person who executed the mortgages had no title, either legal or equitable. No title, therefore, could be got through a suit against him alone. The mortgagees had to rely upon a species of estoppel, and they could not have this estoppel judicially declared against persons who were not before the court. It is too plain for discussion that, at any time before the foreclosure suits, the real owners had the right to redeem their property from the incumbrances to which it was subjected by the fraud of the agent of their predecessor in interest; and they could not be deprived of this right by suits to which they were not parties. The rule that adverse titles cannot properly be litigated in foreclosure has no application. The fallacy which we think runs all through the argument of the learned counsel for the respondent is in assuming that Robert P. Duff ever had any title. But, as we have stated, the conveyance to him was in excess of the powers of the agent, and was therefore a mere nullity. If Robert P. Duff had conveyed the property to a purchaser for value, without notice, and such purchaser had mortgaged it, the result would probably have been different. It might then have been claimed that the whole title passed to such purchaser, and that he was the only party necessary to be made a defendant in the foreclosure suits. But inasmuch as the mortgagees took their mortgages directly from Robert P. Duff, who never had any title either at the date of the mortgages or otherwise, it was necessary to bring the persons who had the title before the court, which was not done. Hence the foreclosure proceedings did not *ex proprio vigore* cut off the rights of the successors in interest of William R. Duff.

3. But the apparent title being in Robert P. Duff, a defendant in the foreclosure suits, we think that a purchaser at the sheriff's sales for value, and without notice, would take as good a title as if he had purchased directly from Robert P. Duff, and taken a deed from him. See 2 Pom. Eq. Jur. § 774. And

inasmuch as there is no dispute that the purchasers at such sales gave value for their deeds, the question is reduced to this: Did they have notice of the rights of the defendants at the time they purchased? In this regard the findings show the power of attorney in full, the fact that the deed from the agent to Robert P. Duff was without consideration, and that the foreclosure suits were against Robert P. Duff and one Frank S. Duff—not against the defendants here. The findings, therefore, show that the legal title did not pass to the purchasers at the foreclosure sales, unless they were without notice. It is necessary, therefore, that the want of notice should appear from the findings. Compare *Landers v. Bolton*, 26 Cal. 394. If they do not show this affirmatively, they do not support the judgment; and this, independent of the question as to the burden of proof at the trial. But the findings do not show that the purchasers were without notice at the time of the foreclosure sales. What they do show is that the mortgagees had no notice at the time they took their mortgages, which is quite a different thing. This defect in the findings is not cured by any admission of the parties, as supposed by the counsel for the respondent. There was nothing in the nature of an agreed statement of facts, made part of the judgment roll by stipulation. See cases cited in section 249, Hayne, New Trial & App. The admissions were of mere matters of evidence at the trial. The cases cited by the learned counsel have no application, being in reference to admissions in the pleadings. The findings, therefore, do not support the judgment. This is sufficient to require a reversal; but, since the question of notice will arise upon a retrial, and has been argued, we have examined the evidence in regard to it.

The evidence shows that the suit of *Duff v. Duff*, was commenced before either of the decrees in foreclosure was rendered. The purpose of that suit was "to have the title acquired by Robert P. Duff and Frank S. Duff, under the power of attorney mentioned in defendants' cross-complaint in this action, declared void." The plaintiff, Randall, who was the purchaser at the Ritchie sale, had actual knowledge of this suit. It does not appear that Fiebig, who bought in the property at the sale under his mortgage, and afterwards conveyed to Randall, had any such actual knowledge. But a notice of *lis pendens* was filed on the day the suit was commenced; and this gave both Randall and Fiebig constructive notice of the pendency of the suit. Now, as has been stated, the mortgagees could not claim to be purchasers of anything but a lien up to the time of the foreclosure proceedings; and those proceedings did not cut off the rights of the defendants here, because they were not parties to said suits; so that whatever rights Fiebig and Randall got must arise from their having been innocent purchasers, at the foreclosure sales, of the apparent title of Robert P. Duff. They therefore claim through him. This being the case, and the suit to declare the invalidity of his supposed title having been pending at the time they purchased, and they being charged with notice thereof, how can it be contended that they took the property free from the claims litigated in that suit, so as to be entitled to have their title quieted as against such claims? We understand it to be elementary law that a person who acquires the claim of a defendant in a pending suit, of which he has notice, takes subject to the rights of the plaintiff in such suit. The maxim is, *pendente lite nihil innovetur*; and while our statute has made some change as to what constitutes notice, it makes none as to the effect of the notice when given. It results that the purchasers at the foreclosure sales are subject to the rights of the plaintiff in the suit of *Duff v. Duff*. We cannot know from the record before us what the final outcome of that suit will be. Therefore we are not called upon to say what the rights of the parties will be in case the defendants in *Duff v. Duff* shall finally prevail. In other words, the question whether the notice with which the purchasers at the foreclosure sales were charged, would cease to operate upon a defeat from any cause of the plaintiff in that suit, or would extend beyond it, and affect the present case, notwith-

standing such defeat, is a question which does not arise upon the record on this appeal.

4. It is argued for the respondent, however, that the rights of the defendants here are barred by limitation, because they discovered the fraud upon their predecessor in interest more than three years before the filing of their cross-complaint; but if we assume, in favor of the respondent, that this point arises upon the record, we do not think the point well taken. The fallacy of the argument is in assuming that any title passed to Robert P. Duff. The learned counsel assume that he took the title, and that the defendants here are driven to fasten a secret trust upon it; but, as we have pointed out, no title passed to Robert P. Duff. And whatever rights the respondent has must depend upon whether he and Fiebig were purchasers without notice at the sheriff's sales. If they cannot establish this, their claim to the property fails. If they do establish it, they take a perfect title, irrespective of any period of limitation. For this purpose, therefore, it is immaterial when the cross-complaint was filed, or whether one was filed at all. The questions as to what affirmative relief the defendants are entitled to, and what should be required of them as a condition thereof, are not necessary to be considered at present. We therefore advise that the judgment and order appealed from be reversed and the cause remanded for a new trial.

We concur. BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and the cause remanded for a new trial.

McFARLAND, J., dissenting.

77 Cal. 353

SANSOME v. MYRES, Judge. (No. 20,452.)

(Supreme Court of California. November 19, 1883.)

EXCEPTIONS, BILL OF—SIGNING BY JUDGE—MANDATE TO COMPEL.

Where a party presents a bill of exceptions which is meager, inaccurate, and partial, omitting important evidence, and condensing into 4½ pages of manuscript more than 100 pages of type-writing, the judge will neither be compelled to sign the bill, nor to amend it, as an amendment would be practically to draft a new bill; which duty is, by Pen. Code Cal. § 1171, required to be done by the excepting party.

In bank. Application for writ of mandate.

John Sansome, having been found guilty in the superior court of Placer county of the crime of robbery, moved for a new trial. He tendered a bill of exceptions, which, for reasons set out in the opinion, Hon. B. F. MYRES, judge of said court, refused to sign; whereupon he applied to the supreme court, and obtained an alternative writ of mandate, in accordance with his petition.

A. L. Hart and D. L. Chamberlain, for petitioner. F. P. Tuttle and John W. Fulweiler, (Pillsbury & Blanding, of counsel,) for respondent.

THORNTON, J. This is an application for a writ of mandate commanding the Honorable B. F. MYRES, judge of the superior court of the county of Placer, to settle a bill of exceptions in the case of *People v. John Sansome*. Sansome, the petitioner for the writ here, was indicted by the grand jury of Placer county for the crime of robbery, and tried on this indictment before the superior court of the same county, the Honorable B. F. MYRES presiding. He was convicted and sentenced, and at the proper time a motion for a new trial was made. This motion was made on the grounds that the court had misdirected the jury in matters of law, and erred in the decision of matters of law arising during the course of the trial, and that the verdict was contrary to the evidence. In due time counsel for the defendant, Sansome, prepared a draft of a bill of exceptions, which was regularly presented, on notice to the district attorney, to the judge for settlement. The judge refused to settle the bill presented, on the ground that it was inaccurate, and in many respects untrue, and contained but a meager and partial statement of the facts and proceedings leading up to and connected with and upon which the rulings of the court were had, that are complained of, and also a mere defective skeleton of the testimony and evidence submitted to the jury, and upon which they reached their verdict of guilty. To the alternative writ issued in this case the judge has filed an answer, in which he states the same reasons for not settling the bill of exceptions, and amplifies them. The judge in his answer says: "That to have presented fully and fairly all the matters and things and facts connected with and leading up to the rulings of the court and connected with the trial, as tending to show error, it would have been necessary for the court to have added amendments to that part of the bill of exceptions, relating to such errors, of about twenty pages of manuscript, and, in fact, the matters were so presented in said bill of exceptions that the only proper way would have been to have drawn an entirely new bill as a substitute; and, the testimony of the seven witnesses for the people, as set out in the proposed statement, was condensed to four and a half pages of very coarsely-written manuscript, while the testimony for the people, as given by the witnesses, covered over one hundred and fifteen pages of type-writing, as actually written by the court reporter under the order of the court, for the use of the petitioner's attorney; and, in fact, contained very little, and in some instances none of the material testimony, as given by the witnesses for the people. That, to have made that part of the statement a fair presentation of the testimony upon which the jury found their verdict, would have required amendments covering at least fifty pages of manuscript; and this court would have to have written, or ordered

the same written at its dictation, such amendments, and, in fact, would have had to draft an entirely new bill of exceptions and statement." The judge further states that none of the testimony of Capt. A. W. Stone, so far as it related to the commission of the offense, and as tending to connect the petitioner with the commission of the crime, was set out in the bill of exceptions, although the same covered over 50 pages of type-writing, nor was any part of the three statements claimed to have been made by the petitioner at three different times, and to be contradictory and inculpatory in their nature, given in the bill, although such statements were more than 10 pages in length of type-writing; that the testimony for the defense, as set out in the bill presented, was partial, and did not contain, but rather omitted, all those matters which tended to criminate defendant, or to show that such evidence might not be true, or was given under a mistaken recollection of the facts. The learned judge states that he was ready at all times, and has ever been ready, to settle and allow a fair and full bill of exceptions in the case, and submits that he should not be compelled to draft or amend the bill of exceptions presented so as to present a full and impartial statement and showing of the facts and circumstances and matters upon which the rulings of the court were made, and of the testimony by which the verdict was supported, and upon which it was reached. The above statements present the portions of the answer herein which are of material importance, and which are to be considered.

As we understand the position of this cause, it was argued upon a general demurrer to the answer. The statements of the answer must then be taken as true. That it is the duty of the party desiring to have a bill of exceptions settled to prepare the draft of such bill, is plainly required by the statute. See Pen. Code, § 1171. See, also, section 1174 of the same Code. This duty of preparing such a draft cannot, by direct or indirect means, be thrown on the court or judge. The draft to be prepared by the party should be full and fair. It should show fully and fairly all the facts and circumstances on which the rulings of the court excepted to were based; and when the ruling of the court, on a motion for a new trial made on the ground that the verdict is contrary to the evidence, is to be reviewed, all the evidence on which the jury acted should be set out in the draft of the bill. The mistakes and omissions of the draft may be corrected and supplied by the suggestion and order of the judge on the settlement of the bill, so as to make the bill, when settled, conform to the truth, and correctly set forth, so far as is material, what transpired on the trial or proceeding to be reviewed. The judge should see that the bill is a true history of what it purports to set forth. But this duty of the judge does not extend so far as to require him to prepare or have prepared what in effect would be a new bill of exceptions. This would be to impose on the judge, and relieve the party of the duty of preparing the draft of the bill of exceptions to be settled. Taking the facts stated in the answer of Judge MYRES to be true, as we must in the manner in which the case is presented to this court, we think it clear that, by allowing the writ here asked for, we should be imposing on the judge the duty and task of preparing what would be substantially a new bill of exceptions, and taking from the party desiring to have the bill settled a duty imposed on him by the statute. Entertaining these views, we must hold that the answer of Judge MYRES is sufficient, and states facts which are a defense to the application of the petitioner. The demurrer to the answer must be overruled. So ordered.

We concur: SEARLS, C. J.; MCFARLAND, J.; PATERSON, J.; WORKS, J.; SHARPSTEIN, J.

STERN v. LOWENTHAL. (No. 11,010.)

(Supreme Court of California. November 16, 1888.)

1. LIBEL AND SLANDER—PLEADING AND PROOF—VARIANCE.

In an action for slander, where the complaint alleges that defendant called plaintiff a thief, testimony that defendant said plaintiff had been robbing him is not literally nor substantially the same; and, not being said by the witnesses to have been spoken at the same time with the words alleged in the complaint, should have been stricken out, and the error is not cured by subsequently striking it out on plaintiff's motion.

2. SAME—EVIDENCE.

The original, having been superseded by an amended answer, is improperly admitted in evidence.

In bank. Appeal from superior court, Humboldt county; J. P. HAYNES, Judge.

Action by L. Stern against J. Lowenthal, for slander. The complaint alleged that defendant had said of plaintiff: "He is a thief; he is doing business on my money." Several witnesses testified that defendant had said plaintiff had been robbing him. Motion to strike out this testimony was overruled. Judgment for plaintiff, and defendant appeals.

J. D. H. Chamberlain, James Hanna, and E. W. Wilson, for appellant. S. M. Buck, Horace L. Smith, and J. J. De Haven, for respondent.

SHARPSTEIN, J. On the trial of this action (for slander) some of the witnesses for the plaintiff testified to utterances by the defendant other than those alleged in the complaint. The defendant moved that the evidence as to such utterances be stricken out. The motions were denied, and the defendant excepted. This raises the question of the admissibility of evidence to prove words not set out in the complaint. Upon that question the opinions of courts have been discordant. Against the admissibility of such evidence the opinion of BRONSON, J., in *Root v. Lowndes*, 6 Hill, 518, is characteristically clear and vigorous. Townshend, after referring to some conflicting opinions upon this point, says: "But the better opinion appears to be that evidence of a charge of a different nature and at a different time from that alleged in the declaration is inadmissible to prove malice, or for any purpose. This is, in effect, only another form of the rule that actionable words not counted upon cannot be given in evidence unless suit upon them is barred by the statute of limitations; and their admission, where the statute has run, is opposed to principle, as it, in effect, restores a cause of action, which has been taken away by the law." Townsh. Sland. & Lib. § 392. In that view of the question we concur, and think the court erred in denying the motion of defendant to strike out. After denying the defendant's motion to strike out, the court, on motion of plaintiff, struck out the evidence which the defendant had moved to have stricken out, with the exception of that given by the witness Taylor, who testified that defendant told him "that he would break Mr. Stern [plaintiff] up in business." If the court erred in denying defendant's motion to strike that out, the error was not cured by any subsequent act of the court. Was the denial of that motion error? The words are not literally nor substantially the same as those alleged in the complaint to have been spoken by the defendant. And the witness does not testify that they were spoken in connection with those alleged in the complaint to have been spoken, or that the defendant ever, at any time, spoke in his (witness') hearing the words alleged to have been spoken by the defendant. The testimony of this witness was clearly irrelevant, and the motion to strike it out should have been granted. The case of *Chamberlin v. Vance*, 51 Cal. 75, cited by plaintiff's counsel, is distinguishable from this case. In that case the court says the words testified to "were substantially the same as those declared on." The rule against admitting irrelevant testimony applies in this as in other

cases. In *Howard v. Sexton*, 4 N. Y. 157, the lower court admitted evidence of a charge made by the defendant against the plaintiff of a different nature, and at a different time, from the slander alleged in the declaration, "to show with what mind the words stated in the declaration were spoken, and for no other purpose;" in other words, to prove express malice. The court of appeals said: "As this was not essential to sustain the action, there could be no assignable reason for the admission of such testimony, except to aggravate the damages. And yet upon that question the learned judge instructed the jury to disregard it. If they had regarded the ruling of the court, which is never done under such circumstances, the evidence was irrelevant, and should have been excluded.

The original answer of the defendant was superseded by an amended answer, and the court, against the objection of the defendant, admitted the original in evidence. The question here involved was considered in *Morris v. Lachman*, 68 Cal. 109, 8 Pac. Rep. 799. In that case the plaintiff sought to introduce the original answer, which had been superseded by an amended answer, in evidence. The court sustained defendant's objection to its introduction, and this court said: "The defendant had a right to withdraw the charge made against the plaintiff's reputation in his first answer, and by the court's permission to file an amended pleading, leaving the objectionable matter out. And no error was by that tribunal committed in refusing to allow proof to be made that such a charge had been thus preferred on a previous trial, and attempted to be established by evidence." If it was not error to exclude such evidence in that case, it certainly was error to admit it in this case. In *Gilmore v. Borders*, 2 How. (Miss.) 824, pleas of justification were pleaded and withdrawn. It was held to be error to permit them to be read in evidence. The question is one which admits of considerable elaboration, but we forbear, as *Morris v. Lachman*, in our opinion, is decisive of it. Upon the other points discussed by counsel we express no opinion. Judgment and order reversed.

I concur: PATERSON, J.

McFARLAND, J., (*concurring*.) I concur in the judgment upon the first ground stated in the opinion of Mr. Justice SHARPSTEIN.

SEARLS, C. J., (*concurring*.) I concur in the judgment upon the ground that the original answer of the defendant, having been superseded by an amended answer, was not admissible in evidence on behalf of the plaintiff. *Ponce v. McElvy*, 51 Cal. 222; *Mecham v. McKay*, 37 Cal. 154; *Morris v. Lachman*, 68 Cal. 109, 8 Pac. Rep. 799. Upon the other questions discussed I express no opinion.

77 Cal. 347

SENTER *et al.* v. MONROE. (No. 12,763.)

(*Supreme Court of California.* November 16, 1888.)

CONTRACT—ACTION FOR BREACH—PLEADING—COMPLAINT.

A complaint alleging that defendant falsely represented himself as agent of the owners of certain land, and authorized to sell it; that plaintiffs, relying thereon, agreed to buy it, and paid part of the purchase money, and received the written agreement of defendant, as the owner's agent, for the conveyance of the property; that, while they were always ready to pay the residue of the price, defendant and said owners refused to convey the land; that defendant knew the persons did not own the property, and that they had not authorized him to sell it; that after the sale, and before the time fixed for the last payment, the land had greatly appreciated in value; and praying judgment for the value of the property,—as a com-

plaint for damages for breach of contract, is bad on demurrer, as the defendant did not profess to bind himself personally, and there is nothing to show that the failure to convey injured plaintiffs. Following *Wallace v. Bentley*, 18 Pac. Rep. 788.

In bank. Appeal from superior court, Los Angeles county; H. K. S. O'MELVENY, Judge.

Action for damages for breach of contract by Mary S. Senter and Adelaide C. Stanley against William N. Monroe. Verdict and judgment for plaintiffs, and defendant appeals.

E. W. Little and *Williams & McKinley*, for appellant. *M. C. Hester*, for respondents.

WORKS, J. The complaint in this action avers, in substance, that the defendant represented to plaintiffs that E. F. Spence, J. F. Crank, and John D. Bicknell were the owners of certain real estate in the county of Los Angeles, specifically describing it, and that he, defendant, was the agent of said parties, with full power to bargain, sell, and convey the same; that plaintiffs, relying upon said representations, bought from him said lands for the sum of \$250, and then paid him on said purchase the sum of \$62.50, and took from him his written obligation, as follows:

"This is to witness that I have this day sold to Mary Stanley Senter and Adelaide C. Stanley that certain lot of land described as follows: Lot 18, block F, town of Montrovia,—for the sum of \$250, and received \$62.50, this day paid to me on the purchase price thereof; the balance to be paid as follows: \$187.50 on or before 17th day of June, 1887, and ——— dollars on or before ———, 18—. All deferred payments to bear interest at the rate of eight (8) per cent. per annum from this date, interest payable annually; and, if not so paid, to be compounded with the principal; and to be evidenced by their promissory notes under the terms aforesaid, to be executed by said Mary Stanley Senter and Adelaide C. Stanley upon receiving an agreement from E. F. Spence, J. F. Crank, and John D. Bicknell to convey the said property. Deed to be executed when said purchase price, with all interest thereon, is fully paid.

"Dated 17th day of June, 1886.

[Signed]

"W. N. MONROE, Agent."

—That plaintiffs have been ready and willing to execute their notes for the deferred payments upon receiving the agreement mentioned in said written instrument, and to do and perform all and every other thing required of them by said written instrument; that they have not received said agreement from said Spence and others, or either of them, or from the defendant, although they have requested the defendant to deliver the same to them; that they tendered to the defendant the full amount of said purchase money and interest, as provided for in said writing, and demanded of him a deed, which he refused to give, and that he has ever since refused to receive said money or execute said deed; that said Spence and others had no title to said real estate, and defendant had no authority to act for them in the sale thereof; that between the time of entering into said contract and the time fixed therein for making the last payment of the purchase money the land had largely increased in value, and was reasonably worth \$3,000; that defendant knew that said parties had no title to said property, and that he had no authority to act as their agent in the sale thereof, and that plaintiffs had relied upon his statements to the contrary, but he had never informed them of the facts, or offered to return them the money paid by them. The complaint further alleges that, "by reason of the said failure and refusal of the defendant to cause the said lot of land to be conveyed to them, they have sustained damages in the sum of \$3,000, which said sum is now due and wholly unpaid." The prayer is for "judgment for the sum of \$3,000, for their costs in this be-

half, and for all proper relief." There was a demurrer to the complaint, which was overruled. The answer put in issue all of the material allegations of the complaint. There was a trial by jury, and verdict for plaintiffs for \$1,019.53. A motion for a new trial was overruled, and defendant appeals.

The appellant contends that the court erred in overruling the demurrer to the complaint. It is difficult to determine the ground upon which the plaintiffs seek to recover. The facts alleged tend to show an attempt to recover damages against defendant for falsely representing that the parties named were the owners of the land, and that he was their agent, thus inducing the plaintiffs to part with the sum of \$62.50, but the damages alleged are for a failure to cause a conveyance of the real estate; and, if the intention is to recover for the false representations, the contract need not have been set out, and the allegation as to the value of the real estate would be immaterial. In that case plaintiffs would only be entitled to recover the money paid by them to defendant, and interest. *Hall v. Crandall*, 29 Cal. 568; *Wallace v. Bentley*, 18 Pac. Rep. 788. But, whatever the intention of the pleader may have been, we must hold the complaint to be bad. If it seeks to recover for the false representations, it is not alleged in the complaint that the plaintiffs were ignorant of the facts as to the ownership of the property of the defendant, and no special damages are alleged which can be regarded as the result of the acts of the defendant. If we treat the complaint as one for damages for a breach of the contract, and we think it must be so treated, it is clearly insufficient. It alleges in express terms that the plaintiffs were not contracting for the title of the defendant in the land, but the title of Spence and others, through the defendant, their agent. The contract shows upon its face that the defendant was assuming to act as the agent of other parties, and, if it did not, it is made to appear by the allegations of the complaint. That an action on the contract for damages cannot be maintained under such circumstances has been determined by this court. *Wallace v. Bentley*, *supra*. In that case it is said: "The theory of the pleader evidently was that, upon the facts alleged, the liability of the defendants is the same as that of the owner of the property would be if he had authorized the defendants to sell the property, and then, after he had sold it, he had sold and conveyed it to some one else. Had that been the case, he, and not the defendants, would have been liable for the damages claimed in this case. But the owner is not liable on the contract, because the defendants had no authority from him to make it. The defendants are not liable unless the contract contains apt words to charge them personally. *Hall v. Crandall*, 29 Cal. 568; *Lander v. Castro*, 43 Cal. 497. If not liable upon the contract because they did not undertake to contract on their own behalf, the plaintiff's remedy against the defendants is 'an action to recover the money, if any has been paid them, or the value of the work or labor, if any has been performed for him, under the supposed contract, or special damages resulting to the plaintiff by reason of the defendant's wrong in undertaking to act for another without authority.' *Hall v. Crandall*, *supra*. This action is not for the recovery of any money paid by the plaintiff to the defendants; and the only attempt to allege facts entitling the plaintiff to special damages is that, by reason of the representations of the defendants, he was prevented from purchasing the premises." In this case there is no allegation that the owner of the property was unknown, or that the property could not have been purchased for the price agreed to be paid defendant for it, or any state of facts set out showing or tending to show that the failure of defendant to convey the property did or could have resulted in damage to the plaintiffs. The demurrer to the complaint should have been sustained. Other questions are presented by the record, and argued in the briefs, but the conclusion we have reached renders it unnecessary that they should be considered.

The judgment and order denying a new trial are reversed, and the cause remanded.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.; THORNTON, J.

77 Cal. 345

PACIFIC MUT. LIFE INS. CO. *v.* SHEPARDSON *et al.* (No. 12,790.)

(*Supreme Court of California*, November 16, 1888.)

PLEADING—COMPLAINT—DEMURRER.

A complaint alleging that through the default in the payment of interest plaintiff, under an option given in the note, has declared the whole principal and interest immediately due and payable, a demurrer on the ground that the action is prematurely brought does not present the question whether or not the option has been properly exercised, the complaint stating a good cause of action for the overdue interest.

In bank. Appeal from superior court, Colusa county; E. A. BRIDGFORD, Judge.

Action by Pacific Mutual Life Insurance Company against Dudley Shepardson, Minnie Shepardson, his wife, T. I. Talbot, and John Doe, to recover on two notes given to plaintiff by the Shepardsons, and to foreclose the mortgage given to secure them. Talbot, a subsequent incumbrancer, appeals from a judgment overruling his demurrer to the complaint.

J. W. Goad, Richard Bayne, and T. I. Talbot, for appellant. C. N. Fox, for respondent.

WORKS, J. This is an action against the defendants, Dudley Shepardson and Minnie Shepardson, his wife, to recover upon two notes executed by them to the plaintiff, and to foreclose two mortgages given to secure the same. T. I. Talbot was made a defendant, he being a subsequent incumbrancer. There was a separate demurrer by Talbot to the complaint, which was overruled, and judgment and decree entered against the defendants; Talbot making no defense. Talbot alone appeals from the judgment.

The appellant presents but one point in his brief. He claims that his demurrer should have been sustained on the ground that it appeared on the face of the complaint that the debt sued for was not due, and therefore the action was prematurely brought. The note set forth in the first count bears date December 15, 1883, and is made payable three years after date. It fixes the rate of interest, provides that it shall be payable annually, and recites further: "In case default be made in the payment of the interest as the same becomes due, according to the terms hereof, then the whole principal and interest shall, at the option of the holder hereof, become at once due and payable." The complaint, filed December 15, 1886, alleges that "no part of the principal or interest on said note has been paid, and that, by reason of default in the payment of the interest, the plaintiff, in the exercise of the option given in said note and mortgage, has declared all sums secured by said mortgage immediately due and payable." The appellant urges upon us that, as the note could only become due, upon failure to pay interest, at the option of the holder, such option must be exercised immediately. The case of *Crossmore v. Page*, 73 Cal. 213, 14 Pac. Rep. 787, is cited as supporting this view. The point presented and decided in the case referred to was that the failure to exercise the option within a reasonable time was a waiver of the right, as against an indorser, to enforce the payment of the whole of the principal and interest called for in the note. No such question is presented here. The only ground of demurrer, properly pleaded, is that the complaint does not state facts sufficient to constitute a cause of action. The complaint constitutes a cause of action for the recovery of the interest. Whether anything more could have been recovered could not be raised by demurrer. The

promise to pay the interest annually was absolute. The only question left to the option of the holder was whether, upon the failure to pay such interest, the whole amount of principal and interest should immediately become due and payable, without any act on the part of the holder showing his election to exercise the option given him. The case, as presented, does not call for a decision of this question, but we think the case of *Whitcher v. Webb*, 44 Cal. 127, determines it adversely to the appellant. The judgment appealed from is affirmed.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; THORNTON, J.; PATERSON, J.; MCFARLAND, J.

(77 Cal. 352)

FAGAN v. CARTY. (No. 12,793.)

(Supreme Court of California. November 19, 1888.)

1. QUIETING TITLE—EVIDENCE.

The land in dispute was, on April 29, 1871, conveyed to defendant by the trustees under act Cong. July 23, 1866, conveying this and other lands in trust for the parties who at the time of its passage were in the *bona fide* occupancy thereof. Plaintiff's testimony that he bought the property, April 5, 1870, at constable's sale, was the only evidence tending to show title in him. Held to justify a judgment for defendant in an action under Code Civil Proc. Cal. § 733, to determine adverse claims.

2. APPEAL—RECORD—AMENDMENT OF DEFECTS.

Supreme court Cal. rule 12, providing for the correction of errors or defects in the transcript on the suggestion of either party, by the clerk's certificate of so much of the record as may be necessary, does not apply to the case of failure to procure from the trial judge a sufficiently full statement of the case.

In bank. Appeal from superior court, Solano county; C. H. GAROUTTE, Special Judge.

Action by James Fagan against Miles Carty to quiet title. From a judgment for defendant plaintiff appeals. Rule 12 of the supreme court of California provides that, for the purpose of correcting any error or defect in the transcript, either party may suggest the same in writing, and, upon good cause shown, obtain an order for the certification by the clerk of so much of the record as may be necessary, or may produce it so certified without any order.

James Fagan, appellant, *pro se*. *J. McKenna* and *Geo. A. Lamont*, for respondent.

PATERSON, J. This is an action brought under the provisions of section 738 of the Code of Civil Procedure, to determine the rights of the parties to the real estate described in the complaint. The court found that the plaintiff is not the owner of the property, or any part thereof, and "that the defendant was, at the time of the commencement of this action, and had been for a long time before, and is now, the owner of said land, and the whole thereof." These findings are as broad as the issues, and are sufficient. The evidence shows that the land in dispute is a portion of the lands which were conveyed by act of congress passed July 23, 1866, to the city of Benicia, in trust for the parties who were, upon the passage of the act, in the *bona fide* occupancy thereof; and that in pursuance of said act of congress the trustees of Benicia conveyed the land to respondent by deed dated April 29, 1871. The only evidence in the statement tending in any respect to show that the plaintiff ever acquired any title is the testimony of plaintiff that he "purchased the property described in the complaint at constable's sale on the 5th day of April, 1870." Appellant, realizing the insufficiency of his statement to present the merits of his case on appeal, has printed in the transcript, immediately following the statement, a transcript of the official reporter's notes of the evidence and proceedings, duly certified by that officer, and now asks the court to consider the same upon his suggestion of a diminution of the record. But manifestly we have no right, upon such a suggestion, to add to the statement any of the evidence proposed.

The Code prescribes a plain and simple method of securing a statement of the evidence and proceedings, and rule 12 of this court is not intended to relieve those who, through ignorance, negligence, or mistake, have failed to procure from the trial judge a full and correct statement of the case. Judgment and order affirmed.

We concur: MCFARLAND, J., WORKS, J., SHARPSTEIN, J., and SEARLS, C. J.

THORNTON, J., concurs in the judgment.

77 Cal. 396

PENROSE v. CALKINS. (No. 12,789.)

(Supreme Court of California. November 26, 1888.)

MECHANIC'S LIEN—NOTICE—DESCRIPTION OF PROPERTY—SUFFICIENCY.

A notice of a mechanic's lien, referring to the land as "that certain lot and parcel of land situated in said county of Nevada, state of California, and sought to be charged with this lien, and described as follows, to-wit," containing no other description of the land, is insufficient.

In bank. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

Action by Thomas Penrose against Malcolm D. Calkins, to enforce a mechanic's lien. Judgment for plaintiff, and defendant appeals.

Caldwell & Little, for appellant. *W. P. Sowden*, for respondent.

WORKS, J. The only question presented in this case is as to the sufficiency of the description of the real estate in the notice of mechanic's lien sought to be foreclosed. The court below held the notice to be sufficient, and rendered judgment in favor of plaintiff. The only reference to any real estate in the notice is as follows: "That certain lot and parcel of land situated in said county of Nevada, state of California, and sought to be charged with this lien, and described as follows, to-wit." It would seem that it was the intention of the scrivener who drew the notice to follow this general reference to the property by a specific description of it, but, if so, such description is entirely omitted. The courts have been very liberal in upholding imperfect descriptions in this class of cases, but here there is absolutely no description of the property. The court below erred in admitting the notice in evidence over the objection of appellant, and the findings of the court based upon such notice are not sustained by the evidence. The judgment and order denying the motion for a new trial are reversed.

We concur: SEARLS, C. J.; THORNTON, J.; PATERSON, J.; MCFARLAND, J.

77 Cal. 383

TAPIA v. DEMARTINI *et al.* (No. 12,720.)

(Supreme Court of California. November 21, 1888.)

1. MORTGAGES—FUTURE ADVANCES—PRIORITY OF LIEN.

To the extent of the sum limited in it, and as against subsequent incumbrances, including mechanics' liens, a recorded mortgage is entitled to priority for future advances made without actual knowledge of such incumbrances, though it is not expressed to be for future advances, and the agreement making it a lien therefor is verbal.

2. SAME—EXPRESS TRUST—ALTERATION OF WRITTEN AGREEMENT.

An agreement, at the time of the execution of a mortgage on realty, that it shall be held to secure one not named in it for future advances, is not a declaration of an express trust in lands, required by Civil Code Cal. § 852, to be in writing; nor does it vary the terms of a written instrument, within the provision of section 1698 that a written contract may be altered only by writing, or an executed oral agreement; nor is it within section 1624, requiring agreements not to be performed within a year to be in writing; and such a verbal agreement is valid as against subsequent incumbrancers.

In bank. Appeal from superior court, Sierra county; F. D. SOWARD, Judge. Suit by J. M. Tapia against A. Demartini and others for the adjustment of partnership affairs. Defendants Busch, Mooney, Castagnetto, and Sorocco

filed a cross-complaint as mortgage creditors against the partners. The mortgage was held not a lien in favor of Mooney, and he appeals. The following are the material provisions of the Civil Code: Sec. 852. "No trust in relation to real property is valid unless created or declared (1) by a written instrument, subscribed by the trustee, or by his agent thereto, authorized by writing; (2) by the instrument under which the trustee claims the estate af-

fect; or (3) by operation of law." Sec. 1624. "The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged, or by his agent. (1) An agreement that by its terms is not to be performed within a year from the making thereof. * * *" Sec. 1698. "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise."

Smith & Ford, for appellant. *B. Schessinger* and *J. F. Ramage*, for respondents.

WORKS, J. Suit was brought by the plaintiff against certain of the defendants to dissolve a partnership alleged to exist between them in carrying on the business of mining, and to close up and adjust the partnership affairs. Subsequently numerous other parties, who claimed to hold liens against the property of the copartnership, were made defendants, and set up, by way of answer, their respective claims of liens, most of which were mechanics' liens, for labor performed on the mining property of the firm. The defendants Busch, Mooney, Castagnetto, and Sorocco also filed their cross-complaint, alleging, in substance, that the plaintiff and the defendants, his copartners, on the 1st day of February, 1888, executed to said defendant Busch his promissory note for \$15,000, payable one year after date, with interest at the rate of 6 per cent. per annum, and to secure the payment thereof executed to said defendant their mortgage on the real estate in controversy in this action; that at the time said note and mortgage were so executed the mortgagors were indebted to said Busch and one Herringlake, his partner, in the sum of \$571.22, and to the defendant Mooney in the sum of \$1,425.14, and to the defendant Crowell in the sum of \$1,152.27; "that said note and mortgage were executed and delivered with the understanding and agreement among all the parties thereto, and said Mooney and Crowell, that the same were so executed and delivered to secure the payment of the several balances of account aforesaid then due said Busch and Herringlake, as copartners aforesaid, and said Mooney and Crowell, respectively, and to secure further sums to become due for goods, wares, and merchandise to be afterwards sold and delivered by said Mooney and Crowell, respectively, to said mortgagors, not exceeding the sum agreed to be paid in said promissory note." It is further alleged that Mooney, under said agreement, furnished goods, wares, and merchandise to the amount of \$2,174.43, and the amounts due and unpaid to the respective parties are stated. The recording of the mortgage, and the fact that, prior to the commencement of the suit, the said Crowell had sold, assigned, and delivered his account and all his rights under the mortgage to the defendants Castagnetto and Sorocco, are alleged, and it is asked that Herringlake, partner of Busch, be made a party, and that the lien of certain of the defendants be declared subordinate to the claims under said mortgage, and the property sold to satisfy the said mortgage lien. With the pleadings in this condition it was stipulated by all the parties in interest that a decree might be entered dissolving the partnership, and ordering the sale of the property, and the payment of the proceeds of the sale into court, to be applied on the respective claims of the parties, according to their priority, to be determined by the court thereafter. The decree was entered, the property sold, and the proceeds paid into court. The court below, in adjusting the liens, held that, as between the defendant Mooney and the other lienholders, the mortgage held by Busch created no lien in his favor, and the final decree was rendered accordingly. The defendant Mooney alone appeals to this court.

Three questions are presented for our consideration: (1) Was the mortgage executed to Busch valid as against subsequent incumbrances for future advancements? (2) Was such mortgage a valid and effective lien in favor of Mooney, he not being named as a mortgagee or mentioned therein, and

no trust in Busch, for his benefit being declared in writing? (3) If the mortgage was valid for any purpose in favor of Mooney, was it binding as between him and subsequent incumbrancers as to future sales of goods and merchandise, under the parol agreement for advances under the mortgage?

1. It is firmly settled by a long line of decisions that a mortgage made in good faith to cover future advancements or indorsements is valid, not only as between the immediate parties to the instrument, but as against subsequent purchasers or incumbrancers, if properly recorded. Civil Code, § 2884; *Tully v. Harloe*, 35 Cal. 302, 309; *Ackerman v. Hunsicker*, 85 N. Y. 46; *Googins v. Gilmore*, 47 Me. 13; *Morris v. Cain*, (La.) 1 South. Rep. 797, 810; 1 Jones, Mortg. §§ 373, 374; *Shirras v. Caig*, 7 Cranch, 34; *McDaniels v. Colvin*, 16 Vt. 300; *Ward v. Cooke*, 17 N. J. Eq. 93, 99; 3 Pom. Eq. Jur. §§ 1197, 1198. The mortgage under consideration is in the ordinary form, and does not disclose upon its face that it is given in part for future advancements. While it is better and more consistent with open and fair dealing that the mortgage should express its object, this is held not to be necessary to its validity if the amount of liability to be incurred under it is expressly limited. *Tully v. Harloe*, *supra*; *Morris v. Cain*, *supra*; *Lawrence v. Tucker*, 23 How. 14, 26; 1 Jones, Mortg. § 374; *Shirras v. Caig*, *supra*; *Moroney's Appeal*, 24 Pa. St. 372; *Witczinski v. Everman*, 51 Miss. 844. Nor is it necessary that the agreement under which advances are to be made shall be in writing. 1 Jones, Mortg. § 351. The mortgage, as against subsequent incumbrancers, becomes a lien for the whole sum advanced, from the time of its execution, and not for each separate amount advanced from the time of such advancement, although the right to enforce the collection thereof can only arise upon each advancement being made. *Ackerman v. Hunsicker*, 85 N. Y. 43, 49; *Shirras v. Caig*, *supra*; *Moroney's Appeal*, 24 Pa. St. 372. But the lien of the mortgage cannot be enforced as against subsequent incumbrances of which the mortgagee has actual notice, for advancements or indorsements made or given after such notice. The notice must be actual. Constructive notice, by the recording of subsequent incumbrances, is not enough. *Ackerman v. Hunsicker*, *supra*, 52; *Ward v. Cooke*, 17 N. J. Eq. 93, 99; *Shirras v. Caig*, *supra*; 1 Jones, Mortg. § 372; 3 Pom. Eq. Jur. § 1199. It is immaterial whether the advances are to be made in money or materials. *Brooks v. Lester*, 36 Md. 65. If the mortgage discloses upon its face that it is to stand as security for future advancements, the amount of the advances to be made need not be set out. It is sufficiently definite to put subsequent incumbrancers on inquiry, and they must ascertain the extent of the lien or suffer the consequences. *Lovelace v. Webb*, 62 Ala. 271; *Witczinski v. Everman*, 51 Miss. 841, 845. The rules thus established apply to mechanics' liens. Ph. Mech. Liens, § 236. We are fully in accord with the doctrines laid down in the cases cited. They seem to us to be eminently just and equitable. Applying them to this case, the mortgage under which the appellant claims was of record, and was notice to subsequent incumbrancers that it constituted a lien upon the property to the full sum of \$15,000. They performed labor on the property, with full notice of the existence of a lien to that amount. If they had desired to do so, they might have ascertained the actual condition of the security, and by notice to the holder of the mortgage have prevented any additional incumbrance of the property for further advancements, by giving notice of their liens. Not having done so, their rights must be held to be subject to the mortgage to the full amount of the advancements shown to have been made.

2. We pass to the question whether the execution of the mortgage to Busch, under a parol agreement between all of the parties in interest that it should be held in part for the benefit of the appellant, was valid and binding as against the respondents. As we understand the position of counsel for respondents, they contend: (1) That the agreement by which Busch was to

hold the mortgage for the benefit of the appellant had the effect to change the written contract between the mortgagor and mortgagee, and, being in parol, was not binding under section 1698 of the Civil Code. (2) That the oral arrangement, if valid, must have been executed within a year, under section 1624 of the Civil Code. (3) That it amounts to a declaration of an express trust in lands, and cannot rest in parol. The question presented is not a new one. The decided cases are clearly to the effect that such an agreement as the one under consideration is valid and binding upon the parties. In this state a mortgage conveys no estate in the land, but is a simple lien upon the property. This being true, a transaction of this kind is not within the provisions of the Code that an express trust in lands cannot be created except by an agreement in writing, or a parol agreement fully executed. Being but a personal chattel, "a parol trust may attach to a mortgage that the mortgagee shall hold it, in trust for his own benefit, and in part for the benefit of another." 1 Jones, Mortg. §§ 376, 846; *Hubbell v. Blakeslee*, 71 N. Y. 63, 69; *Wood v. Weimar*, 104 U. S. 786; *Hall v. Crouse*, 13 Hun, 557; 1 Pom. Eq. Jur. § 74; 3 Pom. Eq. Jur. § 1181. The proof of such an agreement does not vary the terms of the written instrument. 1 Jones, Mortg. § 376. It is not claimed that the transaction here was fraudulent. On the contrary, the case is presented with the express understanding that the agreement was made in good faith, and that the advancements were made by appellant in pursuance thereof, as set forth in the cross-complaint. We have no doubt of the validity or binding effect of the parol contract made between these parties. Its enforcement, as against the subsequent incumbrancers, can work them no injustice. It can make no difference to them whether the mortgage is enforced in favor of Busch or the appellant. They had notice of the amount of the lien, which was the material question for them. As to the claim made by appellant that the contract, being in parol, must be performed within one year, it is sufficient to say that it is the written contract, the mortgage, that is to be performed. The parol agreement can only have the effect to explain the object of the mortgage, and determine for whose benefit it may be enforced.

3. If we are correct in the conclusions we have reached upon the first two questions presented by the briefs, it must follow as a necessary consequence that the mortgage executed to Busch for the benefit, in part, of the appellant, was valid and binding in his favor as against the respondents for the amount due him for advancements made thereunder. It is not claimed that the appellant had actual notice of the liens of the respondents at the time he made the advancements, and it is conceded that, as there is no dispute as to the facts, a new trial is unnecessary. The judgment appealed from is reversed, with instructions to the court below to so modify the same as to give the lien of said mortgage, to the extent of the amount due the appellant, priority over all liens of respondents for work done or materials furnished subsequent to the execution of said mortgage.

We concur: SEARLS, C. J.; MCFARLAND, J.; THORNTON, J.; SHARPSTEIN, J.; PATERSON, J.

77 Cal. 390

BALDWIN v. SECOND ST. CABLE R. Co. (No. 12,605.)

(Supreme Court of California. November 22, 1883.)

1. HUSBAND AND WIFE—SUIT BY WIFE FOR PERSONAL INJURIES—PARTIES.

A married woman is the real party in interest in an action for personal injuries to her, and the evidence showing that she is living separate from her husband by reason of his desertion, the action is properly brought by her alone under Code Civil Proc. Cal. § 370.

2. PARTIES—DEFECT OF PARTIES—OBJECTIONS WAIVED.

A defect of parties plaintiff being ground for demurrer under Code Civil Proc. Cal. § 430, and section 434 providing that objections not taken by demurrer, or answer, with certain exceptions, are deemed waived, the objection of the non-joinder of the husband cannot be raised on motion for nonsuit.

In bank. Appeal from superior court, Los Angeles county; H. K. S. O'MELVENY, Judge.

Action by Mary Baldwin, a married woman, against the Second-Street Cable Railroad Company for personal injuries alleged to have been caused by defendant's negligence. Judgment and verdict for plaintiff, and defendant appeals. Code Civil Proc. § 370, provides that "when a married woman is a party her husband must be joined with her, except * * * when she is living separate and apart from her husband by reason of his desertion of her * * * she may sue or be sued alone." By section 430, "that there is a defect or misjoinder of parties plaintiff" is ground for demurrer; and section 434 provides that if the objections enumerated as grounds of demurrer, except an objection to the jurisdiction, or that the complaint does not state facts sufficient to constitute a cause of action, are not "taken either by demurrer or answer, the defendant must be deemed to have waived the same."

P. W. Dooner and Chapman & Hendricks, for appellant. *Holloway & Kendrick*, for respondent.

PATERSON, J. This is an action instituted by the plaintiff to recover damages for personal injuries alleged to have been sustained by her through the negligence of the defendant while she was riding upon one of its cars in the city of Los Angeles. The plaintiff is a married woman, and sues alone. No objection was made, either by demurrer or answer, that there was a defect of parties plaintiff; but when the plaintiff had introduced her evidence and rested her case, the defendant moved for a nonsuit on the ground that the plaintiff was a married woman, and not deserted by her husband, and that she was not the real party in interest.

We think that the motion was properly denied. The evidence shows quite clearly that plaintiff is "living separate and apart from her husband by reason of his desertion of her," hence it was unnecessary that he be joined as a party plaintiff. Section 370, Code Civil Proc.; *Andrews v. Runyon*, 65 Cal. 629, 4 Pac. Rep. 669. But, even if the evidence failed to show such desertion, the objection urged on the motion for nonsuit was waived when the defendant failed to raise it by demurrer or answer. Section 434, Code Civil Proc.; *Hoop v. Plummer*, 14 Ohio St. 449. Such objection cannot be raised for the first time on motion for a nonsuit. Boone, Code Pl. §§ 868-869. The plaintiff is a real party in interest. In *Matthew v. Railroad Co.*, it is said: "The ground of the action is the wife's personal injuries. The cause of action is hers. The husband was only joined as a plaintiff because the common-law rule requiring that he do so is yet in force. But the husband could not himself recover for personal injuries sustained by the wife." 63 Cal. 451. The wife in such cases is a necessary party. No recovery can be had for such damages in an action to which she is not a party. *Sheldon v. Steam-Ship*, 18 Cal. 535; *Fuller v. Railroad Co.*, 21 Conn. 574.

On the question of damages it is enough to say that we think the evidence sufficient to support the verdict. Judgment and order affirmed.

We concur: SEARLS, C. J.; THORNTON, J.; WORKS, J.; SHARPSTEIN, J.; MCFARLAND, J.

77 Cal. 357

In re STEPHENS. (No. 20,457.)

(Supreme Court of California. November 21, 1888.)

ATTORNEY AND CLIENT—APPLICATION FOR DISBARMENT—SUFFICIENCY OF COMPLAINT.

In proceedings for disbarment, an accusation that respondent urged a prosecution for libel and promised to secure satisfactory evidence of the guilt of the defendant, and alleged that the statute of limitations had not run, and at the examination, appeared for defendant and set up the statute of limitations and procured a writ of prohibition and defendant's discharge thereon, is good on demurrer.¹

In bank. On demurrer to the accusation on application for disbarment.
Horace Bell, for applicant. *Alexander Campbell*, for respondent.

PATERSON, J. This is an application for the disbarment of C. C. Stephens, an attorney and counselor at law. The written accusation alleges, in substance, that on December 1, 1887, two criminal actions were pending in the superior court of Los Angeles county against one B. A. Stephens, (brother of respondent,) and another of the same character in the supreme court against said B. A. Stephens, and one A. M. Thornton, charging the defendants therein with having published a libel against Horace Bell, the accuser herein; that said C. C. Stephens and one G. Wiley Wells were the attorneys for said defendants; that while said actions were pending as aforesaid, said C. C. Stephens represented to said Bell and the prosecuting attorney that said G. Wiley Wells was the person really guilty of the publication of the libels mentioned, said B. A. Stephens and A. M. Thornton having acted under the guidance and instructions and at the instigation of said Wells, and that he, said defendant, knew of and would furnish to said Bell the original manuscript of said libel in the handwriting of said Wells, and assist in the prosecution and conviction of said Wells, if said Bell would agree to dismiss the said actions against his brother and Thornton; that said Bell agreed to do as requested, and in pursuance of his promise said Stephens consulted with the prosecuting officers concerning the facts and the law involved in the proposed action and repeatedly urged said Bell to commence the prosecution against said Wells; that on the day said actions in the superior court were to be tried said Stephens produced a document which he represented to be the original manuscript referred to and requested a dismissal of the actions; that said Bell refused to consent to said dismissal, being in doubt as to the genuineness of the document, but did consent to a continuance at that and subsequent times in pursuance of the understanding between the parties; that at the urgent request of said Stephens, who claimed that the statute of limitations had not run against the action, and upon his promise to procure satisfactory evidence of the guilt of said Wells, a complaint was filed in the justice's court on February 23, 1887, charging said Wells with criminal libel, and thereafter a warrant was issued and served, and the examination of said Wells upon said charge continued and set for April 17, 1888; that up to the last-named date said Stephens consulted with and advised the prosecuting officers in the preparation of the case and in securing evidence against said Wells, but when the matter came on for examination he appeared as attorney for the defense of said Wells on said charge, and objected to the examination of Wells on the ground that the action was barred under the provisions of sections 801 and 802 of the Penal Code; and that, when this objection was overruled, he procured, as attorney for said Wells, a writ of prohibition, prohibiting the justice from proceeding with the examination, and thereupon said Wells was discharged. To this accusation a demurrer has been filed, in which it is claimed that no sufficient reason for disbarment is shown, because it appears that Stephens did try to furnish evi-

¹In general, respecting the grounds for and proceedings on the disbarment of attorneys at law, see *State v. Burr*, (Neb.) 28 N. W. Rep. 261, and exhaustive note; *In re Serfass*, (Pa.) 9 Atl. Rep. 674, and cases cited.

dence as he agreed to do, and that no bad faith is shown on the part of respondent in his promise and effort to bring Wells to justice. It is said that he may have found that he was mistaken as to the guilt of Wells, and on finding Bell was not dealing fairly by him he was induced to accept a retainer from Wells.

It is unnecessary for us, at this time, to consider how far—admitting the accusations to be true—the bad faith or failure of Bell in relation to the matter would operate to justify Stephens in the conduct charged, or to what extent the good faith of the latter may excuse him for advising the prosecution, and then acting for the defense of Wells. We think that the charges call for an answer. It has always been considered a sufficient cause for disbarment for an attorney and counselor to urge and aid in the prosecution and then appear for the defense of a person charged with crime, or to encourage the commencement of proceedings which he knows or has reason to know are illegal or unjust. *Weeks, Attys. 140 et seq.* The demurrer is overruled with directions to respondent to answer the accusation within 30 days after notice of this order.

We concur: SEARLS, C. J.; WORKS, J.; SHARPSTEIN, J.; MCFARLAND, J.; THORNTON, J.

77 Cal. 392

TURNER v. WHITE *et ux.* (No. 12,649.)

(Supreme Court of California. November 22, 1888.)

QUIETING TITLE—EVIDENCE.

A complaint in an action against husband and wife, alleging that the husband was the owner of land, and conveyed it to his wife in fraud of creditors; that the land was afterwards sold to plaintiff under execution against the husband; that the conveyance is a cloud on plaintiff's title; and that by the continuance of the use and occupation by defendants plaintiff has been deprived thereof,—shows no cause of action where plaintiff admits at the trial that no conveyance by the husband to the wife was made.

In bank. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

In this action by George E. Turner against James White and Martha S. White, to set aside a deed as fraudulent, and to remove a cloud on title, and for other relief, defendants had judgment, and plaintiff appeals.

Thomas Ford, for appellant. *Frank Power*, for respondent.

WORKS, J. This is the second time this case has been before us. On the former hearing it was reversed, on the ground that the defendants had been permitted in the court below to make proof of certain matters not put in issue. *Turner v. White*, 14 Pac. Rep. 794. Upon a second trial there was judgment for the defendants, from which, and an order denying him a new trial, the plaintiff appeals. The complaint is very long, and was evidently intended as one to set aside a deed on the ground that it was made to defraud creditors. It alleges, in substance, that on the 12th day of June, 1880, the defendant James White was the owner of certain real estate, describing it, and on said day conveyed the same to his co-defendant, who was his wife; that the conveyance was without consideration, and made to defraud credit

ors, which was known to the grantee; that on the 1st day of October, 1881, said White became indebted to plaintiff in the sum of \$51.79; that he sued and recovered a judgment therefor, caused execution to issue and the property to be sold by a constable, became himself the purchaser, and received a constable's deed therefor. The complaint further alleges "that said real property was subject to and liable on execution for the debts and obligations of defendant James White, who was the owner thereof; that, by virtue of the deed of conveyance from said constable, plaintiff became seized of and ever since has been and now is seized of and the owner of said premises, and entitled to the possession thereof; that the said purported deed of James White, conveying all his property to his wife, in no manner altered or affected the title, *status*, or condition, as against this plaintiff, of the property herein described as purchased by plaintiff, but that nevertheless the said conveyance now operates as a cloud upon the plaintiff's title to the said purchased property." The value of the rents and profits of the real estate is stated, of which sum it is alleged plaintiff has been wrongfully deprived by the defendants; "and, by the continuance of the use and occupation of said premises by defendants, plaintiff has and will be deprived of such use and occupation, to his damage in the sum of \$250 in addition thereto." The prayer of the complaint is for judgment "that the defendant James White was the real owner of said described premises at the time of the recovery of the judgment aforesaid, the issuing of the execution, and the sale and conveyance by said constable to plaintiff, and that defendant Martha S. White held her purported title to the same by fraud, and in violation of the plaintiff's rights; that the said purported conveyance from said James White to his wife, so far as it affects the property purchased by plaintiff, be decreed to be fraudulent and void, of no legal force or effect; and that plaintiff is the legal owner of said premises, and entitled to the possession thereof; that defendants may be decreed to make, execute, acknowledge, and deliver to plaintiff a deed of conveyance of all their right, title, and interest in and to said premises described, and, if they make default in doing so on a day to be fixed by the court, that some competent person may be appointed by this court to do it for them; "that plaintiff recover the sum of \$500 damages for the withholding of said property, and the loss of the value of the rents, issues, and profits thereof; that such general relief as the nature of the case may require may be awarded, and that plaintiff also have judgment for costs." The answer denied that any deed of the property in controversy had been given by White to his wife. The opening of the bill of exceptions containing the evidence has this recital: "On the second trial of this cause, before the offer of any evidence, the plaintiff read to the court and filed with the clerk a written statement, admitting as true the allegations of defendants' answer that the property in controversy was not included in the deed of June 12, 1880, and never was conveyed by defendant James White to his wife, the other defendant. The trial then proceeded as an action to quiet title." The alleged errors relied upon for a reversal relate to the admission and exclusion of evidence; and the findings of the court, it is claimed, were not sustained by the evidence.

As the facts appear in this record, we cannot conceive of any ruling upon the evidence, or any finding of the court, that could possibly work the plaintiff any injury. The one and only allegation in the complaint that gave him a cause of action to quiet title was that the deed of June 12, 1880, had been executed by White to his wife, and was a cloud on plaintiff's title. There is no general allegation in the complaint that either of the defendants are claiming or asserting any title or interest in the property adverse to the plaintiff. It can only be inferred that such claim is made from the alleged fact of the execution of this deed. At the opening of the trial the plaintiff expressly admits that no such deed was ever executed. If so, there was no cloud upon his title to be removed, and no evidence of any adverse claim on the part of the

defendants. Treating the complaint as one to set aside a deed as fraudulent, there was no deed to set aside. His complaint and this admission left the plaintiff the owner of the property, with no cause of complaint against the defendants. In other words, the plaintiff admitted his whole case away. This being the condition of the case, there was absolutely nothing left for the court to try. Strictly speaking, it may have been error to admit any evidence, but, as we have said, if it was error, it was harmless, and could not entitle the plaintiff to a reversal of the judgment. The judgment and order appealed from are affirmed.

We concur: SEARLS, C. J.; MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.; THORNTON, J.

77 Cal. 397

REEVES v. HYDE *et al.* (No. 11,460.)

(*Supreme Court of California.* November 27, 1888.)

PUBLIC LANDS—OWNED BY STATE—AGRICULTURAL LANDS.

Lands adapted to the growth of fruits are agricultural lands, and may be entered as such, fruits being an "ordinary agricultural crop," as that phrase is used in Pol. Code Cal. § 3495, prescribing the tests of lands which may be entered as agricultural.

Commissioners' decision. Department 1. Appeal from superior court, Lake county; RODNEY J. HUDSON, Judge.

Action by James M. Reeves against Marcus D. Hyde and H. W. Rice, to determine the right to purchase certain land from the state. Judgment for plaintiff. Motion for new trial denied, and defendants appeal. Pol. Code § 3495, prescribing the tests of agricultural land which may be entered as such, provides "that any smallest legal subdivision of school lands shall be deemed suitable for cultivation, if any part not less than one-half of its area will, without artificial irrigation, but with or without the clearing of timber or other growth therefrom, by the ordinary processes of tillage, produce ordinary agricultural crops in average quantity."

E. W. Britt, (*C. E. Wilson*, of counsel,) for appellants. *R. W. Crump*, for respondent.

FOOTE, C. This action was to determine a contest as to which of the parties to it had the better right to purchase a tract of 320 acres of school land from the state. The cause was tried before the court without a jury, and judgment was rendered in favor of the plaintiff, from which, and an order denying a new trial, the defendants appeal.

The only point in dispute in the court below was as to whether or not the land was suitable for cultivation. The court found "that the land in controversy is now, and was at the time of the filing of the application of the defendant Hyde to purchase said land, and ever since has been, suitable for cultivation, and at least one-half of every subdivision thereof is now, and was at the time of the filing of said application to purchase said land, and ever since has been, suitable for cultivation." The defendants contend that the evidence conclusively shows that no kind of crops could be raised upon the land, except fruits, and that they are not such "ordinary agricultural crops" as are meant in section 3495 of the Political Code, which prescribes the tests for agricultural lands, which may be entered as such. They further claim that there is no evidence demonstrating the fact that one-half of each legal subdivision of the land was suitable for the cultivation of any ordinary agricultural crop. Upon these points there is an undoubted conflict, yet there is some evidence of a persuasive kind going to show that the land, in at least the proportion of one-half of each legal subdivision thereof, is suitable for the cultivation of the ordinary fruit crops grown in this state; and we cannot say that the court below, before whom the witnesses appeared in person and

testified, had no basis for its finding. The language of section 3495 of the Political Code, which describes what character the land shall possess in order to make it agricultural, should be taken in its broadest sense, and be held to include crops of fruit in the term "ordinary agricultural crops," especially in view of the circumstance that a very large portion of the husbandmen of this state are engaged in tilling portions of the soil in which are grown various descriptions of fruit, a fact well known to the people and their legislative representatives, who enacted the law. It will not do to say that (as we understand) in California apples, prunes, and grapes are not ordinary agricultural crops. We advise, therefore, that the judgment and order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

3 Cal. Unrep. 27

SESLER v. MONTGOMERY. (No. 11,359.) *

(Supreme Court of California. December 3, 1888.)

1. LIBEL AND SLANDER—COMMUNICATION BY HUSBAND TO WIFE—PUBLICATION.

Communication by a husband to his wife of slanderous words in regard to a woman is a publication.

2. SAME—EVIDENCE.

In an action for slander, where it is shown that defendant accused plaintiff of perjury and want of chastity, in a room where his wife was, in a voice loud enough to be heard outside, there is sufficient evidence that she heard and understood the words.

3. SAME—PRIVILEGED COMMUNICATION—HUSBAND AND WIFE.

Under Civil Code Cal. § 47, providing that a privileged communication is one made without malice to a person interested therein, by one who is also interested, or by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, and section 48, providing that malice is not to be inferred from the mere fact of publication, a finding of the jury that a communication from a husband to his wife, with whom he was on bad terms, slanderous of a female acquaintance of hers, who had testified for her in divorce proceedings between her and her husband, was made with malice, and was not privileged, cannot be disturbed.

4. TRIAL—ARGUMENT OF COUNSEL—FAILURE TO INTRODUCE EVIDENCE.

Under Code Civil Proc. Cal. § 2061, subd. 6, providing that evidence is to be estimated, not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and the other to contradict, comment to the jury upon the failure of defendant to introduce his wife to corroborate his own testimony is proper.

Commissioners' decision. In bank. Appeal from superior court, Alameda county; E. M. GIBSON, Judge.

Action by Mary A. Sessler against A. Montgomery for slander. Judgment for plaintiff, and defendant appeals.

Estee, Wilson & McCutchen, J. C. Martin, and W. F. Goad, for appellant. W. W. Allen, A. R. Cotton, and W. H. H. Hart, for respondent.

HAYNE, C. Action for slander. Verdict and judgment for plaintiff. Defendant appeals. Several points are made.

1. It is said that there was no publication. The facts are that the words were spoken to the defendant's wife, and were overheard by the plaintiff, who was listening in the corridor. The point is that husband and wife are in law one person, and that therefore a communication between them is not "published," within the meaning of the law of slander. It is to be observed that this is a different thing from saying that the communication was privileged. There must be a publication before the question of privilege can arise. We have not been referred by appellant to any decision in support of the precise point, except *Trumbull v. Gibbons*, 3 City H. Rec. 97, decided by an inferior

* Reversed in banc. See 21 Pac. 185, 78 Cal. 486.

court. We have not had access to this report, but from the mention of the case in *Townshend on Slander* we should infer that the decision proceeded on another ground, and that what is said in relation to the question in hand is merely a *dictum*. Nor have we been able to find any case exactly in point. Upon principle we should say that there was a publication. That husband and wife are one person is a mere fiction, and is not true for all purposes. The tendency of modern law, especially in California, is certainly not to extend the operation of the fiction. Nor do we see any reason why it should be extended, at least in the present direction. The reputation of a woman can certainly be injured by slanderous communications to her female friends; and the fact that the communication came through a husband would not ordinarily deprive it of its injurious effect. Furthermore, if husband and wife are one person to the extent that a communication from the husband to the wife concerning a third person is not published, it would seem to follow that a communication from a third person to one of the spouses concerning the other would not be a communication concerning a third person, so as to constitute a slander. But the contrary has been decided. A communication to one of the spouses concerning the other may be slander. *Wenman v. Ash*, 13 C. B. 836; *Schenck v. Schenck*, 20 N. J. Law, 208; *Odgers, Sland. & Lib.* *152, *153. That the result is the same in each case is stated by *Townshend*, who says: "The husband or wife of the author or publisher, or the husband or wife of him, or whose affairs the slander concerns, is regarded as a third person." *Townsh. Sland. & Lib.* § 95. We think, therefore, that a communication from a husband to his wife may constitute a publication.

2. It is contended that there was no evidence that the wife heard or understood the words uttered. The words imputed to the plaintiff perjury and a want of chastity, and hence were slanderous *per se*. They were not ambiguous, and were spoken of the plaintiff, and could not have referred to any other person. This being the case, the only possible point that can be made in this regard is that there is no proof that the wife heard or understood the words at all. It is certainly true that the slanderous words must be heard and understood. And it may be conceded that the burden is on the plaintiff to prove the hearing and understanding. But where a man converses with his wife in a room in such a tone of voice that he can be heard and understood by a person outside of the room, it is hardly possible that the wife did not hear and understand him. If the wife was deaf, or did not understand the language, or any other peculiar circumstance existed to prevent what would be the ordinary result, we think the defendant should have proved it. What was proved was sufficient to overcome the burden we have assumed to be on the plaintiff in the first instance.

3. It is urged that the communication was privileged. The Code provides that a privileged communication is one made "in a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information." Civil Code, § 47. It is clear from the above that if there be malice the communication cannot be privileged, and the question of the existence of malice is one for the jury. In this case the jury was instructed that if no malice was shown the communication was privileged. It must be assumed from their verdict, therefore, that they believed that there was malice; and, although malice is not to be inferred from the mere fact of the publication, (*Id.* § 48,) we cannot say from the record that the jury was not justified in finding the existence of malice. The circumstances were such as to negative the theory that the communication was for justifiable purposes. At the time it was made, the defendant was on bad terms with his wife. A suit for the annulment of the marriage was then pending. The plaintiff was an acquaintance of the wife,

and had come, at the wife's request, to give the protection of her presence against any outbreak on the part of the husband. She had testified on behalf of the wife in the suit above mentioned. The charge of perjury was probably made by the husband with reference to this testimony, and the inference is strong that it was resentment on his part at her testifying on the part of the wife, and not solicitude for the welfare of his family, that caused him to utter the slander. This inference is not weakened by the circumstance that the interview between the defendant and his wife was a stormy one; that he "became so excited" that he called his wife a liar; that the communication with reference to plaintiff was coarse and brutal in its nature; and that "he spoke in an angry tone." Taking everything together, we think there was evidence from which the jury could infer malice. Hence the communication was not privileged.

4. It is claimed that there was an irregularity of counsel for the plaintiff in the argument to the jury. During the trial the plaintiff called the defendant's wife to the stand, and after she had been sworn, and testified that she was his wife, the defendant's counsel objected to any further testimony from her, on the ground that the consent of the defendant to her being a witness had not been obtained. There was no ruling upon the point. The plaintiff withdrew the witness, and she was not subsequently recalled by either party. This left a direct conflict between the plaintiff and the defendant as to whether the slanderous words were uttered. The plaintiff affirmed the fact, and the defendant positively denied it. During the argument the plaintiff's counsel began by referring to the objection which had been made to the wife's testifying, and was proceeding to argue from it that an inference against the truth of the testimony of the defendant should be drawn. The counsel for the defendant objected to this line of argument; but the court overruled the objection, and the counsel for the plaintiff proceeded with his argument, dwelling mainly upon the failure of the defendant to call his wife as a witness. We think the action of the court was proper. Where it is in the power of a party to call a witness who can corroborate or disprove his statements, his failure to call such witness is a legitimate subject of comment to the jury. Such a case falls within the scope of subdivision 6 of section 2061 of the Code of Civil Procedure, which provides that "evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce, and of the other side to contradict." See, also, *Gray v. Burk*, 19 Tex. 233. The non-production of evidence in such case is a circumstance from which the jury may draw an inference of fact. If this is so, it is permissible to counsel to ask them to draw such inference; and it is a matter of every-day occurrence for counsel to make such arguments. The case is not similar to that of a person accused of crime; for the statute expressly provides, with reference to cases where the prisoner does not testify, that "his neglect or refusal to be a witness cannot in any manner prejudice him, nor be used against him on the trial or other proceeding." Pen. Code, § 1823. Now, in the present case, the wife was perfectly competent to be a witness if the defendant had consented. The slanderous words having been alleged to have been spoken to her, she could have corroborated or disproved his statements; and the circumstances excluded any idea that the communication was in fact confidential. He exercised much ingenuity to avoid admitting that she was his wife. His failure to consent was the sole reason she could not testify; and under the circumstances we think that the case falls within the rule above stated, and that the failure to give his consent was a subject of comment to the jury. It is to be observed that there was no ruling of the court upon the admissibility of the testimony, the witness having been withdrawn before a ruling was made; and there was no attempt to argue against the justice of the law, or to induce the jury to disregard the law, and it is therefore unnecessary to express an opinion as to what would have been

the result had such circumstance existed. Moreover, we are not to be understood as saying that in every case in which a party fails to produce a witness such failure may be commented on to the jury. The fact sought to be inferred may not be an issue in the case, (*Fletcher v. State*, 49 Ind. 134,) or may not be proper for the consideration of the jury, (*Rudolph v. Landwerlen*, 92 Ind. 34.) The whole subject of the latitude to be allowed counsel in argument rests very much in the discretion of the trial court, and an exercise of such discretion should not be disturbed except in a clear case. The other points do not require special notice. We do not see any contradiction in the instructions. The charge of the court seems to have correctly presented the case to the jury. We think that the defendant had a fair trial, and we therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McFARLAND, J., (*concurring*.) I concur in the judgment; but I am not prepared to say that there would have been a publication, if, at the time the slanderous words were spoken by defendant to his wife, he had been living with her in the friendly and confidential relation which usually exists between husband and wife.

77 Cal. 399

STANDART v. ROUND VALLEY WATER CO. (No. 12,633.)

(*Supreme Court of California*. December 3, 1888.)

PROPERTY—ARTIFICIAL WATER-COURSE—REAL PROPERTY—QUIETING TITLE.

Under Civil Code Cal. § 658, providing that real property shall consist of that which is incidental or appurtenant to land, and section 652, providing that a thing is deemed to be incidental or appurtenant when it is used with the land for its benefit, as in the case of a water-course from or across the land of another, a right to use an iron pipe, through which water is conducted from a reservoir to a mill, and to the water itself, is real property, and the subject of an action to quiet title.

In bank. Appeal from superior court, Plumas county; G. G. CLOUGH, Judge.

Action by George Standart against the Round Valley Water Company, to quiet title. Demurrer to complaint sustained, and plaintiff appeals.

Goodwin & Goodwin, for appellant. *W. W. Kellogg*, for respondent.

WORK, J. The complaint in this case alleges, in substance, that the plaintiff is the owner, and in possession of a certain mill-site and a quartz-mill thereon, situate about 400 feet below the dam known as the "Round Valley Reservoir Dam;" that during the 20 years he and his grantors have owned and possessed the same they have owned, possessed, and used, and the plaintiff does now own, possess, and use, a sheet-iron pipe extending from the water-wheel in said mill to and through said reservoir dam, which pipe, during all of said time, has been, and still is, a part of said mill, and used with the same; that said pipe has been during all of said time, and now is, the only outlet for the water stored in said reservoir; that plaintiff is, and he and his grantors have been during all of said time, the owner of the water flowing from said reservoir through said pipe to the extent of 350 inches, measured under a 4-inch pressure, as a motive power, with which to propel the machinery of said mill, and have used, and plaintiff now has the right to use, the same for said purpose; that the defendant claims to own said reservoir as a storage-room for water for sale, and claims to own a water-ditch from North canyon, immediately through which the water so stored is distributed and sold, after leaving plaintiff's said premises, and claims some right or title in

said iron pipe, and in said water as it flows through said pipe, adverse to plaintiff's ownership and use thereof, and intends to divert said water from said pipe, and to deprive plaintiff of the use thereof as aforesaid, and that said claim is invalid. The prayer of the complaint is that defendant be required to set forth its right or title to said water-pipe and water; that its rights, so far as they are adverse to plaintiff, be declared invalid; and that plaintiff be quieted in his title and use in said water and pipe to the extent and for the uses and purposes set forth. A demurrer to the complaint, on the ground that the same does not state facts sufficient to constitute a cause of action was sustained, and judgment rendered thereon in favor of the defendant, from which plaintiff appeals.

The only question before us is as to the sufficiency of the complaint. We see no objection to its form. We are not favored with any brief on behalf of the respondent, and are not informed of the grounds upon which the court below held it to be bad. We infer from what is said in appellant's brief that it was held that the property mentioned in the complaint was not real estate, and therefore not the subject of an action to quiet title. The complaint raises two questions: (1) That of the ownership of and right to use the iron pipe through which the water is conducted from the reservoir to the mill; (2) the right to the water contained in the reservoir, to the extent mentioned in the complaint. As to the first of these, the ownership of the soil through or over which the pipe passes is not claimed. If the pipe is personal property, any interference with it would certainly be a trespass, for which a recovery might be had in an action at law. So if, by reason of its connection with plaintiff's mill, it can be regarded as an interest in real estate, an action at law would lie for the recovery of damages, or, if it were necessary to prevent the defendants so using or interfering with the same as to work the plaintiff injury, he might have resorted to the preventive remedy of injunction. But neither of these remedies can be regarded as exclusive. If the parties are claiming conflicting or adverse interests in the property, and it is an interest in real estate, there is no more simple, direct, or satisfactory proceeding by which to settle these conflicting claims than the one here chosen. The water-pipe used, as is alleged in the complaint, is what is sometimes termed in the decided cases an "artificial water-course." *Farmer v. Water Co.*, 56 Cal. 13. We may very properly consider together the alleged right to the water-course, and the ownership of the water itself, and the right to flow the same through the pipe to be used in propelling the machinery of the mill with which it is connected. By the provisions of our Code real or immovable property consists of (1) land; (2) that which is affixed to land; (3) that which is incidental or appurtenant to land; (4) that which is immovable by law. Civil Code, § 658. "A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit; as in the case of a way or water-course, or of a passage for light, air, or heat, from or across the land of another." *Id.* § 662. The question whether the right to have water flow upon lands, through an artificial water-way, is appurtenant to the real estate frequently arises where a conveyance of the real estate and its appurtenances has been made. The case of *Farmer v. Water Co.*, *supra*, is a case in point. There the action was to determine the rights of the parties in the water in controversy, and for an injunction. The water had been conveyed by the defendant to one Lamar, who owned about four acres of land, with a dwelling-house and other buildings thereon, and who brought the water so conveyed to him onto said land, and used the same thereon for irrigation and domestic purposes. Lamar conveyed the premises, with the appurtenances belonging thereto, to one Bell, from whom, through mesne conveyances, plaintiff deraigned his title. Subsequently Lamar conveyed the water-right to one Todd, through whom the defendant claimed the right to, and did deprive the plaintiff of the water. The court below found for the defendant, but this court reversed the judg-

ment, holding that the water-right there in controversy became and was appurtenant to the land in the hands of Lamar, and passed, by his deed and mesne conveyances, to the plaintiff. Other cases in this court are to the same effect. *Fratt v. Whittier*, 58 Cal. 126; *Ditch Co. v. Canal Co.*, 60 Cal. 108. We cite as establishing this doctrine, Ang. Water-Courses, §§ 141, 161, 167; *Kilgour v. Ashcom*, 5 Har. & J. 83; *Philbrick v. Ewing*, 97 Mass. 133. There is no direct allegation in the complaint that the use of the water flowing through the pipe is necessary to the use of the plaintiff's mill, but the facts alleged sufficiently show such necessity. We hold that the complaint states facts sufficient to constitute a cause of action, and that the demurrer to it should have been overruled. The judgment is reversed, with instructions to the court below to overrule the demurrer to the complaint.

We concur: SEARLS, C. J.; PATERSON, J.; SHARPSTEIN, J.; MCFARLAND, J

77 Cal. 416

PEOPLE v. ROSS. (No. 20,433.)

(Supreme Court of California. December 4, 1888.)

CRIMINAL LAW—FORMER CONVICTION—INSTRUCTIONS—VERDICT.

Where an information read to the jury charges petit larceny, and a former conviction of burglary, and defendant pleads guilty to the latter, and the trial is had on the charge of petit larceny only, the jury being instructed that they have nothing to do with the charge of former conviction, defendant cannot complain that the form of verdict, given by the court, stating that the jury find defendant guilty as charged in the information, misled the jury into the belief that they must consider the charge of former conviction in determining his guilt or innocence of petit larceny.

Commissioners' decision. In bank. Appeal from superior court, San Joaquin county; F. T. BALDWIN, Judge.

Information against one Ross, charging petit larceny, and a former conviction of burglary. Conviction of petit larceny, and defendant appeals.

S. D. Woods, for appellant. *Geo. A. Johnson*, Atty. Gen., for respondent.

FOOTE, C. The defendant was charged with petit larceny, and a prior conviction of burglary, and from the judgment rendered against him, and an order denying a new trial, he appeals. The point which he makes for a reversal of the judgment and order is that the court erred in instructing the jury that, if they found him guilty the form of the verdict should be: "We, the jury, find the defendant guilty as charged in the information." The reason advanced by the defendant as showing error upon the part of the court in giving the instruction complained of, is that the jury was misled into the belief that they must consider the question of the defendant's former conviction of the offense of burglary in determining his guilt or innocence of petit larceny; that, inasmuch as the information charging petit larceny and prior conviction of burglary had been read to the jury on the opening of the trial, they, having that in mind, were misled by the court's instruction into the belief that they must, in their verdict, find upon both charges. But an examination of the record shows the entire improbability of such an understanding. After the information had been read, the defendant pleaded not guilty to both charges, and the district attorney stated what he expected to prove, and the defendant answered that portion of the information which charged prior conviction of burglary by entering a plea of guilty. Then the case stood for trial upon the charge of petit larceny alone, so far as the pleadings were concerned, and the province of the jury. When the evidence was introduced it was confined to the question of the guilt or innocence of the defendant of petit larceny. The instructions for the people referred solely to the matter of the guilt or innocence of the defendant of petit larceny. To make it absolutely certain that the charge of prior conviction for burglary should not be considered by the jury, the court, at the instance of the defendant, ex-

pressly informed them that as to that matter they had nothing whatever to do. Taking the instructions altogether, it is perfectly plain that the only charge remaining in the information for trial was that of petit larceny; that the jury were positively instructed to confine their deliberations to the consideration of the truth or falsity of that charge upon the evidence before them. There is no reason whatever to suppose that they ever dwelt in the remotest degree upon the charge of prior conviction of burglary, which, in their presence, had been eliminated from the trial by the confession of the defendant by his plea of guilty after the information had been read, and by the emphatic instructions of the court. They must have understood the instruction objected to as relating solely to the charge of petit larceny, the only one about which there was any dispute as to the defendant's guilt. The authorities cited by the defendant are wholly inapplicable to this case. We advise that the judgment and order be affirmed.

We concur BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

77 Cal. 408

APPLEGARTH *et al.* v. MCQUIDDY *et al.* (No. 12,653.)

(Supreme Court of California. December 4, 1883.)

CORPORATIONS—ACCOUNTING BY DIRECTORS—SUIT BY STOCKHOLDERS—PLEADING.

A complaint by stockholders against the directors of a ditch and canal company, which alleges that the company "is incorporated under and by virtue of the laws of the state of California" for the purpose of constructing a water-ditch for irrigating purposes, and that defendants have fraudulently distributed the water gratuitously, without alleging that the corporation was organized for profit or for the purpose of selling water, does not state a cause of action, since it shows no misconduct on the part of defendants.

Commissioners' decision. In bank. Appeal from superior court, Tulare county, WILLIAM W. CROSS, Judge.

Action by John Applegarth and Henrietta A. Applegarth against T. J. McQuiddy, D. Burris, W. Newport, and the People's Ditch Company. Plaintiffs are stockholders, and defendants McQuiddy, Burris, and Newport are stockholders and directors of said company. Plaintiffs appeal.

Jarboe, Harrison & Goodfellow and *Oregon Sanders*, for appellants. *Brown & Daggett*, for respondents.

FOOTE, C. This action was brought to compel an accounting from the directors of a ditch and canal company for losses claimed to have been sustained by the stockholders, resulting from the alleged fraudulent failure of the directors to sell the water which flowed through an irrigating canal, and to obtain a judgment for the amount so found due for such alleged failure to sell the water. A demurrer was filed, setting up that the complaint did not state facts sufficient to constitute a cause of action. There was no direct allegation in the complaint that the corporation was organized for profit, or that the purposes for which it was incorporated were other than "to construct a water-ditch, for irrigating purposes, in said Tulare county." The court below sustained the demurrer, and, the plaintiffs declining to amend the complaint, judgment passed for the defendants, from which an appeal is taken.

The appellants contend that it is a presumption of law that, when it is alleged in a complaint, as in this case, that a corporation "is incorporated under and by virtue of the laws of the state of California," the corporation so mentioned is a corporation organized for profit, and that such an allegation is sufficient to declare that it is so organized. The proposition thus asserted is not correct, for it may happen that, as a matter of fact, a corporation incorporated

under the laws of this state to operate an irrigating canal is not one designed for profit. It is true that, as a matter of evidence, it might be presumed that such a corporation was organized for profit; but such presumption would not necessarily arise as a matter of law. Because the complaint alleged that the corporation was organized for the purpose of irrigation, would not of itself compel the presumption that the corporation was organized for the purpose of selling the water in its canal or ditch for irrigation purposes. It would be entirely legal for an irrigating canal and ditch company to be incorporated to distribute water gratuitously. If from the allegation of incorporation, as expressed in the complaint, it is not necessarily to be presumed that the purpose for which the corporation was incorporated was to sell water for irrigating purposes, then there is nothing contained in the pleading which alleges the violation of any existing obligation on the part of the defendants. Having violated no obligation which was binding on them, they cannot be made to respond in damages for failing to sell the water. The allegation in the complaint with respect to fraud on the part of the defendants is not sufficient; for while it is alleged that the directors fraudulently distributed the water for irrigation purposes by doing so gratuitously, there is no allegation that any duty to sell the water rather than to give it away was imposed upon them. Hence there were no facts alleged in the complaint which constituted the supposed fraud. We therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

APPLEGARTH *et al.* v. BURRIS *et al.* (No. 12,652.)

(*Supreme Court of California.* December 6, 1888.)

Commissioners' decision. In bank. Appeal from superior court, Tulare county. *Jarboe, Harrison & Goodfellow* and *Oregon Sanders*, for appellants. *Brown & Daggett*, for respondents.

FOOTE, C. The points involved in this case are precisely similar to those in the case of *Applegarth v. McQuiddy*, *ante*, 692, (decided December 4th,) and on the authority of that case the judgment herein should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. On the authority of *Applegarth v. McQuiddy*, *ante*, 692, (No. 12,653, filed December 4th,) the judgment is affirmed.

77 Cal. 360

PEOPLE *ex rel.* ATTORNEY GENERAL v. STANFORD *et al.* (No. 9,783.)

(*Supreme Court of California.* November 21, 1888.)

1. CORPORATIONS—FRANCHISES—FORFEITURE—PLEADING.

Where a count in a petition prays for the forfeiture of franchises then being exercised by a company of persons acting as a corporation, and alleges that, if it ever had, as a corporation, any legal existence, privilege, or franchise, the same has become forfeited, the previous existence of the corporation not being alleged, no cause of action is stated. Following 18 Pac. Rep. 55.

2. SAME—ADMITTING EXISTENCE.

A count alleging that certain private individuals and a railroad company, joined as defendants, are falsely claiming that there is such a corporation, and usurping certain powers, etc., is demurrable, since by suing the corporation as such its existence is admitted, and therefore no cause of action stated; and, further, an alleged corporation and the members composing it cannot be joined in an action to declare its non-existence.

3. SAME.

Where a complaint seeking the forfeiture of the franchises of a corporation alleges that the corporation has ceased to exist, it must state how and by what means it has ceased to exist.

4. SAME—DEFECTIVE PROCEEDINGS—ALLEGATIONS.

Though an allegation, in a petition to declare the non-existence of a corporation, that there never was such a corporation, is sufficient, if it is insisted that the proceedings under which it acts are defective, the defects must be set out. Reversing 18 Pac. Rep. 85.

5. SAME—QUO WARRANTO—ANSWER—GENERAL DENIAL.

An information in the nature of *quo warranto* against a corporation and the individuals claiming to compose it, which alleges that there is no such corporation, is, in effect, against the individuals, and not against the corporation, and an answer denying the allegations of the complaint is sufficient, without any disclaimer or justification by the corporation of its exercise of the franchises alleged to have been usurped.

6. SAME—JUDGMENT.

The complaint in such case will not sustain a judgment which, without determining the question of the existence of the corporation, provides that plaintiffs recover of defendants the rights and privileges exercised by them.

7. HORSE AND STREET RAILROADS—CONSTITUTIONAL LAW—ASSIGNMENT OF FRANCHISES.

Const. Cal. art. 4, § 31, providing that corporations may be formed under general laws, but shall not be created by special act, does not prohibit a duly-organized corporation from receiving by assignment from its lawful owners a franchise to lay down and maintain a street railroad.

In bank. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

On rehearing. For former opinion see 18 Pac. Rep. 85.

McAllister & Bergin, for appellants. *Geo. A. Johnson*, Atty. Gen., and *J. P. Meux*, for respondents.

WORKS, J. This cause was decided in department 1, and a rehearing granted. It was held by the department that the second count of the complaint was bad, and that it was error to overrule the demurrer thereto. We adhere to this conclusion, and to that extent the opinion of the department is adopted as the opinion of the court.

There was also a demurrer to the first count of the complaint, which was overruled by the court below. It is urged upon us that this count of the complaint is bad, for the reason that conclusions are pleaded, and not the facts. The pleading is an anomaly. It sues the Potrero & Bay View Railroad Company as one of the defendants, and at the same time alleges that it is not a corporation. It alleges that the private individuals named as defendants, and the Potrero & Bay View Railroad Company, are falsely claiming that there is such a corporation, and that they have unlawfully held and exercised, and still do exercise and claim and hold unlawfully, divers powers, etc. It is well settled that a corporation cannot be sued as such, and brought into court, and the action maintained against it on the ground that it is not a corporation. If it is intended to draw in question the franchises of the corporation, the proceeding must be against the individuals who usurp the franchise. If it is claimed that the corporation is usurping privileges and powers not belonging to it, the corporation is the proper and only proper party. Ang. & A. Corp. § 756; Boone, Corp. §§ 162, 163; *State v. Coke Co.*, 18 Ohio St. 262; *People v. Railroad Co.*, 15 Wend. 113; *Draining Co. v. State*, 43 Ind. 236. By making the corporation a party it is admitted that it once had an existence. Ang. & A. Corp. § 756. In *Draining Co. v. State*, *supra*, the court says: "This first paragraph was clearly bad. It is not against certain persons claiming to be a corporation, but against the corporation by its corporate name. It is brought into court as a corporation, to answer an allegation that it is not and never was a corporation. When a corporation is brought into court by its corporate name, its existence is thereby admitted." In this case, the corporation being made a party, its existence is admitted. It must follow, therefore, that there is no cause of action stated as against it. But there are other defendants sued jointly with it, and charged with having, jointly with such corporation, usurped the rights of a corpora-

tion, etc. There is no question made in the record or in the briefs as to the misjoinder of these parties. But we are clear that the people cannot bring both a corporation and the individuals who compose it before the court by information in the nature of *quo warranto*, and claim the non-existence of the corporation thus brought before the court, and that the other defendants, jointly with it, are claiming to be and exercise the rights and privileges of such corporation. To permit such a course would be subversive of all rules of pleading. If we are right in the position taken, that by suing the corporation as such its existence is admitted, this is an end of the matter, so far as this count of the complaint is concerned, for the reason that the whole force of its allegations, as against the individual defendants, rests upon the sole ground that no such corporation exists.

If the complaint can be defended on the ground that it admits that such a corporation once existed, but has ceased to exist, it is open to the objection made to it, that it does not state the facts showing how and by what means it has ceased to exist. We are of the opinion that it would be sufficient, in an action against individuals, charging that they are wrongfully claiming to act as a corporation, to allege, in general terms, that there never was such a corporation. In such case the allegation that there never was such a corporation covers the whole ground. Nothing can be added to this general statement, which is itself an allegation of a fact. We are equally clear that where the existence of the corporation is expressly averred, or is admitted, it is not sufficient to allege that it has ceased to exist. The facts showing that its existence has terminated must be set forth; and if the claim is that the corporation is acting as such, but the proceedings under which it is acting are defective, the facts showing that it is so claiming to act, and the defects claimed to exist, should be set out specifically. Taking either view of the complaint, therefore, we must hold this count to be bad, and that the court below erred in overruling the demurrer to it.

There was an answer to the complaint, to which a demurrer was sustained. Notwithstanding what was said in the opinion in department, we are constrained to hold that this was error. The answer for each and all of the defendants jointly and severally and specifically denies that "the defendants, or any of them, claiming to be the said Potrero & Bay View Railroad Company, have for a long time, or do now, or at any time have, unlawfully claimed or unlawfully exercised the franchises, powers, or privileges in said city and county in this behalf in said complaint alleged, or any franchise, power, or privilege." The other material allegations of the complaint, are denied in like manner. It is urged that in an action of this kind it is not enough for the defendants to deny the allegations of the complaint, for the reason that the writ requires them to show affirmatively by what right they are exercising the franchises, and so it is held in department. This is true where it is admitted, or not denied, that they are exercising the rights and privileges alleged, and attempt to establish their right to do so. High, Extr. Leg. Rem. §§ 712, 716.

But the defendants, whether it is the corporation or individuals, who are alleged to be wrongfully claiming to be such, may, instead of justifying their claim, deny that they are making such claim and exercising the rights and privileges alleged. It is certainly not necessary to justify their right to lay down and operate a railroad when they deny specifically that they are doing any such thing. The authorities cited in the former opinion are to the effect that the people are not bound to prove anything where the defendants attempt to justify their right or disclaim. 2 Dill. Mun. Corp. (3d Ed.) § 893; Ang. & A. Corp. § 756. But these authorities are only applicable where it is admitted, or not denied, that the defendants are exercising the franchises, and the question is as to the right to exercise them. That is not the case here. The issue presented is not one of the right to exercise a franchise, but whether it is being exercised. The impropriety of attempting to join the corporation

and the individuals alleged to be acting as such in the same action is thus made manifest. It is impossible that both could be doing the acts alleged. That the individual defendants are in the wrong, as alleged, can only be established by showing that there is no such corporation, and, if the corporation does exist, and is itself exercising the franchises complained of, the individuals charged may truthfully, and with perfect propriety, deny that they are exercising such franchises; and such a denial, it seems to us, is a complete defense to the action as to them. In this case they not only deny that they, as individuals, are doing the acts or exercising the privileges set forth in the complaint, but allege affirmatively that "the Potrero & Bay View Railroad Company was and is a corporation duly organized and acting under the laws of the state of California, and lawfully entitled to own, maintain, and operate its line of street railroad along and upon the several streets, highways, and roads in said complaint alleged, and in so doing to demand and receive fares and tolls in money from all persons and people who may pass over the same, over the cars of said Potrero & Bay View Railroad Company." The answer goes further than is necessary to meet the first count of the complaint. The individual defendants are the only ones against whom it can be claimed any cause of action is stated. They meet the whole of this cause of action by denying that they are or have been doing the acts complained of. They go a step further, and allege that some one else, viz., the Potrero & Bay View Railroad Company, is doing the acts set forth in the complaint, and that it has the right so to do. This latter allegation may properly be treated as mere surplusage, and the answer still contains a complete defense to the action. If we are right in the conclusion reached, that a general averment that no such corporation exists is sufficient, it must follow necessarily that a denial in the same general form is likewise sufficient.

It is clear that in the opinion of the department the first count of the complaint was understood to be against the railroad company, as an existing corporation, on the ground that it was exercising the privileges set forth without right. It is said: "The first count of the complaint alleged that the Potrero & Bay View Railroad Company never had the right or franchise to build and maintain tracks and run cars upon streets within the city and county of San Francisco, and the answer fails to aver facts showing that the company had such rights or franchises." We cannot so construe this count of the complaint. As we have said, it does not claim to recover on the ground that the corporation is usurping franchises or privileges not belonging to it, but, on the contrary, avers in direct terms that there is no such corporation, and that the individuals named are claiming to be such corporation. This being true, we are of the opinion that the cases cited by counsel for respondent to support their contention that a denial is not enough, but facts must be alleged showing a right to exercise the privileges claimed to be usurped, are not controlling. The case of *People v. Pfister*, 57 Cal. 532, was one in which it was alleged that the corporation "never at any time legally existed as a corporation, and that, if it ever did so exist and was a corporation at any time, its full term of existence expired, and it ceased to be a subsisting corporation on the 11th day of November, 1887." The answer in the case was a "denial of all the material allegations of the complaint." No question seems to have been raised as to the form of either the complaint or answer. Certainly no such question is decided by the court. In the case of *People v. Lowden*, 8 Pac. Rep. 66, the complaint alleged specifically the facts showing the illegality of the corporation. It was held that the facts stated must be specifically denied, and the denial of the legal conclusions drawn from the facts was insufficient. *People v. Clayton*, 11 Pac. Rep. 206, was an information to contest the right of the defendant to hold a territorial office in Utah. It was held sufficient to allege generally in the complaint that the defendant "holds and exercises the functions of the office without authority of law there-

for," and that such averment cast upon the defendant the burden of pleading and proving his title to the office.

We do not question the correctness of these cases, but do not regard them as in any way antagonistic to the views we have expressed. In the case of *People v. Riverside*, 66 Cal. 288, 5 Pac. Rep. 350, it was alleged that the defendant was usurping the franchise to be a corporation. It was urged on the part of defendant that the allegation that it was never incorporated was equivalent to an allegation that it never existed, and therefore no action could be maintained against it. The court says: "The argument is not devoid of logical force, and, unless the action given by the Code differs in this respect from that which existed at common law, the weight of authority is doubtless on that side; for it has been held in England and in this country that an information for usurping the franchise to be a corporation should be against the particular person guilty of the usurpation, (*Le Roy v. Cusacke*, 2 Rolle, 113; *People v. Richardson*, 4 Cow. 109;) and it was held that *quo warranto* would not lie against one claiming office under a corporation which had no existence. But in New York and Minnesota, under statutes not materially different from our Code in this respect, it has been held that the statutory action would lie against one usurping a town or county office, although no such town or county as the one in which it was charged the office was usurped existed. *People v. Carpenter*, 24 N. Y. 86; *State v. Parker*, 25 Minn. 215. An allegation that a person had usurped the office of supervisor of the county of A. would be inconsistent with one that there was no county of A.; and, since a city cannot exist in this state without incorporation, it is equally inconsistent to sue one as a corporation, and at the same time deny its existence as a corporation. But for this there is a precedent, (*People v. Nevada*, 6 Cal. 143;) and as no substantial right of any one can be prejudiced by following it, we think no good would result from not doing so; particularly as the object of the Code would be effected, and justice promoted thereby." The opinion shows great doubt in the mind of the court as to the correctness of the rule laid down. No reason is given for the statement that the Code changes the common law in respect to the proper mode of pleading, and we see none. That case differs from this, however. It was an action to determine the validity of certain proceedings to incorporate the city of Riverside, and the particulars in which those proceedings were invalid were specifically set forth. It would seem to be proper in such case that the defendant, claiming to be a city under such proceedings, and acting thereunder as such, should be made a party in an action to determine the validity thereof. *Boone, Corp.* § 162. In such a proceeding the trustees of the city could not be sued, as there could be no trustees if there were no city, and no individuals could be made parties as claiming to be a corporation. In case of a private corporation the rule must be entirely different. If no corporation exists, the parties who are claiming to be such can be proceeded against. That such is the only proper course where, as in this case, it is claimed that certain persons are unlawfully claiming to be, and are, exercising the functions of a private corporation which never had an existence, the authorities are, so far as we know, agreed, and such we believe to be the proper rule. In *People v. Flint*, 64 Cal. 49, this court held that in a proceeding of this kind the corporation was the proper defendant. But there the facts were set forth, showing that the defendant was a *de facto* corporation, acting under articles of incorporation which were claimed and held by the court to be defective. The court, after holding that the corporation was a necessary party, says: "It is well to say, to prevent any misconception, that if, on a new trial, after the alleged corporation had been made a party, it should be adjudged that it never had been legally a corporation, that in that case appropriate proceedings should be had by which the affairs of such *de facto* corporation should be wound up and settled by the trustees."

The statute of limitations is pleaded by way of answer, and a demurrer

thereto was sustained by the court below. This it is claimed was error, but as the case must be reversed on other grounds, and the pleadings be amended, we express no opinion on the question.

As to the other questions arising upon the answer, they relate to the special answer to the second count of the complaint, which count of the complaint was held in the former opinion to be bad. We adhere to that opinion so far as it relates to these questions, except so far as it holds that a duly-organized corporation cannot take an assignment, from its lawful owners, of a franchise to lay down and maintain a street railroad. This is based upon the constitutional provision that "corporations may be formed under general laws, but shall not be created by special act." Article 4, § 31. This provision applies to the formation or creation of corporations, and to the powers directly conferred upon them by legislative enactment, and cannot, in our judgment, be construed as prohibiting the assignment of a franchise to a legally organized corporation, by persons having the lawful right to exercise and transfer the same.

If we look to the judgment rendered in this case it is apparent that it is founded upon the second count of the complaint, which was held by the department to be bad. It does not decree that there is or was no such corporation as the Potrero & Bay View Railroad Company, nor that the said corporation, or the other defendants, are usurping the right to be such corporation, but simply decrees that the plaintiff "recover of the defendants the said rights, powers, and franchises by them, the said defendants, exercised and claimed, viz., of constructing, maintaining, and operating an iron railroad, commonly called and known as a 'street railroad,' along and upon certain of the streets, roads, and highways, to-wit," describing the route; and the defendants are enjoined from exercising said franchises. We are of the opinion that, upon the decision of the department that the second count of the complaint was bad, the judgment of the court below should have been reversed, for the reason that the judgment cannot be supported by the first count. The sole ground upon which the first count is based, viz., the non-existence of the corporation, is left wholly undetermined by the judgment. The judgment appealed from is reversed, and the cause remanded.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.

77 Cal. 410

KNIGHT v. RUSS *et al.* (No. 12,659.)

(*Supreme Court of California.* December 4, 1888.)

1. ATTORNEY AND CLIENT—COMPENSATION—RETAINER—EVIDENCE.

In an action for professional services as attorney at law in certain cases, evidence of the value of a "retainer" in the cases is admissible on behalf of plaintiff, the value of the services including the value of the retainer.

2. WITNESS—COMPETENCY—TRANSACTIONS WITH DECEDENT.

Under Code Civil Proc. Cal. § 1880, providing that parties to an action against an executor or administrator upon a claim against the estate of a decedent cannot be witnesses as to any matter occurring before the latter's death, an attorney at law who sues for professional services rendered the decedent is not incompetent to testify as to the nature and extent of his law practice.

3. TRIAL—ARGUMENT OF COUNSEL—READING PLEADINGS TO JURY—COMPETENCY AS WITNESS.

Plaintiff, arguing the case in his own behalf, is not precluded from reading to the jury the claim and verification thereof, filed in the case, on the ground that he is incompetent as a witness to the facts stated therein.

4. ATTORNEY AND CLIENT—COMPENSATION—INSTRUCTIONS.

An instruction that, for the purpose of determining the value of plaintiff's services, "it is proper to receive evidence as to the price usually charged and received for similar services by other persons of the same profession, in the same vicinity, and practicing in the same court," is correct.

5. APPEAL—REVIEW—WEIGHT OF EVIDENCE.

There being evidence that plaintiff was employed by deceased, and that his services were worth the amount allowed by the verdict, the latter will not be set aside as against the weight of evidence.

Commissioners' decision. In bank. Appeal from superior court, Humboldt county; JAMES E. MURPHY, Judge.

Action by George A. Knight against Zipporah Russ and others, executrix and executors of Joseph Russ, deceased.

J. D. H. Chamberlin, J. H. G. Weaver, and Geo. W. Hunter, for appellant.
John A. McQuaid, for respondent.

BELCHER, C. C. The plaintiff presented a claim, properly verified, against the estate of Joseph Russ, deceased, for \$1,500, "for professional services as attorney and counselor at law, rendered in the month of May, 1886, at the city and county of San Francisco, in the following cases," etc. The cases referred to were four indictments in the United States district court for subornation of perjury; one of the indictments being against the deceased. The claim was rejected, and thereupon this action was commenced to recover the amount thereof. The case was tried by a jury, and the verdict was in favor of the plaintiff for the full amount claimed. The defendants moved for a new trial, and have appealed from the judgment and from the order denying their motion.

At the trial it appeared that the indictments were filed in court on the 3d of April, 1886, and demurrers thereto were interposed by another attorney; that one of the cases was taken up as a test case, and the demurrer therein was argued by the attorney who filed it on the 28th of April; that the demurrer in that case was sustained on the 2d of May, and thereupon all of the indictments were dismissed. The plaintiff then, after proving that he was an attorney at law and in good standing at the bar, introduced evidence tending to show that, after the demurrers were filed, he was engaged by the deceased to assist in the defense of all the cases, and that he was present in court at the time of the argument and at the time of the decision, and had rendered some service outside. He then called witnesses to prove the value of a retainer in the cases. This evidence was objected to on the ground that the action was brought to recover the value of professional services rendered, and not the value of a retainer. The objection was overruled and an exception reserved. It is earnestly argued for appellants that this ruling was erroneous, but we think it correct. The word "retainer," when used in this connection, is defined by Bouvier to be "the act of a client by which he engages an attorney or counselor to manage a cause, either by prosecuting it, when he is plaintiff, or defending it when he is defendant." Bouv. Law Dict. It has been held that whenever an attorney is employed generally, to prosecute or defend an action, he may, after the action has been terminated, recover from his client a retaining fee, although the contract of employment did not expressly or specifically mention a retaining fee. *Perry v. Lord*, 111 Mass. 504; *Blackman v. Webb*, 17 Pac. Rep. 464. In the last-named case the supreme court of Kansas said: "When an attorney is engaged to prosecute or defend in an action, his entire services in that action are engaged for his client, and he cannot perform services for the adverse party. He is retained by his client for that entire action; and, whether his client may ever call upon him to perform services or not, he cannot perform services in that action for the adverse party, nor can he receive any fee or compensation from the adverse party. All his skill and ability for that case is at the command of his client. A retainer of an attorney at law is presumably worth something to the client, and presumably a loss to the attorney; and, whether the attorney is ever called upon to perform any services or not in that case, he may, when the case is terminated, recover for whatever the evidence shows the retainer was worth." When an

action is brought to recover the value of an attorney's services, the retainer, it not having been paid, constitutes a part of the plaintiff's cause of action; but it is not necessary to set forth the items of the account in the complaint. It is sufficient to state the facts constituting the cause of action in ordinary and concise language, and, if the defendant desires further particulars, he may call for them, and they must be given him within a limited time. Code Civil Proc. §§ 426, 454. At the trial, if the issue has been tendered as to the value of the services, their value must be proved, and that will include the value of the retainer.

The plaintiff was called as a witness in his own behalf, and was asked if he was an attorney at law, how long he had practiced law, how long he had been practicing in San Francisco, whether he had devoted considerable time to criminal practice, and what had been the income from his practice for the last two or three years. These questions were all objected to by the defendants, upon the ground that the plaintiff was rendered incompetent to be a witness in the case by the provisions of section 1880 of the Code of Civil Procedure; and the objections were overruled. That section provides that parties to an action against an executor or administrator, "upon a claim or demand against the estate of a deceased person," cannot be witnesses "as to any matter of fact occurring before the death of such deceased person." The evident purpose of the section was to prevent parties from testifying to matters tending to establish the asserted claim or demand, and not to prevent their testifying in reference to other matters which may arise incidentally. The plaintiff's testimony was wholly as to incidental matters; and they were matters, too, which cannot be said to have occurred before the death of deceased. In our opinion, it did not come within the inhibition of the statute, and the ruling of the court was therefore proper.

Many other objections were taken by defendants to the admission of evidence offered by plaintiff, but they do not require special notice. After carefully going over the record, we are unable to see that any prejudicial error was committed by the rulings of the court.

When the testimony was all in, the plaintiff argued the case to the jury in his own behalf. In doing so he read the complaint, and the verified claim which was attached thereto and made a part thereof. Counsel for defendants objected to his reading the claim and verification thereof, on the ground that he could not be a witness to the facts stated therein, and, if allowed to read them, would, in effect, do indirectly what he could not do directly. The court overruled the objection, and defendants reserved an exception. In commencing a trial before a jury the pleadings are ordinarily read to the jury, or the facts of the case are fully stated by counsel; and if, in the progress of the argument, counsel desire to again read the pleadings, or to further call the attention of the jury to the facts alleged, there can, so far as we can see, be no impropriety in their doing so. The argument is under the control of the court, and extraneous matters should not be brought in or commented upon. But counsel have a right to discuss the case in all its bearings; and, so long as they do not go outside of it, and attempt to bring in other matters, cannot be restrained by the court. The verified claim in this case constituted a part of the complaint, and the plaintiff had a right, if he desired to do so, to read the whole complaint, and he violated thereby no rule of law or propriety.

In its instructions to the jury, the court, among other things, told them that if they found that the deceased employed the plaintiff, then the plaintiff was entitled to the value of the services rendered, taking into consideration the nature of the services performed, the plaintiff's standing in his profession for learning, skill, etc., and then added: "For the purpose of aiding in determining this, it is proper to receive evidence as to the prices usually charged and received for similar services by other persons of the same profession, in the same vicinity and practicing in the same court." The part of the instruc-

tion above quoted was excepted to by defendants, and it is now claimed that it was misleading and erroneous. We think the instruction proper. It stated a well-settled rule of law, and there was therefore no error in giving it. *Vilas v. Downer*, 21 Vt. 419; *Stanton v. Embrey*, 93 U. S. 557.

It is also urged for the appellants that the verdict was not justified by the evidence. But there was evidence tending strongly to show that plaintiff was employed by the deceased to assist in the cases named, and that his services and retainer were worth as much as he was allowed by the verdict. We cannot say, therefore, that the judgment should be reversed on this ground. In our opinion, the judgment and order should be affirmed.

I concur: FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

3 Cal. Unrep. 33

FRANKISH v. SMITH. (No. 12,611.)

(Supreme Court of California. December 4, 1888.)

QUIETING TITLE—EVIDENCE.

Where the decisive question in an action to quiet title is whether a note given for the purchase of the land was intended as an absolute payment, or as an evidence of debt, and the evidence is conflicting, a finding that it was merely evidence of debt will not be disturbed.

Commissioners' decision. In bank. Appeal from superior court, San Bernardino county; JAMES E. GIBSON, Judge.

Action by Charles Frankish against J. H. Smith to quiet title to a piece of land which plaintiff had contracted to sell to defendant. Plaintiff obtained judgment. Defendant appeals.

Rowell & Rowell, for appellant. *W. Taylour English*, for respondent.

FOOTE, C. Action to quiet title. The principal point of contention in this case is as to whether a note for \$500, given by Smith on the purchase of a piece of land from Frankish, was intended as an absolute payment, or as an evidence of debt. The defendant contends that the evidence shows it was accepted as an absolute payment of so much of the purchase price for the land, and that the remedy of the plaintiff was thenceforward by suit on the note, distinct from any claim on the land. The court below found that the note was not accepted as payment; that it was not paid when due; and that thereupon the plaintiff, as he had a right to do under a written contract of sale of the land contemporaneous with and a part of the same transaction as the giving of the note for \$500, rescinded the contract of sale; and that the tender of payment of the note last mentioned, and another note for a deferred payment, given at the time when the agreement to sell was made, came too late. There was a sharp conflict in the evidence upon the points involved, and we advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

3 Cal. Unrep. 34

HARRIS *et ux.* v. SUTHERLAND, (BOX, Intervenor.) (No. 12,655.)

(Supreme Court of California. December 4, 1888.)

APPEAL—REVIEW—WEIGHT OF EVIDENCE.

A decree deciding that a deed absolute on its face is not a mortgage will not be disturbed, on appeal, where the evidence is conflicting.

Commissioners' decision. In bank. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

Action by C. C. Harris and Pattie A. Harris, his wife, against William Sutherland, to redeem land from an absolute conveyance made by plaintiffs to defendant, which plaintiffs allege to be a mortgage. A. J. Box intervened, claiming the land as an innocent purchaser from Sutherland. The court held the instrument to be a deed, and not a mortgage. Plaintiffs appeal.

Hinds & Merriam, for appellants. *E. D. Edwards*, for defendant and respondent. *C. G. Sayle*, for intervenor and respondent.

FOOTE, C. This case turns upon the point as to whether or not the evidence is sufficient to warrant the court below in finding that a certain instrument in writing made by the plaintiff to Sutherland, the defendant, was intended to be a deed, and not a mortgage. The evidence is conflicting, and the finding should be upheld. We advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

77 Cal. 427

NUNEZ v. MORGAN *et ux.* (No. 11,601.)

(Supreme Court of California. December 7, 1888.)

1. SPECIFIC PERFORMANCE—CONTRACT—PARTIAL PERFORMANCE.

Where a mortgage had been released as to that portion of the premises purchased by defendant, and on foreclosure against the entire tract, plaintiff, representing that he was interested in having a speedy and cheap foreclosure, and had arranged to purchase the premises at the sale, agreed that if defendant would bear certain expenses of a conveyance and fence, and would allow judgment of foreclosure, plaintiff, on obtaining title, would convey to defendant his portion, defendant, on complying with his part of the agreement, and on plaintiff's obtaining title to the premises, is entitled to a specific execution of the contract.

2. SAME—PLEADING THE AGREEMENT—STATUTE OF FRAUDS.

A complaint on the agreement need not aver that it was in writing.

3. FRAUDS, STATUTE OF—WAIVER—PAROL EVIDENCE OF CONTRACT.

The benefit of the statute of frauds is waived where no objection to the admission of parol evidence of the contract is made.

4. TRIAL—FAILURE TO FIND ON ISSUES—WAIVER.

It is not necessary that there be a finding that a contract within the statute of frauds was in writing, especially where the right to interpose the defense of the statute is waived.

In bank. Appeal from superior court, Santa Cruz county; F. J. McCANN, Judge.

Ejectment by Manuel S. Nunez against Daniel B. and Mary A. Morgan, and cross-complaints for specific performance. Demurrers to the answer, (except the first count thereof, which was a denial of plaintiff's right to possession, etc.) and to the cross-complaints, were overruled. Plaintiff then answered the cross-complaints, and the court found the issues thereon in favor of defendants. Motion for new trial was denied, and plaintiff appeals.

Goldsby & Jeter, for appellant. *W. D. Story*, for respondents.

THORNTON, J. The plaintiff instituted this action against Daniel B. Morgan and Mary A., his wife, to recover possession of a tract of land. The complaint is in the usual form in such actions. The answer denies that the plaintiff was entitled to the possession of the land in suit, and further denies that the defendants ever unlawfully or wrongfully withheld from the plaintiff the possession of the land. The defendants, by way of defense, set up a contract between the plaintiff and defendant Daniel as in equity entitling them to the possession of the land in suit, and in two cross-complaints set forth substantially the same contract as entitling them to have the plaintiff, holding the legal title to the land, convey it to them in execution of such contract. Issue was joined as to the material allegations of the cross-complaints. The cause was tried, and the court found the facts as alleged in the cross-complaints, and decreed a specific execution of the contract. The averments of the cross-complaints set forth the following: That on the 21st day of December, 1876, the defendant Daniel, for the consideration of \$2,500, purchased of one J. L. McLaughlin, who was then the owner thereof, the tract of land involved herein; that McLaughlin, on the same day, executed a conveyance of this land to the defendant above named; that on the 15th of October, 1874, the premises were mortgaged by McLaughlin to one Porter; that at the same time that the conveyance above mentioned was executed, McLaughlin procured of Porter a release of this land from the lien of this mortgage, which release was duly executed, acknowledged, and recorded; that under the conveyance above mentioned defendants entered into possession of the premises and have since continuously resided thereon; that on the 13th of September, 1880, Porter commenced an action in the superior court of the proper county for the foreclosure of the mortgage mentioned above against the plaintiff and defendants herein, and others; that in this suit Porter proceeded for a foreclosure against the whole tract mortgaged by McLaughlin to him, and demanded judgment of foreclos-

ure against the tract mentioned herein, as well as the other lands covered by his mortgage; that on the 25th of May, 1882, a judgment of foreclosure was entered against the premises, and the other lands proceeded against in the suit, and a sale of such land ordered, which sale was had, at which the plaintiff became the purchaser; that in the early part of May, 1882, and before defendants had answered in the action of Porter for foreclosure, the plaintiff represented to defendant Daniel that he had an arrangement with Porter whereby he was to become the purchaser of the mortgaged land after the mortgage should be foreclosed, and that he, the plaintiff, was interested in having the foreclosure suit pressed as rapidly as possible, and in having the cost and expenses of such suit made as light as possible, and the plaintiff, Nunez, then and there promised to and agreed with defendant Daniel that if this defendant would agree to bear the necessary expenses attending the conveyance to him and of erecting the line fence between the tract in suit and other lands of Nunez, and if the defendants would file their answer in the suit admitting the allegations of the complaint and permitting judgment of foreclosure to be entered against the land described in the complaint, that Nunez, as soon as he obtained the title to this land, would convey it to defendant Daniel by a good and sufficient deed, and would not attempt to dispossess the defendants thereof; that the foregoing proposition was accepted and agreed to by the defendant above mentioned; that defendants, relying on the promise above stated, and in consideration thereof, complied with the said agreement; that Nunez, after acquiring the title as above stated to the land, refused, on request of the defendants, to comply with his promise, and refused to make the promised conveyance.

The contract mentioned in this action, and of which specific performance is asked, is as above set forth, and we are of opinion that it is a contract of that character that, if established by proof, the defendant Daniel is entitled to have of the plaintiff the specific execution thereof. We do not understand that the contract is at all dependent upon an uncertain or indefinite contingency. Whatever contingency ever existed in the dealings between the plaintiff and defendant Daniel, in regard to this land, did depend upon the plaintiff's becoming the purchaser at the foreclosure sale under the decree above mentioned; but, the plaintiff having purchased at such sale, the contingency disappeared. It is argued "that the facts averred in said pretended cross-complaints do not take the alleged contract out of the statute of frauds." Admitting that the statute of frauds requires, as essential to the validity of such a contract as that involved in this suit, that it should be in writing, still, according to the well-settled rule in this state, we think the cross-complaints, though they lack the averment that the contract pleaded was in writing, are and must be held sufficient. In *Wakefield v. Greenhood*, 29 Cal. 599, which was a case involving the provision of the statute of frauds requiring that the agreement of the defendant to answer for the default of another should be in writing, it was held, on general demurrer, that it was not necessary to aver in a complaint on such agreement that it was in writing. The court further remarked on this point as follows: "If the contract stated in the declaration or bill in equity was denied, it was incumbent upon the plaintiff or complainant to prove by legal evidence its existence, and this could be done only by the production or proof of the execution and contents of the written agreement or some note or memorandum thereof, executed according to the provisions of the statute of frauds." 29 Cal. 599, 600. The rule, as declared in *Wakefield v. Greenhood*, was followed in *Brennan v. Ford*, 46 Cal. 8. The contract counted on the complaint in that case was one for the exchange of lands. In *McDonald v. Association*, 51 Cal. 210, which was an action to rescind a contract for the sale and purchase of land, etc., a like ruling was made as to the sufficiency of the allegations of the complaint in regard to the contract. There does not appear to have been any demurrer to the complaint in the case cited. In the cross-

complaints herein the contract for the conveyance of land is set forth as stated above; and, following the decisions of this court above referred to, we must hold that the averments of the cross-complaints are sufficient. We cannot conceive that the rule held applicable to a complaint would be different when applied to a cross-complaint, and, applying the rule referred to to the cross-complaints, the averments in it are all that the law requires.

When the testimony to prove the allegations of the cross-complaints was introduced by defendants, no written evidence of the contract counted on was offered. The testimony was entirely parol. But to this testimony plaintiff made no objection and reserved no exception. The plaintiff had denied the stipulations of the contract, as set forth by the defendants, and might have objected to the evidence on the ground that it was not written, and reserved an exception, had the ruling of the court been adverse to his objection. Conceding, now, that the contract declared on was void, by reason of the statute of frauds, because it was verbal, still, as no objection was made by plaintiff to the evidence when offered, it must be held that the right to invoke the statute of frauds was waived by the appellant, and it cannot now be invoked in this court as a reason why the judgment should be reversed or a new trial granted. The defense of the statute of frauds can be waived, and that it was waived by the plaintiff in failing to object at the time to the parol evidence when offered, we think there can be no doubt. Such we understand to be the ruling in *McDonald v. Association*, above cited, where it was held that, "if the contract was in fact merely verbal, objections should have been taken to the proof offered to establish it, and, if the objections were overruled, an exception should have been properly reserved." It is not found that the contract was in writing, but this is not necessary within the ruling in *McDonald v. Association*, *supra*. Moreover, the plaintiff had waived his right by his neglect at the trial, as just above pointed out, to invoke the statute of frauds. We have examined the other points made on behalf of plaintiff, (appellant here,) and are of opinion that they are either not maintainable, or, if maintainable, they are not of such character as to call for a reversal. There is no error in the record, and the judgment and order are affirmed. Ordered accordingly.

We concur: SEARLS, C. J.; WORKS, J.; SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.

77 Cal. 403

COWAN *et al.* v. THEIR CREDITORS. (No. 11,413.)

(*Supreme Court of California.* December 4, 1888.)

EXEMPTION—RIGHT TO EXEMPTION OUT OF FIRM PROPERTY.

Under Code Civil Proc. Cal. § 690, exempting from execution specified property of a judgment debtor, and act Cal. 1850, § 35, providing that, upon partners being adjudged insolvent, all the property of the firm and all the separate estate of each of the partners shall be taken, excepting such parts thereof as may be exempt by law, a partner cannot, on insolvency of the firm, claim an exemption out of firm property.

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county; F. E. SPENCER, Judge.

J. H. Campbell, for appellants. *C. D. Wright* and *T. H. Laine*, for respondents.

BELCHER, C. C. W. W. Cowan and Thomas Scott were partners engaged in the business of farming and fruit-raising in the county of Santa Clara. In September, 1885, they filed in the superior court of that county a petition asking to be adjudged insolvents, and discharged from their debts. All of the property mentioned and described in the petition and schedule was partnership property, used in carrying on the business of the firm, and all the debts were

partnership liabilities. In due time each of the petitioners applied to the court to have certain parts of the property set apart for his use and benefit, on the ground that such parts were by law exempt from execution. Subsequently Scott withdrew his petition, and after a hearing the court denied the petition of Cowan upon the ground that he "was not entitled to have any part of the property claimed by him, and heretofore described by him, set apart to him, for the reason that the whole thereof is partnership property, and therefore not exempt by law from execution." Cowan appealed from the order, and the only question is, was the court right in its conclusion as to the law applicable to the matter?

Section 690 of the Code of Civil Procedure provides for the exemption from execution of property belonging to a judgment debtor, and names the kinds and amount of property which shall be treated as exempt. Section 35 of the insolvent act of 1880 provides that two or more persons who are partners in business may be adjudged insolvent, "in which case an order shall be issued in the manner provided by this act, upon which all the joint stock and property of the partnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as may be exempt by law." And section 60 of the act declares that "it shall be the duty of the court having jurisdiction of the proceedings to exempt and set apart for the use and benefit of said insolvent such real and personal property as is by law exempt from execution."

If the petitioner had been the sole owner of the property in question, there can be no doubt that it would have been exempt from execution, and the duty of the court to set it apart for his use and benefit. Did the fact that it was partnership property change the rule in this regard, and make it subject to seizure and sale by creditors? The authorities upon the question are sharply conflicting, and a majority of the cases hold that partnership property is not exempt. See *Thomp. Homest. & Ex.* §§ 194-216, where the cases are very fully collected and reviewed. See, also, *Freem. Ex'ns*, (2d Ed.) § 221.

The leading case in favor of the proposition that partnership property is exempt is *Stewart v. Brown*, 37 N. Y. 350. In that case a pair of horses and their harness, which were partnership property, had been taken under an execution, and the court said: "If the partners have such an ownership as subjects the property to seizure on execution, they have also such an ownership as entitles them to claim its exemption in a case plainly falling within the terms and intent of the statute. * * * If each of the respondents had owned a pair of horses, both teams would have been exempt, upon the state of facts found by the referee. It would be an obvious perversion of the statute to hold that the plaintiffs forfeited its protection, by owning but a single team between them, used for the common support of both. The language of the statute should be construed in harmony with its humane and remedial purpose. Its design was to shield the poor, and not to strip them. The interest it assumes to protect is that belonging to the debtor, be it more or less. The ownership of the team may be joint or several; it may be limited or absolute. Whatever it be, within the limitations of the statute, the debtor's interest is exempt, in view of his own necessity, and of the probable destitution to which its loss might reduce a family dependent on him for support." And see *Skinner v. Shannon*, 44 Mich. 86, 6 N. W. Rep. 108; *McCoy v. Brennan*, 61 Mich. 362, 28 N. W. Rep. 129; *Burns v. Harris*, 67 N. C. 140; *Evans v. Bryan*, 95 N. C. 174; *Blanchard v. Paschal*, 68 Ga. 32.

On the other side the leading case seems to be *Pond v. Kimball*, 101 Mass. 105. In that case the court said: "We agree with plaintiff's counsel that the statute is humane and beneficial in its purpose and operation, and fairly entitled to as liberal a construction as can be given it consistently with its true and just interpretation. There are many difficulties in the way of applying it to the case of copartners and joint owners, and these difficulties we find to

be insuperable. Property purchased with the joint funds of the firm, and constituting a portion of its capital, must necessarily be subject to all the incidents of partnership property. On the decease of one member of the firm it would go to the surviving member, and he would have a right to hold it, to be used in settling the affairs of the concern and paying its debts. In the case of numerous partners, can it be said that each would have the right to claim, as exempt from attachment for the joint debts, \$100 worth of material and stock, or is the whole firm to be considered as one debtor only? Does the exempted property in that case belong to the partners jointly, or does each take a separate share? It appears to us that the statute is intended to apply only to the case of a single and individual debtor. The exemption which it gives is strictly personal. The statute speaks in the singular number throughout, unless, possibly, the clause as to fishermen be an exception. Its apparent object is to secure to the debtor the means of supporting himself and his family, by following his trade or handicraft, with tools belonging to himself. It also provides that his family are to be secured in the enjoyment of certain indispensable comforts and necessities out of his property. But property belonging to the firm cannot be said to belong to either partner as his separate property. He has no exclusive interest in it. It belongs as much to his partner as it does to him, and cannot, in whole or in part, be appropriated (so long as it remains undivided) to the benefit of his family. It may be wholly contingent and uncertain whether any of it will belong to him on the winding up of the business and the settlement of his accounts with the firm. The exemption, in our opinion, is several, and not joint. It applies to the debtor in the singular number, and is personal and individual only. If he desires to form a partnership, and combine his means with those of one, or more than one, other person, he must take the precaution to retain exclusive ownership of his tools and implements, allowing the use of them to his associates, or he will lose entirely the benefit of the statutory exemptions as to that kind of property." And see *Gaylord v. Imhoff*, 26 Ohio St. 317; *Guptil v. McFee*, 9 Kan. 30; *Spiro v. Paxton*, 3 Lea, 75; *Gill v. Lattimore*, 9 Lea, 381; *White v. Heffner*, 30 Ia. Ann. 1280; *Giovanni v. Bank*, 55 Ala. 305; *Baker v. Sheehan*, 29 Minn. 235. 12 N. W. Rep. 704; *State v. Spencer*, 64 Mo. 355; *Bonsall v. Comly*, 44 Pa. St. 442. Without discussing the question further, it is enough, under all the circumstances, to say that we think the rule, which is supported by the great preponderance of authority, the safer and better one, and we therefore advise that the order appealed from be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

77 Cal. 418

SULLIVAN v. GRASS VALLEY QUARTZ M. & M. Co. (No. 12,650.)

(Supreme Court of California. December 6, 1888.)

1. ACTION—SEPARATE CAUSE OF ACTION.

Findings that defendant employed plaintiff to do certain tunneling at a specified price per foot; that it inadvertently let the same work to L. on the same terms, and, on discovery of the mistake, "arranged with plaintiff and L. to do the work together, which they did;" that defendant, on the termination of plaintiff's contract, measured the work done, and promised to pay plaintiff his share, an amount stated,—show a separate cause of action for the amount found due plaintiff.

2. CONTRACTS—ALTERATION AND MODIFICATION.

L.'s assent to the promise to pay the amount found due plaintiff was not necessary.

3. SAME—CONSTRUCTION—PERFORMANCE.

It having been originally agreed that, if plaintiff should find work elsewhere, he should have the right to terminate the contract, and he having found such work,

and notified defendant of the termination, and defendant having measured the work and promised to pay, defendant cannot object that the contract was entire, and that there was not complete performance.

4. CORPORATIONS—ACTIONS AGAINST—PLEADING—AUTHORITY OF OFFICERS.

A complaint, in an action against a corporation for services, alleging that plaintiff was "employed by defendant through one A., its secretary," need not aver the secretary's authority to bind the corporation.

In bank. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

Action by Cornelius Sullivan against the Grass Valley Quartz Milling & Mining Company for balance on a contract to do certain tunneling. A demurrer to the complaint was overruled. Defendant answered, and judgment on the evidence was given for plaintiff. Defendant appeals.

T. S. Ford, for appellant. *C. W. Kitts*, for respondent.

WORKS, J. The appeal in this case is from a judgment in favor of plaintiff, and comes up on the judgment-roll. The complaint is to recover \$56, and to enforce a mechanic's lien therefor. It is alleged that the plaintiff was "employed by the defendant, through one John Reilly, its secretary," to run 50 feet of tunnel on the defendant's mine, and was to receive therefor \$3 per foot—the defendant to furnish certain tools and materials, the price to be paid, one-third as the work progressed, and the remainder at the completion of the work; that work was commenced on said tunnel and continued until the defendant failed to furnish the material, "and by agreement of all the parties the contract was terminated;" and that the value of the labor has been paid, except the sum of \$56. The complaint also contains the necessary allegations to entitle the plaintiff to a mechanic's lien. There is a demurrer to the complaint on the grounds (1) that it does not state facts sufficient to constitute a cause of action; (2) it is ambiguous, unintelligible, and uncertain in that (a) it does not appear therefrom that Reilly, the secretary of the defendant, had authority to make the contract sued on; (b) it cannot be ascertained from it whether it is sought to recover the value of the services rendered, or a balance due under the contract. The demurrer was overruled. The defendant, by its answer, denies the making of a separate contract with the plaintiff, and alleges, affirmatively, that it did enter into a joint contract with the plaintiff and one Lehey by which said parties agreed to do the work mentioned in the complaint; that the work was done by them under such contract, and paid for in full. The case was tried by the court. The court finds, in substance: (1) That the defendant, through its secretary, entered into the contract with plaintiff, as set out in the complaint, and, in addition, that it was agreed that if, during the work under the contract, he found work at wages elsewhere, he might terminate the contract. (2) That about the same time the defendant, through another officer, inadvertently let the same work to Lehey on the same terms, except as to the privilege given to terminate the contract. (3) That upon the discovery of the mistake that had been made defendant arranged with plaintiff and Lehey to work on said contract together, which they did. (4) That they continued work until the tools used by them were stolen, and defendant was by plaintiff requested to replace them, but failed for two days to do so, and in the mean time plaintiff found other work at wages, notified defendant, quit work, and demanded his pay; that defendant measured the work done by plaintiff and Lehey, and found that 44 feet of tunnel had been constructed, and then and there promised to pay plaintiff for his share of the same, viz., \$56, (he having previously received \$10,) the same to be paid when Lehey completed the work. (5) That Lehey completed the work October 14, 1887, and defendant paid him therefor in full, and plaintiff has not been paid or tendered the amount due him by defendant or Lehey.

(6) That plaintiff's work was worth \$56, that he directed defendant not to pay the same to Lehey, and that plaintiff and Lehey never jointly demanded payment of the amount due on the contract. There were other findings, but they relate to the mechanic's lien, and need not be noticed, as no question arises on them.

1. It is urged that the court below erred in overruling the demurrer to the complaint. The objection made to the complaint is that it alleges the making of the contract by the secretary of the defendant, and fails to allege that he had authority to bind the company. The complaint does not allege the making of the contract by the secretary. The allegation is that the plaintiff was employed by the defendant through the secretary. It would, no doubt, have been better pleading to have omitted all reference to the secretary; but, as the allegation is directly made that the employment was by the defendant, we regard it as sufficient.

2. The findings of the court are attacked and minutely criticised. The evidence not being before us, we must be guided, as to the facts, by these findings. It is contended by the appellant that the findings are inconsistent in many particulars, but that, taking them as a whole, they establish a joint contract between the plaintiff and Lehey and the defendant; that the work was paid for in full to one of the joint contractors who had a right to receive it; and that no separate cause of action could accrue to the plaintiff, admitting that a balance of the contract price remained unpaid, if the findings show a joint contract and payment in full, as claimed, the position taken is undoubtedly correct. But we are clearly of the opinion that the findings cannot bear such a construction. The original contract was with the plaintiff alone for the whole work. By mistake the same 50 feet of tunnel work was also let to Lehey. By a subsequent arrangement it was agreed that they should both go on and do the work. The price was so much per foot. The work of each could easily be done separately, and both receive payment for what he actually did. Whether this was the arrangement or not does not clearly appear from the findings, but it does appear that, when plaintiff came to quit work, the defendant treated the contract as several, measured it, found what was due him for his share of the work, and agreed to pay him as soon as Lehey finished the work. This, it seems to us, gave the plaintiff a separate cause of action for the amount thus found to be due him. Thereafter the defendant could not shield itself from liability to him by payment to Lehey. It is contended, further, that the contract was entire, and, as plaintiff did not complete the work, he could not recover, and the agreement to pay him for the work done was without consideration. But the court expressly finds that plaintiff was, by the original contract, given the right to terminate the contract when he could get work elsewhere at wages; that he did find such work; notified the defendant that he terminated the contract; the defendant assented to it, measured his work, and agreed to pay him. He was probably entitled to immediate payment, but the court finds that it was agreed that he should receive his money when Lehey finished the work. If the contract could have been considered as entire before, it was thus modified, and the obligation to complete the contract was waived. It is further urged that the agreement was not binding because Lehey was not a party to it. But the findings do not show that Lehey had any interest in the matter, or that his assent was necessary to its validity. The defendant saw fit to contract with the plaintiff, and, if he was originally bound to complete the work, to release him from the obligation, and agree to pay him for what he had done. This must be binding upon it whether Lehey assented to it or not. The fallacy of the whole argument of counsel for appellant is that he assumes that the contract sued on was a joint one, with the plaintiff and Lehey, while the facts, as found by the court, show it to be a several contract with the plaintiff alone. We do not regard the findings as inconsistent or contradictory as claimed. They are

consistent with the cause of action alleged in the complaint, and support the judgment. The judgment is affirmed.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; PATERSON, J.; MCFARLAND, J.; THORNTON, J.

77 Cal. 555

KERNS v. DEAN. (No. 8,211.)

(Supreme Court of California. December 18, 1888.)

1. EVIDENCE—BOOKS OF ACCOUNTS.

In ejectment by the grantee of the vendor to enforce a forfeiture for non-payment of the purchase price, the vendor's account-book, containing a charge against and credits in favor of the vendee, is not admissible to prove that the purchase price is in part unpaid; the book not being shown to be one of original entries, and it not appearing that such entries were made at the date of the transactions recorded, or were known by the person making them to be correct. Following *Kerns v. McKean*, 18 Pac. Rep. 122.

2. EJECTMENT—PLEADING—COMPLAINT.

In ejectment for non-payment of the purchase price under contract of sale, where the complaint states facts constituting a cause of action, it is not demurrable because it also states facts which give defendant an opportunity to redeem, and to avoid the effect of a judgment of restitution by performing the contract.

3. SAME—STATUTE OF LIMITATIONS.

Defendant cannot object that the amounts alleged to be due under the contract are barred by the statute; the theory of the complaint being, not that defendant is absolutely liable for such amounts, but that he should be adjudged to have forfeited his right to the land, unless he pay such amounts within a reasonable time fixed by the judgment.

4. VENDOR AND VENDEE—CONTRACT—RIGHTS OF VENDOR—NOTICE OF FORFEITURE.

The contract provided that in case of non-performance by the vendee, the vendor might rescind by filing a notice of forfeiture in the county recorder's office, and that thereupon all moneys paid on the contract should be retained as compensation for use of the premises. *Held*, that no recovery could be had for rents prior to the filing of such notice; the vendee's rights up to that time being limited to the forfeited payments.

5. LIMITATION OF ACTIONS—ADVERSE POSSESSION—NOTICE.

Defendant having entered into possession under contract with the vendor, his holding cannot be adverse unless its hostility has been manifested by unequivocal acts brought expressly, or by legal implication, to the vendor's knowledge.¹

6. EXECUTORS AND ADMINISTRATORS—CLAIMS AGAINST DECEDENT.

The vendee being dead, and no personal demand made against his estate, it was not necessary to present the claim to his administrator.

7. SAME—REMOVAL OF ADMINISTRATOR—RIGHTS OF SUCCESSOR—PROSECUTION OF ACTIONS.

Where an administrator defendant, pending his appeal, is removed, his successor has the right to prosecute the appeal and defend the action.

In bank. Appeal from superior court, Santa Cruz county; J. H. LOGAN, Judge.

Action to recover possession of land, brought by Thomas Kerns, as assignee of W. H. Patterson, against P. F. Dean, administrator of the estate of A. P. Sanford, deceased. Judgment for plaintiff, and defendant appeals.

Garber & Bishop and *J. A. Barnham*, for appellant. *Chas. B. Younger*, for respondent.

McFARLAND, J. Plaintiff had judgment, and defendant appeals from the judgment and from an order denying a new trial. Many of the facts and questions involved in this case are identical with those which were before this court in the cases *Kerns v. McKean*, (No. 8,040,) 65 Cal. 411, 4 Pac. Rep. 404; *Kerns v. McKean*, (No. 11,207,) 18 Pac. Rep. 122, and *Kerns v. Dean*, (No. 8,041,) 6 Pac. Rep. 704. The most of the facts are stated in the opinion of the court in said case of *Kerns v. McKean*, in 65 Cal. It is sufficient to say here that on October 25, 1867, W. H. Patterson, being the owner in fee of the land described in the complaint, made a written contract with A. P. Sanford, now deceased, by which the latter agreed to pay the former a certain sum of money, —\$500 in cash, and the balance in four equal annual payments, with a stipulated interest; and Patterson agreed that upon the payment of said money

¹In general, as to what occupancy will confer title by adverse possession, see *Boone v. Hulsey*, (Tex.) 9 S. W. Rep. 531, and cases cited; *Grether v. Clark*, (Iowa,) 39 N. W. Rep. 655, and cases cited; *Hockmoth v. Des Grands Champ*, (Mich.) Id. 737, and note.

he would convey the land to Sanford. By the terms of the contract Sanford was to have possession of the land, and he immediately took possession under the contract, and he and his administrators have been in possession ever since. It was provided that if Sanford failed to pay any installment when due, Patterson might declare the contract and all of Sanford's rights thereunder forfeited and ended by depositing a notice to that effect in the office of the county recorder. It was also provided that Sanford should pay all taxes on the land, and that upon a forfeiture Patterson should retain all moneys that should have been paid by Sanford as compensation for use of the premises. Patterson filed the notice of forfeiture on the 18th day of September, 1875; and on December 13, 1876, he conveyed the land to plaintiff. Sanford died September 4, 1874. Dean was removed as administrator, and Edward White was appointed, and substituted as appellant, after the appeal reached this court. The complaint avers that Sanford has paid, altogether, \$1,200 on said contract; that no other amount has been paid thereon by him, or by defendant, or any other person; and that a large sum remains unpaid, amounting, as found by the court, to \$9,017.90. This is denied by the answer, in which it is averred that the whole amount had been paid. The issue thus made was the principal matter of fact in contest. The plaintiff, to maintain his side of the issue, was allowed to introduce, over the objection of defendant, a certain account-book of Patterson, which showed that Sanford had made three several payments, amounting in all to \$1,200; the purpose being to show that no more than that sum had been paid.

We shall not here enter anew upon the discussion of the question whether the admission in evidence of the account-book was a material error. The question was fully discussed in the opinion of this court, delivered by Mr. Justice MCKINSTRY in *Kerns v. McKean*, 18 Pac. Rep. 122, and the conclusion was there reached that the admission of the book was a reversible error. And while the ruling there may not be absolutely the "law of the case" in the case at bar, still, as the question there was entirely identical with the one presented here, we think that it should be taken as conclusive upon the point. For this error, therefore, the judgment must be reversed.

There are some other matters which should be noticed for the benefit of the court below in the event of another trial.

1. While the complaint, on the first glance, no doubt presents some apparent confusion of ideas, still we think that the demurrer was properly overruled. The plaintiff might have contented himself with merely stating facts sufficient to constitute a cause of action in ejectment. In that event, defendant would have been compelled to set up the contract, if he desired to claim any equities under it. But plaintiff chose to state the contract in his complaint, and to there disclose the rights which defendant might claim under it; and as the complaint, we think, states sufficient facts to constitute a cause of action in ejectment, it is not demurrable, because it also states facts which give defendant an opportunity to redeem, and to avoid the effect of a judgment for restitution, by complying with the contract; and for the same reason appellant's position that the amounts alleged to be due on the contract are barred by limitation because they were all due more than four years before the commencement of the action, is not tenable. The theory of the complaint is not that plaintiff is entitled to an absolute judgment for what was unpaid on the contract, but that he could recover possession of the land unless the defendant paid the amount due within a reasonable time,—which is fixed by the judgment at 80 days. The defendant's right to redeem is not a question in the case, because the plaintiff concedes it. The question under the statute of limitations is whether or not plaintiff's right to recover the land is barred. Neither do we think that the complaint is demurrable on the ground that it contains separate causes of action not separately stated.

2. The court should have found more specifically as to the seizure of plain-

tiff, and as to whether plaintiff's right to recover the land was barred by the statute of limitations. With respect to the latter question, as Sanford entered into possession under the agreement with Patterson, such possession by him and his administrator could not be adverse, unless its hostility was manifested by unquestionable acts brought expressly to the knowledge of Patterson, or of such a character as to clearly charge him in law with such knowledge, (*Kerns v. McKean*, 65 Cal. 411, 4 Pac. Rep. 404;); and there should be a specific finding upon this point. The action having been commenced within five years after the filing of the notice of forfeiture, it certainly was not barred, unless there had been a hostile possession for more than five years manifested as above indicated.

3. As nothing was asked against the estate, there was no necessity to present the claim to the administrator. 65 Cal. 416, 4 Pac. Rep. 407.

4. We do not think that plaintiff is entitled, under any circumstances, to recover rents for any period prior to the time of the filing of the notice of forfeiture in the office of the county recorder. Prior to that act Patterson's right to rents and profits was limited to the payments which had been made on the contract.

5. White, as administrator, appointed after the removal of Dean, has the right to prosecute this appeal and defend the action. The judgment and order denying a new trial are reversed, and the cause remanded for a new trial.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.

77 Cal. 448

HIRSCHFELD v. SEVIER *et al.* (No. 11,555.)

(*Supreme Court of California.* December 6, 1888.)

VENUE IN CIVIL CASES—CHANGE OF VENUE—DENIAL OF MOTION.

In an action which must be tried in the county in which defendants or some of them reside, an order denying a motion for change of venue from the county in which one of sixteen defendants resides to a county in which others are residents will not be reviewed.

In bank. Appeal from superior court, Humboldt county; J. J. DE HAVEN, Judge.

In this action of Hirschfeld against Sevier and others, a motion for change of venue was denied, and defendants appeal.

Naphtaly, Freidenrich & Ackerman, for appellants. *H. H. Lowenthal*, for respondent.

SHARPSTEIN, J. This is an appeal from an order denying a motion to have the place of trial changed from Humboldt county to San Francisco. The action was commenced in Humboldt county against sixteen defendants, twelve of whom were residents of the city and county of San Francisco, two of New York city, and one of Humboldt county. Four of those residing in San Francisco appeared in the action by filing a demurrer to the complaint, and at the same time demanded that the place of trial be changed from Humboldt to San Francisco. Afterwards, and before the denial of the motion to change the place of trial, Sevier, the only defendant residing in Humboldt county, appeared, by filing a demurrer to the complaint, and at the same time filed a consent in writing that the place of trial be changed as demanded by four of the defendants. It appears by the record that five, and five only, of the defendants, appeared in the action. It does not appear that a summons was served on any of the defendants. Upon the foregoing facts, were the appellants entitled to have the place of trial changed as by them demanded? This action belongs to the class which must be tried in the county in which the defendants, or some of them, reside at the commencement of the action. Code Civil Proc. § 395. In this case one of the defendants (Sevier) resided in the county in which

the action was commenced, viz., in Humboldt county. Therefore the action might be tried in that county; and since it might, we cannot disturb the order denying the motion to change the place of trial. Order affirmed.

We concur: SEARLS, C. J.; MCFARLAND, J.; THORNTON, J.

(77 Cal. 449)

RENTON et al. v. MONNIER. (No. 11,344.)
(Supreme Court of California. December 8, 1888.)

1. PRINCIPAL AND AGENT—AUTHORITY OF ARCHITECT—NOTICE TO AGENT.

An architect, whose authority is to see that the building is properly constructed, and, as the work progresses, to sign certificates that it is properly done, and to decide disputes as to the drawings and specifications, is not authorized to receive notice of an assignment of the payments accruing on the contract for the erection of the building, so as to charge the owner with notice thereof.

2. ASSIGNMENT—OF CLAIM—NOTICE TO DEBTOR—RIGHTS OF ASSIGNEE.

Where the owner is unable to read or write English, and understands the language imperfectly, and testifies that he did not understand the meaning of the written assignment of the payments exhibited to him, and so stated at the time, and requested that it should be shown to him again when his clerk should be present, which was not done, an instruction, in an action by the assignee for a payment which had been made to the contractor, that notice of the assignment, to be effectual, should be sufficient to have put the owner fully on his guard, and he should have understood it, is proper.

3. SAME—EVIDENCE OF ASSIGNMENT—PAROL TO EXPLAIN CIRCUMSTANCES.

Evidence that the contractor was a stranger to the assignee; that the latter had procured bondsmen for him; and did not wish the money to go into his possession; that the assignment was for security; and that the assignee had made an advancement which had been repaid,—is admissible to explain the written assignment, under Civil Code Cal. § 1647, allowing explanation by reference to the circumstances in which a contract is made, and also as having some tendency to show such confidence in the contractor that notice of the assignment was not given until the time admitted by the owner.

4. SAME—RIGHTS OF ASSIGNEE—NOTICE.

The admission of a letter from the assignee to the contractor as to the disposition of the moneys received by the former, if erroneous, is cured by an instruction that the assignee's right to the payments is not affected by any arrangement between the assignee and contractor in relation to such disposition unless the owner were a party to it.

5. DEPOSITION—ADMISSIBILITY—ABSENCE OF WITNESS.

Testimony that inquiries were made at the former place of business of an alleged absent witness, and at other places of various people who had known him, and that they said that they did not know where he was, but understood that he was in another state, is sufficient to admit his deposition.

6. APPEAL—REVIEW—OBJECTIONS NOT MADE BELOW.

Volunteered testimony not objected to is not ground for error.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; T. H. REARDON, Judge.

Action by Renton, Holmes & Co. against George Monnier to recover an installment on a contract by V. H. Harding for the erection of a building for defendant, the payments to be made on which were assigned to plaintiffs. The letter of May 16, 1882, of Holmes to Harding was as follows: "We hereby agree that all payments received by R., H. & Co. on the Monnier contract, by virtue of your assignment to R., H. & Co., will be applied towards the payment of your bills on said building, said bills to be correct, and the payment to be ordered in writing on each bill by you before payment, and that the receipt by R., H. & Co. of any payment shall not affect any legal rights you may have against their bill for lumber, and all money that may be left after paying all legitimate bills shall be paid to you; all bills and claims incurred to be at reasonable market value and no more." The following is the third instruction given at plaintiffs' request: "The rights of the plaintiffs to have the

payment of \$1,000 made to them, provided the defendant had prior notice of its assignment to them, are not affected by any agreement or arrangement between plaintiffs and Harding as to what should be done with the money, unless Monnier were a party to such arrangement; for defendant had nothing to do with such agreement, and if any such existed it affords no defense to the defendant." In relation to the whereabouts of Harding, whose deposition was admitted, a witness testified that he knew Harding for about 10 months, and had occasion to search for him; that he knew Harding was to be a witness in this case; that he made inquiries for the purpose of seeing whether he was in town or not; inquired at his former place of business, and of a man named "Tom," who knows him personally; that Tom gave him to understand that Harding was in New Mexico or Arizona, but he did not know where; that he had made inquiries in other places, and no one seemed to know anything about Harding; that he had not been able to find him; and on cross-examination said that he made the inquiries within the last two or three weeks; that he inquired of the man who keeps the saloon at Harding's former place of business, and of those who visited there, and who had known Harding; that Tom knew Harding, but did not know where he was; that Jewell, who knew Harding two or three years previously, said he did not know where he was and had not seen him, but had heard that he had gone away; that witness made inquiries as to Jewell's information, but did not follow it up further than to ask him if he knew where he was, and he said, "No,"—that he had heard that he had gone away; that witness did not remember that he inquired of anybody else; that he made inquiries of a number, but could not say anything further in regard to their names.

Verdict and judgment for defendant; motion for new trial denied; and plaintiffs appeal.

William H. H. Hart and William H. Fifield, for appellants. *Gordon & Young*, for respondent.

BELCHER, C. C. It appears from the record in this case that on the 14th day of April, 1882, the defendant entered into a written contract with one Valentine H. Harding to construct for him a building on Howard street, in the city of San Francisco, for the sum of \$8,957, to be paid in installments as the work progressed, and the first payment of \$1,000 to be made when the frame was up to the second-story floor, including the second-story floor joists and frame of sidewalk. It was provided that the building should be constructed "according and conformable to the drawings and specifications made by William Mooser, architect," and "in a good, workman-like, and substantial manner, to the satisfaction, and under the direction, of the said William Mooser, the duly-authorized architect, to be testified by a writing or certificate" under his hand. The payments were to be made by defendant to Harding, his executors, administrators, or assigns: "provided, that in each case a certificate be obtained and signed by the said William Mooser, architect, that said works have been done in the most substantial and faithful workman-like manner, to the approval and full satisfaction of said architect." On the 15th of April, 1882, Harding assigned to the plaintiffs the several payments to be made to him under the contract by a written assignment, which directed the architect to deliver to plaintiffs the certificates, and directed the defendant to pay to plaintiffs the several payments as they should fall due. The contractor commenced his work, and the first payment of \$1,000 became due on the 29th of April, 1882. On that day the architect gave his certificate to Harding, and the defendant paid him the \$1,000, and subsequently refused to again pay the money to the plaintiffs. The plaintiffs claimed that defendant had notice of the assignment, and wrongfully paid the \$1,000 to Harding, and they brought this action to recover the same. The case was tried by a jury, and the verdict and judgment were in favor of defendant. The plaintiffs moved

for a new trial, which was denied, and then appealed from the judgment and order.

The principal question is, did the defendant have notice of the assignment before he paid the money? If he did, the plaintiffs were entitled to recover; and if not, they could not maintain their action. It was proved that notice of the assignment was given to the architect on or about the 21st of April; and it is claimed for the appellants that this was constructive notice to the defendant, and conclusively settled the question. Whether this claim is well founded or not, depends upon the extent and character of the architect's agency. The rule is well settled "that notice to an agent of facts arising from, or connected with, the subject-matter of the agency is constructive notice to the principal, when the notice comes to the agent while he is concerned for the principal, and in the course of the very transaction." *Bierce v. Hotel Co.*, 31 Cal. 165. But notice to an agent of facts not arising from, or connected with, the subject-matter of his agency is not notice to the principal, unless actually communicated to him. Agencies are general or special; and an agent has such authority as the principal actually or ostensibly confers upon him. Civil Code, § 2315. In this case it is not claimed that the architect had any other authority than that expressly conferred upon him by the written contract for the construction of the building. That authority was: *First*. To see that the building was constructed according to the drawings and specifications, in a good, workman-like, and substantial manner, and to testify in writing to that effect. *Second*. As the work progressed, and the payments became due, to sign and issue certificates that the work had been done in the most substantial and faithful workman-like manner, to his approval and full satisfaction. *Third*. To decide any dispute which might arise respecting the true construction or meaning of the drawings or specifications. The foregoing are all the powers delegated to the architect, and as to these powers the plaintiffs were fully advised. The defendant reserved to himself the duty of making the payments; and it was a matter that in no way concerned the architect when or to whom the payments should be made. This being so, we are unable to see how it can be said that the assignment was a fact "arising from or connected with the subject-matter of the agency;" and in our opinion the instruction requested by the defendant upon this subject stated the law correctly, and was properly given to the jury.

It was claimed by the plaintiffs at the trial that defendant had actual notice of the assignment before he paid the money; and in support of this claim one Bibb was called as a witness, and testified that he was the agent of plaintiffs, and that on the 25th of April he went to the defendant's saloon and exhibited and read to him the written assignment. On the other hand, it was claimed by defendant that no notice of the assignment was given or attempted to be given to him until the 1st day of May; and in support of this claim defendant was called as a witness, and testified that at the time he paid the money to Harding neither Bibb nor any one else had informed him that the payments had been assigned, and that Bibb did not call upon him and exhibit the written assignment until the 1st day of May; that when Bibb called he exhibited a paper and asked witness to sign it, and he declined to do so; that he was a Frenchman, and did not read or write English, or understand what the paper meant, and so informed Bibb at the time; that he asked Bibb to come back when his clerk was in, and Bibb then went away. At the conclusion of the testimony, the court, at the request of plaintiffs, instructed the jury that if the defendant had notice of the assignment to plaintiffs before or at the time he paid the \$1,000 to Harding, then the verdict should be in their favor; and that a verbal notice of the assignment was all the law required. Afterwards, an instruction reading as follows was given for defendant: "The defendant in this action is not liable to plaintiffs, if you find from the evidence that, at the time he paid the said sum of \$1,000, involved in this action, to Valentine

H. Harding, he had no notice that said Harding had assigned such payment to the plaintiffs; and notice given, in order to be effectual, should be sufficient, precise, and complete enough to put the defendant fully on his guard as to the fact of such assignment, and he should have understood it." It is argued for appellants that the last part of this instruction was misleading and erroneous, because it, in effect, told the jury that notice of the assignment would be ineffectual unless the defendant understood it, and it was sufficient to put him fully on his guard; thereby withdrawing from the jury the full consideration of the evidence upon the issues on which they were to pass. And in support of this position counsel cite *Perkins v. Eckert*, 55 Cal. 404. But it should be observed that each party to a lawsuit is entitled to have the law given to the jury which is applicable to his theory of the case, and the testimony of his own witnesses. The court acted upon this rule, and gave to the jury all of the instructions asked by the plaintiffs. The defendant's theory was that no notice of the assignment was given, or attempted to be given, to him until after he paid the money to Harding; and, there being a sharp conflict of the evidence upon this question, that if notice was given it was ineffectual, because he did not understand it or know what it meant. Now, whether notice was given or not, and, if given, whether defendant understood it, and it was sufficient to put him on his guard, or, in the language of the Code, to put a prudent man upon inquiry, (Civil Code, § 19,) were questions of fact for the jury, and the instruction was evidently given to meet the defendant's theory of the case. Possibly, the part of the instruction complained of might have been more happily written; but the question is, was it applicable to the facts proved by defendant, and did it state correct propositions of law? Suppose a similar notice should be given to one who neither reads, writes, speaks, nor understands the English language, would the notice be effectual, and an instruction like that given here be erroneous? Evidently not. And yet we fail to see how the fact that defendant understood and spoke the English language to a limited extent can make any difference. If he did not understand what was read or said to him by the plaintiff's agent, and so informed the agent at the time, then the latter should have left with him a copy of the assignment, or should have returned for further explanation when the defendant's clerk was in. The case of *Perkins v. Eckert*, *supra*, is not in point. In that case, the question was whether a bill of sale was an absolute one, or was given as security, and an instruction was given which, in effect, told the jury that if plaintiffs understood it to be taken as security, and the defendants did not so understand it, they must find it to be an absolute sale. The instruction was held by this court to be erroneous, because it "withdrew from the jury the full consideration of the evidence upon the issue on which they were to pass." In our opinion, under all the circumstances shown, the instruction stated the law correctly, and was properly given to the jury.

When C. S. Holmes, one of the plaintiffs, was upon the witness-stand, counsel for defendant asked him, "What was the object and purpose of this assignment to you?" The question was objected to on the ground that it was immaterial and irrelevant, and that the terms of a written instrument could not be varied by parol testimony. Counsel for defendant replied that they did not wish to vary the terms of the instrument, but to show all the facts and circumstances surrounding the transaction. The court then overruled the objection, and the witness answered that the contractor was a stranger to him, and he had procured bondsmen for him, and did not want the money to go into his hands; that the assignment was made to secure his firm as against the bond and everything pertaining to the construction of the building. And he added that his firm advanced to Harding \$165 before he received payment of the \$1,000, and that Harding repaid the money on the 2d of May. We see no error in the ruling. A contract may be explained by reference to the circumstances under which it was made, (Civil Code, § 1647,) and the testimony

had some tendency to show that plaintiffs had such confidence in Harding that they may not have attempted to give notice of the assignment to defendant until the time named by him.

There is nothing in the next point made, that the court erred in permitting defendant's counsel to show that Harding borrowed money from the plaintiffs and repaid it. Holmes testified to the borrowing and repayment of the money without being asked to do so, and without objection from either side. If it was error to admit in evidence the letter written by Holmes to Harding on the 16th of May, 1882, in reference to the disposition of all moneys which might come into plaintiffs' hands under the assignment, the error was cured by instruction No. 3, which was given to the jury at the request of the plaintiffs.

The last point made by appellants is that the court erred in allowing counsel for defendant to read in evidence the deposition of Valentine H. Harding, because there was no sufficient showing that he was out of the jurisdiction of the court. The showing that Harding was out of the state probably might have been made somewhat fuller and more conclusive, but we think it sufficient to admit his deposition.

After carefully going over the whole record we find nothing calling for a reversal of the judgment, and therefore advise that the judgment and order denying a new trial be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

(77 Cal. 440)

SMITH v. MILLARD. (No. 12,700.)

(Supreme Court of California. December 8, 1888.)

PARTNERSHIP—SALE OF PARTNERSHIP INTEREST—ASSUMPTION OF FIRM CONTRACTS.

Plaintiff sold his interest in a firm to his partners; they, as part consideration, agreeing to do certain printing for him. Afterwards a new company was formed between the remaining partners and defendant. The written agreement did not assume the obligations of the old firm. One of the old partners thought the new company liable for them. The other testified that he, and not the new company, was to be responsible for the printing, and that he made an agreement with the company for its performance; but it was repudiated by plaintiff, who wanted it executed by the old firm. When this partner retired, the others assumed the obligations of the company, releasing him, and on defendant's purchase of the interest of the other partner he assumed "all the obligations of the firm contracted since they became partners." *Held*, that defendant had not assumed the contract with plaintiff.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; H. K. S. O'MELVENY, Judge.

Action by Smith against Millard. Defendant appeals from a judgment for plaintiff.

C. M. Stephens, Lucien Shaw, and James M. Damron, for appellant. Chas. L. Batchelder, for respondent

HAYNE, C. The material issue in this case was whether the defendant, Millard, who was an incoming partner, assumed certain obligations of the old firm. The court below found that he did, but we think that this finding is not sustained by the evidence.

The plaintiff, Smith, who was a member of a partnership known as the "Express Printing Company," sold out his interest to Bynon and Morrill, who continued the business for a short time under the old name. Part of the consideration for this sale was a contract by Bynon and Morrill to do \$500 worth of printing for Smith. This contract is one of the obligations which it is claimed was assumed by the defendant, Millard; the other being a note of Bynon and

Morrill to a Los Angeles bank. Millard had nothing to do with this transaction. There is some testimony by the plaintiff indicating that he thought that defendant's knowledge of the conditions of the transfer, and his subsequent connection with the firm, rendered him liable. But it is clear that this transaction was between the plaintiff, on the one part, and Bynon and Morrill, on the other, and that the defendant had nothing to do with it. A short time after Smith's transfer of interest, a new firm was formed under the name of the "Pacific Publishing Company," consisting of Bynon and Morrill, and the defendant, Millard. The agreement by which this copartnership was formed was in writing. It contains nothing whatever to indicate that Millard assumed the obligations of the old firm. Some of the partners were evidently under the impression that this contract made the new firm liable for the old debts. Thus, Bynon says: "The contract of copartnership by the new firm of Millard, Morrill, and myself contained a paragraph in regard to the payment of these obligations. The intention, so far as I was concerned, was that we jointly assumed all the liabilities." And this idea explains some general statements of this and other witnesses for the plaintiff to the effect that Millard "assumed the payment" of the old debts. They were simply mistaken as to the legal effect of the agreement. There are no facts supporting such an idea. On the contrary, according to Morrill's own testimony, it was expressly agreed that he himself, and not the new firm, should become responsible for the performance of the printing contract. The following is his account of what occurred when the plaintiff came to the office to get the new firm to assume the obligation in question: "Mr. Millard said he was not ready to sign an agreement to do that printing by our office, for the reason that he did not understand how our office was to receive any remuneration for it,—any pay. * * * Mr. Bynon and I explained to him that I was to pay the Pacific Publishing Company for doing that printing. It was to be paid out of money which I was to receive out of the directory and pamphlets which were then being printed both for San Bernardino city and county. Mr. Millard said that was all right, but he wanted something to show for it. It was considerable work,—\$500 worth. He thought that it ought to be secured in some way. We made the arrangement there that I should secure the Pacific Publishing Company for the payment of that work, \$500, and upon my making that agreement they agreed to sign the paper." But it seems that the plaintiff repudiated this proposed arrangement, for Morrill goes on to say: "But Mr. Smith said he had nothing to do with the Pacific Publishing Company. The agreement was by Bynon and I to have that printing done for him, and he wanted us to execute the agreement as the Express Printing Company. We did so." So far, therefore, there is nothing to show any assumption by Millard of the debts of the Express Printing Company. About a month after the formation of the Pacific Publishing Company, Morrill transferred his interest in it to Bynon and Millard. On this occasion it appears that Bynon and Millard assumed the obligations of the Pacific Publishing Company, for Morrill says: "The substance of the conversation was * * * that I should step out, and be released and relieved from all obligations and contracts." This must be taken to mean that he was to be released from the obligations and contracts of the firm from which he was retiring, viz., the Pacific Publishing Company, and, as we have shown, the obligations sued on were not of this company, but of the Express Printing Company. But the idea that the Pacific Publishing Company had in some way or other become liable for the old debts seems to have taken hold of the minds of some of these parties, and they state their conclusions as to it in several places. As above shown, however, this idea was a mistaken one. There were no facts to support it on the former occasion, and there are none on this. Morrill himself says: "At that time there was nothing said, that I know of, about Bynon and Millard doing the five hundred dollars' worth of printing." There was nothing, therefore,

upon this occasion, which showed an assumption by Millard of the old debts. Some time after this, Bynon sold out to Millard, who thus became the only one remaining in the business. There was no testimony which tended to show an assumption by Millard of the debts in question at the time of this transfer. The written agreement of dissolution provides that "all the obligations of the firm, except those specified above, contracted by said Millard and Bynon since they became partners, are assumed by said Millard, including a \$500 note by the firm to himself." But, as we have shown, the obligations in question were of the Express Printing Company, and not "of the firm" referred to in this agreement, which was the Pacific Publishing Company. Moreover, they were not "contracted by said Millard and Bynon since they became partners." There was, therefore, nothing in the evidence which showed an assumption by Millard of the debts in question. The fact that he went to the bank, and offered to have the Pacific Publishing Company assume the note held by the bank, certainly gives color to the theory of the plaintiff. But the proposition was rejected by the bank, which wanted his individual signature, which he declined to give. And his going at all is, we think, satisfactorily explained by him in his testimony, to the effect that he then supposed his partners to be solvent, and that he was willing to have the new firm sign as security for them, but that when he found they were not solvent he declined to do anything. The specifications in the statement are sufficient to raise the question. We therefore advise that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and the cause remanded for a new trial.

77 Cal. 434

VANN v. McCREARY. (No. 11,686.)

(Supreme Court of California. December 8, 1883.)

1. MALICIOUS PROSECUTION—ADVICE OF COUNSEL—EVIDENCE.

Defendant, in an action for malicious prosecution, relied on the advice of counsel. The district attorney testified that he told defendant that he did not think he could convict, and that he had not a very good case. Another witness said to defendant that he could not do anything with plaintiff, to which defendant replied that plaintiff had taken sides against him, and that he would "set him up for his meanness." Though defendant testified that other lawyers whom he consulted advised him that he could maintain the prosecution, none of them were produced as witnesses. *Held* sufficient to sustain a verdict for plaintiff.

2. TRIAL—INSTRUCTIONS—PROVINCE OF JURY.

The court charged that if, when defendant made the complaint, he knew certain facts, and also knew that plaintiff had nothing to do with taking the sheep, except "to separate them from the others in the corral, as testified by the witnesses, [naming them,] there was no probable cause." *Held*, that the words "as testified by the witnesses" referred only to the separation to which all the witnesses named had testified, and, there being no conflict as to this matter, the court did not invade the province of the jury.

Commissioners' decision. Department I. Appeal from superior court, Lake county; RODNEY J. HUDSON, Judge.

J. A. Cooper, for appellant. E. W. Britt and R. W. Crump, for respondent.

HAYNE, C. Action for malicious prosecution; verdict for plaintiff; defendant appeals.

1. It is contended that the verdict is not sustained by the evidence, in this: that the evidence shows that the defendant relied upon the advice of counsel. But in view of the testimony, the jury may well have concluded that the defendant did not believe that the plaintiff was guilty of the crime with which

he was charged. Mr. Crawford, who was the district attorney, testified that he said to the defendant, when he came to him to start the prosecution: "I did not think he could convict under the testimony. I gave him reasons for it. * * * I told him my opinion was that he had not a very good case. He then remarked that he wanted the case prosecuted. * * * I don't think I told him it constituted grand larceny. I wrote the complaint as district attorney because I understood and thought the facts were sufficient to demand an investigation. * * * I wrote out the complaint because there might be additional facts in the case obtained by investigation." Another witness—the constable who arrested the plaintiff—testified to the following conversation with the defendant: "I said: 'I don't think you can do anything with George.' 'Well,' he says, 'George took sides against me in regard to a woman scrape. I am going to set him up for some of his meanness, any-how.' " It is true the defendant testifies that he consulted other lawyers besides the district attorney, and that they advised him that the prosecution could be maintained. But he did not produce such lawyers as witnesses, and this is a somewhat suspicious circumstance. We think the evidence is sufficient to sustain the verdict.

2. It is argued that the court invaded the province of the jury in giving the following instruction: "If the jury find from the evidence that McCreary did not sell the eighteen sheep to McMath, but that before he made the complaint against Vann knew that McMath had taken them and had left money with Scudmore, Reynolds & Co., at Upper Lake, to pay for them, and that Vann had nothing to do with the taking of said sheep, except 'pull them out,' or separate them from other sheep in the corral, as testified to by the witnesses G. W. Vann, E. P. Vann, C. McMath, Jr., and John Donaldson, then I charge you that there was no probable cause," etc. The argument is that all of these witnesses did not testify to all the facts enumerated in the above instruction. But as we construe the instruction the words "as testified to by the witnesses G. W. Vann, E. P. Vann, C. McMath, Jr., and John Donaldson" refer only to what immediately precedes, viz., the pulling out or separation of the sheep, and informed the jury that if the defendant knew that the plaintiff had nothing to do with the taking of the sheep, except to pull them out of the corral, or to separate them, under the circumstance detailed by the witnesses mentioned, there was no probable cause for the prosecution. These witnesses (including Donaldson) all testified to the circumstances of the pulling out or separation, and there was no conflict concerning the matter. We think the defendant is hypercritical in his view of the import of the language; that when properly construed the instruction was correct; and that the jury were not misled by it. The jury were sufficiently instructed that they were the exclusive judges of the facts. But if they had not been, there being no conflict in the evidence as to the circumstances of the pulling out or separation of the sheep, it would have been a harmless omission. The other matters do not require special notice. We therefore advise that the judgment and order denying a new trial be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

77 Cal. 518

SAN BENITO COUNTY v. SOUTHERN PAC. R. CO. (No. 11,201)

(Supreme Court of California. December 13, 1888.)

CONSTITUTIONAL LAW—TAXATION OF FRANCHISE GRANTED BY UNITED STATES.

An ordinance requiring the Southern Pacific Railroad Company to take out a license in order to continue its business in a county of carrying persons or freight for hire by means of railroad cars is void as a tax upon the use of a franchise granted by the United States.

In bank. Appeal from superior court, San Benito county; JAMES F. BREEN, Judge.

N. C. Briggs, J. B. Lamar, Walter A. Lamar, and J. E. Foulds, for appellant. *N. A. Hawkins*, Dist. Atty., and *B. B. McCroskey*, (*McCroskey & Hunder*, of counsel,) for respondent.

PATERSON, J. In view of the decisions of the supreme court of the United States in the cases of *State v. Railroad Co.*, and *Same v. Railroad Co.*, rendered April 30, 1888, (8 Sup. Ct. Rep. 1073,) it would seem useless to follow in this case the decisions of this court in *Railroad Co. v. State Board of Equalization*, 60 Cal. 35; *Los Angeles v. Railroad Co.*, 61 Cal. 59, and *Santa Clara Co. v. Railroad Co.*, 66 Cal. 642, 6 Pac. Rep. 744, for it is quite clear, we think, that the supreme court of the United States would hold, in a proper case, the ordinance before us herein, requiring the defendant to take out and pay for a license to continue its business of carrying persons or freight for hire by means of railroad cars in the county of San Benito, to be void; and of course we ought always to follow the rule of law laid down by that court, when our judgment, as in the case at bar, may be examined by it on writ of error. *Belcher v. Chambers*, 53 Cal. 643. In the case referred to (*State v. Railroad Co.*, *supra*,) it was held that the defendant therein, (defendant herein,) having been invested with certain franchises derived from the government of the United States in connection with other railroad corporations, by certain acts of congress, and having accepted all the terms and conditions of each of said acts, and fully complied therewith, "the state of California can neither take them away nor destroy nor abridge them nor cripple them by onerous burdens." The court, in that case, further said: "It may undoubtedly tax outside, visible property of the company situated within the state. That is a different thing. But may it tax franchises which are the grant of the United States? In our judgment it cannot. * * * No private person can establish a public highway, or a public ferry or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. * * * Corporate capacity is a franchise. * * * How can it be possible that a franchise granted by congress can be subject to taxation by a state without the consent of congress? Taxation is a burden, and may be laid so heavily as to destroy the thing taxed, or render it valueless. As Chief Justice MARSHALL said, in *McCulloch v. Maryland*, 4 Wheat. 316: 'The power to tax involves the power to destroy.' Recollecting the fundamental principle that the constitution, laws, and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a state. The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it is not only derogatory to the dignity, but subversive of the powers, of the government, and repugnant to its paramount sovereignty. It is unnecessary to cite cases on this subject. The principles laid down by this court in *McCulloch v. Maryland*, *supra*, and *Osborn v. Bank*, 9 Wheat. 817, and *Brown v. Maryland*, 12 Wheat. 436, and in numerous cases since, which have followed in their lead, abundantly sustain the views we have expressed. It may be added that these views are not in conflict with the decisions of this court in *Thomson v. Railroad Co.*, 9 Wall. 579, and *Railroad Co. v. Peniston*, 18 Wall. 5. As explained in the opinion of the court in the latter case, the tax there was upon the property of the company, and not upon its franchises or operations. Id. 25, 37. Taxation of a corporate franchise, merely as such, unless pursuant to stipulation in the original charter of the company, is the exercise of an authority somewhat arbitrary in its character. It has no limitation but the discretion of the taxing power. * * * It only remains to consider whether the Southern Pacific Railroad Company as well as the Cen-

tral Pacific was invested with any franchise derived from the government of the United States. Of this, we think there can be no question. * * * It follows that in each one of the cases now before us the assessment made by the state board of equalization comprised the value of franchises or property which the board was prohibited by the constitution of the state from including therein, and that these values are so blended with the other items of which the assessment is composed that they cannot be separated therefrom. The assessments are therefore void." In *Railroad Co. v. Peniston*, *supra*, the court, referring to *McCulloch v. Maryland*, *supra*, said: "The tax, therefore, was not upon any property of the bank, but upon one of its operations; in fact, upon its right to exist as created. It was a direct impediment in the way of a governmental operation performed through the bank as an agent. It was a very different thing, both in its nature and effect, from a tax on the property of the bank. No wonder then that it was held illegal. 'It does not extend,' said the chief justice, 'to a tax paid by the real property of a bank, in common with the other real property in the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in the institution, in common with the other property of the same description throughout the state. But this is a tax on the operations of the bank, and is consequently a tax on the operations of an instrument employed by the government of the union to carry its powers into execution. Such a tax must be unconstitutional. Here is a clear distinction made between a tax upon the property of a government agent, and a tax upon the operations of the agent acting for the government. In *Osborn v. Bank*, the tax held unconstitutional was a tax upon the existence of the bank,—upon its right to transact business within the state of Ohio. * * * For this reason the power of the state to direct it was denied; but at the same time it was declared by the court that the local property of the bank might be taxed, and, as in *McCulloch v. Maryland*, a difference was pointed out between a tax upon its property and one upon its action. * * * A tax upon their operations is a direct obstruction to the exercise of federal powers."

The contention that the exemption claimed ought not to be implied by the court, in the absence of any legislation by congress upon the subject of exemption, is answered by the court in *Osborn v. Bank*, *supra*, where it is said: "It is contended that, admitting congress to possess the power, this exemption ought to have been expressly asserted in the act of incorporation; and, not being expressed, ought not to be implied by the court. It is not unusual for a legislative act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an act of congress to imply, without expressing, this very exemption from state control, which is said to be so objectionable in this instance. * * * It is secured by the judicial power alone; that is, the judicial power is the instrument employed by the government in administering this security. * * * Can a contractor, for supplying a military post with provisions, be restrained from making purchases within any state, or from transporting provisions to the place at which the troops were stationed? Or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative. It is true that the property of the contractor may be taxed as the property of other citizens; and so may the local property of the bank. But we do not admit that the act of purchasing, or of conveying the articles purchased, can be under state control."

It seems to us that the reasoning of the court in the above cases applies with as much force to the license tax upon the use of the franchise—the operations of the road, and the conduct of its business—as to the tax upon the franchise as property; and that the supreme court of the United States would

so hold. Holding this opinion, it is our duty, notwithstanding the opinions of this court upon the same subject hereinbefore referred to, to reverse the judgment and order of the court below, with directions to enter judgment for the defendant. It is so ordered.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; WORKS, J.

THORNTON, J., (*concurring*.) The rulings of the supreme court of the United States, in the cases cited in the beginning of the foregoing opinion, on the question of the power of the state to tax the franchises granted by the United States government must control our action in this case. The question is federal; and on such questions the settled law requires that the courts of the state shall conform to the decisions of the highest federal judicial tribunal. The license tax in question herein is one that affects the franchises enjoyed by the defendant company under a grant or grants from the federal government. It is a tax on the right of this company to carry on its business under the federal grant, and comes within the judgments of the United States supreme court in the cases cited. Under the constitution of this state, which requires all taxation to be equal and uniform throughout the state, it must be supposed that the legislature would not impose or authorize the imposition of any taxes by any county or other political subdivision of the state, whether in the nature of property or license taxes, which would destroy or render valueless the business of any railroad corporation, or cripple such corporations by onerous burdens. The guaranty of fair and just taxation is found in the constitution of the state. Taxation by a county must be equal and uniform, at least as to all persons engaged in the same business in the county; and such a guaranty will protect railroads in a county from unfair or unjust or oppressive taxation which would tend to destroy their business or cripple it, or interfere with their right to do business, as it protects individuals on whom such taxes are imposed. The amount of the tax is so small in the case before us that it cannot be considered onerous. But in the view taken by the supreme federal tribunal, the foregoing considerations are of no weight. The power of the state to tax is held not to exist at all, without regard to the fact whether the tax is so trifling as not to in any degree be onerous, or equal or uniform on all persons, whether natural or artificial, engaged in the business of carrying persons or freight for hire, or by means of railroad cars. Following then the judgments of the supreme court of the United States in the cases above cited, we must hold that the license tax under consideration was levied without authority of law, and must be held void. With the foregoing observations, I add that I concur in the foregoing opinion and judgment.

PEOPLE v. SOUTHERN PAC. R. CO. (No. 11,101.)

(*Supreme Court of California*. December 14, 1888.)

In bank. Appeal from superior court, San Benito county; JAMES F. BREEN, Judge. Appeal by the people from a judgment rendered in favor of the Southern Pacific Railroad Company. See *San Benito Co. v. Railroad Co.*, *ante*, 827.
B. B. McCroskey, Dist. Atty., for appellant. J. B. Lamar, Walter A. Lamar, J. E. Foulds, and N. C. Briggs, for respondent.

PER CURIAM. The judgment in this cause is affirmed, on the authority of *County of San Benito v. Railroad Co.* (No. 11,201,) *ante*, 827, filed December 13, 1888.

77 Cal. 445

PEOPLE v. HENRY. (No. 20,487.)

(*Supreme Court of California*. December 8, 1888.)

1. CRIMINAL LAW—APPEAL—MOTION IN ARREST OF JUDGMENT.

In California, no appeal lies from an order denying a motion in arrest of judgment.

2. BURGLARY—INDICTMENT—DUPLICITY.

An information charging that defendant "feloniously entered the house, room, apartment, tenement, shop, warehouse, store, and building of the San Diego & Coronado Water Company, with the intent then, there, and therein to commit larceny," charges but one offense.

3. SAME—OWNERSHIP OF PROPERTY.

The ownership of the property in such case is sufficiently alleged, though it is not stated whether the San Diego & Coronado Water Company is a corporation or a partnership, and no names are given of persons composing the company; Pen. Code Cal. § 959, making it sufficient to state the acts constituting the offense in ordinary and concise language.

4. SAME—PRACTICE—DISMISSAL—FAILURE TO PROSECUTE.

Under Pen. Code Cal. § 1382, requiring the court, unless good cause to the contrary is shown, to dismiss a prosecution not brought to trial within 60 days from the filing of the information, a judgment will not be reversed where it does not appear that the trial judge abused his discretion in refusing to so dismiss the prosecution.

In bank. Appeal from superior court, San Diego county; E. PARKER, Judge.

Hunsaker, Britt & Lamme, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

PER CURIAM. On the 2d day of May, 1888, an information was filed against the defendant, charging that he, on a certain day prior to the filing of said information against him, had "feloniously entered the house, room, apartment, tenement, shop, warehouse, store, and building of the San Diego & Coronado Water Company, with the intent then, there and therein to commit larceny," etc. To this information the defendant, on the 22d day of May, 1888, demurred upon all the statutory grounds. On the same day the demurrer was overruled, the defendant excepted and pleaded not guilty. On the 3d of September the case was set for hearing on the 25th of September, 1888. On that day, before the trial commenced, the defendant, by his counsel, moved the court to dismiss the case, and discharge the defendant, on the ground that his case had not been brought to trial within 60 days after the filing of the information. Affidavits were filed by both sides upon the motion, which was then denied by the court, the defendant excepting. The trial then proceeded, and the defendant was found guilty of burglary in the first degree. At the time fixed by the court for pronouncing judgment upon the verdict of the jury, the defendant moved the court in arrest of judgment upon the grounds set out in the demurrer. The motion was denied, the defendant excepted, and judgment was given against him. He has appealed from the judgment and order. From the latter no appeal lies. *People v Majors*, 65 Cal. 100, 3 Pac. Rep. 401.

As stated before the information charges the defendant with having feloniously entered the house, room, apartment, tenement, shop, warehouse, store, and building of the San Diego & Coronado Water Company, with the intent then, there, and therein to commit larceny. As we construe this allegation there is but one offense attempted to be charged, the felonious entry of some building of the San Diego & Coronado Water Company, with the intent then and there to commit larceny. It is contended that, as the information does not state whether the San Diego & Coronado Water Company is a corporation or a partnership, and does not give the names of any persons composing the corporation or partnership, there is, in a legal sense, an entire absence of any allegation as to the party intended to be injured. The cases of *People v. Schwartz*, 32 Cal. 160, and *People v. Bogart*, 36 Cal. 245, are cited as conclusive upon this question. The first case referred to was an indictment for burning a building insured against fire, with intent to defraud an insurance company. It was there held that, in order to make the indictment fit the statute and respond directly to its requirements, it had to allege that the Phoenix Insurance Company is a corporation, if such is the fact, or that it is a

partnership, if such is the fact, composed of certain individuals, (giving their names,) and alleging that the act was done with intent to injure and defraud them in their associate capacity. The other was a prosecution for grand larceny, and followed the common-law rule, in the absence of statute to the contrary, that, in cases of larceny, where the stolen goods were the property of partners or joint owners, the names of all the partners or joint owners must be stated. The case before us is one of burglary, and we think that, under the Code definition of that crime, the ownership of the building entered is sufficiently designated by the language used in the information. Section 959 of the Penal Code provides that the information is sufficient if the acts constituting the offense are stated in ordinary and concise language, without repetition, in such a manner as to enable a person of common understanding to know what is intended. There was no error in the refusal of the court to dismiss the case upon the defendant's motion, made under subdivision 2 of section 1382 of the Penal Code.¹ There was no abuse of discretion within the rule laid down in *People v. Camilo*, 69 Cal. 540, 11 Pac. Rep. 128. Appeal from the order dismissed, and judgment affirmed.

77 Cal. 436

PEOPLE v. MAURIN. (No. 20,455.)

(Supreme Court of California. December 8, 1888.)

FALSE PERSONATION—EVIDENCE.

Under Pen.Code Cal. § 529, making punishable "every person who falsely personates another, and in such assumed character * * * verifies, publishes, acknowledges, or proves, in the name of another person, any written instrument, with intent that the same may be recorded, delivered, and used as true," a conviction cannot be sustained for falsely personating a certain doctor, and in such assumed character verifying, etc., a certificate of death, with intent that it should be recorded, etc., where the evidence shows that defendant did not assume or pretend to be the doctor, but signed the latter's name to the death certificate on being told that he had authorized it.

In bank. Appeal from superior court, city and county of San Francisco; D. J. TOOHY, Judge.

Robert Ferral and Jarret W. McEnerny, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

McFARLAND, J. 1. Defendant was informed against and convicted under subdivision 2, § 529, Pen. Code. That portion of said section which is material here is as follows: "529. Every person who falsely personates another, and in such assumed character either * * * (2) verifies, publishes, acknowledges, or proves, in the name of another person, any written instrument, with intent that the same may be recorded, delivered, and used as true, * * * is punishable," etc. The particular charge in the information was that the defendant falsely personated one Dr. F. F. De Derky, and in such assumed character verified, etc., a certain certificate of death, with intent that it should be recorded, etc.

There was no evidence tending to prove that defendant personated the said Dr. De Derky, or assumed his character. The facts proved by the prosecution were, substantially these: One Louise Peckelhoff died at the house of one Mrs. Hagenow, who was a physician. Dr. De Derky also attended the deceased for a few days before her death. A certificate of her death, with the name of Dr. De Derky signed to it, was delivered by an undertaker, Mr.

¹Pen. Code Cal. § 1382, provides that "the court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases: * * * (2) If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the filing of the indictment or filing of the information." *People v. Camilo*, 69 Cal. 540, 11 Pac. Rep. 128, holds that a prosecution will not be dismissed for such cause where "sufficient cause was shown for not bringing the action against the defendant to trial within 60 days after the filing of the information."

Fredericks, to the secretary of the board of health, who supposed that the signature of Dr. De Derky was genuine. The name of Dr. De Derky was, however, as a matter of fact, signed to the certificate by the defendant. The undertaker, Fredericks, prepared the body of the certificate, and left it at the house of Mrs. Hagenow to be signed by the physician. Afterwards it was brought to him by the defendant with De Derky's name to it. Fredericks knew defendant well; had known him for two years; knew that he was a cook working for Mrs. Hagenow; knew that he was not Dr. De Derky, and knew that he did not pretend to be Dr. De Derky. De Derky testified for the prosecution. When pressed to say categorically whether or not he had authorized any one to sign his name to the certificate, he answered that he had not, but that Mrs. Hagenow was under the impression that he had. He testified that Mrs. Hagenow told him that, as she had been convicted of practicing medicine without a license, the board of health would probably not issue a burial permit on her certificate, and that he told her that he would sign the death certificate. He was then asked if she did not say to him: "But supposing that I cannot find you, what shall I do?" and if he did not thereupon say to her: "Well, sign it; but I prefer to sign it myself." To which he answered: "It may be so; I don't remember. I suppose I said something to that effect." This was all the testimony on the part of the prosecution. The defendant, on his own behalf, testified, substantially, that he had worked as cook for Mrs. Hagenow for about 10 years; that he also acted as her secretary, and had signed her name to nearly all the certificates of death which had been given by her as a physician; that the certificate set forth in the information was brought to him in the kitchen by Mrs. Hagenow, who told him that Dr. De Derky had authorized the signing of his name to it, and asked him to sign the doctor's name to it because she was too nervous to do so; and that he signed it believing that he had the authority and that it was proper to do so. This was substantially all the evidence in the case.

There is no question here as to the weight of evidence, or as to the right of the jury to believe or disbelieve certain testimony. The most that the jury could have found against the defendant, under any view of the evidence, was that he signed De Derky's name to the certificate without authority to do so, and without any reason to honestly believe that he had such authority. And they must have concluded that signing the certificate without such authority constituted the crime charged in the information. But there was no evidence that he personated Dr. De Derky, or pretended to any human being that he, the defendant, was Dr. De Derky. He certainly made no such pretension to the undertaker, Fredericks, or to Mrs. Hagenow, who both knew him well; and those were the only persons with whom he came into contact about the business of the certificate. If he signed the certificate without any authority, and fraudulently wrote De Derky's name when he knew he had no right to do it, he may have been guilty of forgery; but a defendant cannot be convicted of a crime which is not charged in the information under which he is tried. To personate another person is to assume to be that person.

2. Instruction No. 3, asked by defendant and refused by the court, contains a very fair description of false personation; and it should have been given, or the substance of it should have been given, in another form, which was not done.

3. We are not prepared to say that the certificate in question is not an instrument which may be recorded, within the meaning of said section 529 of the Penal Code; but the evidence was very vague as to the manner in which the health officer, under the rules of the board of health, keeps a record of deaths, as provided in section 3023 *et seq.* of the Political Code. Judgment and order denying a new trial reversed, and cause remanded.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.

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77 Cal. 461

LEVISTON v. HENNINGER et al. (No. 11,733.)

(Supreme Court of California. December 10, 1888.)

1. EJECTMENT—TITLE TO SUSTAIN—EVIDENCE—EXECUTION SALE.

In ejectment, where plaintiff claims through a sheriff's sale, under an execution issued on a judgment for a balance due on a mortgage debt, after the sale of the mortgaged premises under foreclosure, the docketing of the judgment for the deficiency, and the return of the sheriff in the foreclosure proceedings, should be shown by the record itself.

2. SAME—FORECLOSURE OF MORTGAGE—DOCKETING DEFICIENCY JUDGMENT.

Where a sale of mortgaged premises is made under foreclosure, the mortgagor having no interest in, or title to, them, and afterwards a judgment for a balance due on the mortgage debt is docketed against the real owner, one claiming under a sale made to satisfy the latter judgment can maintain ejectment against one claiming under the former sale.

In bank. Appeal from superior court, Contra Costa county; R. CROUCH, Judge.

Both Leviston and Henninger, parties to this suit, claim title from the same source, namely, the title of Martina Castro. The land in question was mortgaged by Riordan, (at one time attorney for Martina Castro, but now appearing for the plaintiff,) to Dean; and, on the land being sold in foreclosure proceedings brought by the latter, the certificate of sale came, by assignment, into the hands of the defendant Henninger. Subsequently a personal judgment was docketed against Martina Castro for a balance due on the mortgage debt, and plaintiff claims under a sale made to satisfy the latter judgment.

R. W. Hent and Henry Miller, for appellants. Thos. D. Riordan and Wm. Leviston, for respondent.

MCFARLAND, J. This is an action of ejectment. Judgment went for plaintiff, and defendants Henninger and Martina Castro de Newton appeal from the judgment, and from an order denying a new trial. Plaintiff claims title to the land in contest through a sheriff's sale under an execution issued upon a judgment for a deficiency after a sale under a decree of foreclosure in the case of *Dean v. Castro et al.* To establish his title, plaintiff introduced the judgment-roll in *Dean v. Castro*, down to and including the decree of foreclosure. He also introduced an execution which recited that the sheriff, after a sale under the foreclosure decree, made a return upon the order of sale showing a deficiency of \$434.88, and that a judgment was docketed for that amount; but he did not introduce the judgment itself as docketed, nor the order of sale and return of the sheriff thereon showing the deficiency. Defendants objected to the evidence introduced because the deficiency judgment, order of sale, and sheriff's return were not introduced, and, plaintiff having rested, they moved for a nonsuit upon the same grounds, and their motion was denied. The defendants were undoubtedly right in their position. It is clearly the general rule that a plaintiff in ejectment, claiming title under an execution sale, must introduce the judgment upon which the execution issued. A recital of the judgment in the execution is not sufficient. The best evidence of the judgment is the judgment itself. *Schuyler v. Broughton*, 65 Cal. 252, 3 Pac. Rep. 870, and cases there cited; *Hihn v. Peck*, 30 Cal. 288. And what is necessary proof of the docketing of a judgment for a deficiency arising after a sale under a decree of foreclosure must be governed by the same rule, namely, the rule of the best evidence. A docketed deficiency judgment has, no doubt, under our Code, a somewhat peculiar character. It is not expressly made part of the judgment-roll; and, as held in *Bowers v. Crary*, 30 Cal. 622, it cannot be considered as an entirely new and independent judgment. But it differs from the docketing of an ordinary money judgment in this: that it makes definite and certain what, in the decree of foreclosure, was a mere contingent provision, (*Chapin v. Broder*,

16 Cal. 423;) while in the other case the docketing has only the effect of establishing a lien for an amount already ascertained and declared in the judgment. In the said foreclosure decree involved in the case at bar it is provided that, if the proceeds of the sale of the mortgaged premises shall be insufficient to pay the amount found due, the sheriff shall report the deficiency; that, upon the return of the sheriff, "a judgment of this court shall be docketed for such balance against the defendant Martina Castro;" that the said Castro shall "pay to said plaintiff the amount of such deficiency and judgment;" and "that the plaintiff have execution therefor." Under the decree, therefore, the validity of the execution depended upon the docketing of the judgment for the deficiency reported by the sheriff; and, as it was a matter of record, it should have been proved by the record itself. And as the docketing of the judgment for the deficiency was based on the return of the sheriff, showing what the deficiency was, the return of the sheriff should also have been introduced. For these reasons the order denying a new trial must be reversed. Upon the other matters determined in the case we think that the court below was right. The foreclosure of the mortgage in the case of *Dean v. Castro et al.*, and the sale under the decree, carried only the interest which the mortgagor, Riordan, had in the mortgaged premises. But he never had any interest in, or title to, said premises. They belonged all the time to Martina Castro, and the title thereto was in her. Her title was hostile and paramount to that of the mortgagor; and it was therefore not affected by the decree of foreclosure. But if there was a judgment for a deficiency docketed against her personally, and, upon a sale under an execution issued upon such judgment, her interest in the land went to plaintiff, then the latter has the title, and should recover against the defendants who claim under the foreclosure sale. The order denying the motion for a new trial is reversed, and the cause remanded for a new trial.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; THORNTON, J.; PATERSON, J.

PEOPLE v. HOLLADAY *et al.* (No. 8,501.)

(Supreme Court of California. December 11, 1888.)

In bank. Appeal from superior court, city and county of San Francisco.

This action was instituted by the attorney general for the removal of certain buildings and fences from a public park. On appeal judgment in favor of defendants was reversed, and cause remanded for new trial, January 28, 1886. See 9 Pac. Rep. 655. One of the respondents, S. L. Mastick, died pending appeal. On December 10, 1888, Mary W. Mastick was substituted as respondent in his place.

John L. Love and *William Mathews*, for appellant. *S. W. Holladay* and *Mastick, Belcher & Mastick*, for respondents.

SEARLS, C. J. This cause having been heretofore submitted as to the respondent Mary W. Mastick, as executrix of the last will and testament of S. L. Mastick, deceased, upon the briefs on file herein, and upon which the cause was heretofore submitted and determined as to all the respondents except the said S. L. Mastick, it is now by the court considered, ordered, and adjudged, in accordance with the opinion and judgment filed herein January 28, 1886, (9 Pac. Rep. 655,) that the judgment and order of the superior court be and hereby is, as to the respondent Mary W. Mastick, as executrix of the last will and testament of S. L. Mastick, deceased, reversed, and that said cause be as to said respondent remanded to the superior court for a new trial, and that the *remittitur* issue forthwith.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.; PATERSON, J.

77 Cal. 618

PEOPLE v. NORTHEY. (No. 30,441.)

(Supreme Court of California. December 27, 1888.)

1. GRAND JURY—QUALIFICATIONS—FORMER OPINIONS.

Some of the grand jury who found an indictment against M., for procuring defendant to approach and offer a bribe to a juror, afterwards acted as members of the grand jury which indicted defendant for offering to bribe said juror. The grand jurors testified that they formed the opinion that defendant was guilty from his testimony before the grand jury in the *Case of M.*, and they voted for his indictment. *Held*, that the opinions so formed did not disqualify them as grand jurors. Such disqualifying opinions must arise from something heard outside, which has not the sanction of an oath, and is merely hearsay.

2. SAME—INDICTMENT—CORROBORATING TESTIMONY—BIAS.

Although the grand jury could have indicted defendant on his own testimony, the fact that they called another witness, before ordering the indictment, would indicate no bias or prejudice on the part of the grand jury.

3. SAME—PRESENCE IN COURT.

The fact that two of the grand jurors were in court when M. was on trial, and heard defendant plead his constitutional privilege as a witness, on the ground that his testimony would tend to criminate him, is immaterial; there being nothing to show that it had anything to do with their voting for defendant's indictment.

4. CRIMINAL LAW—CONTINUANCE—ABSENCE OF WITNESS—CUMULATIVE EVIDENCE.

The court properly refused a delay to procure the testimony of another member of the grand jury, who was out of the jurisdiction, when the statement of defendant's counsel showed that he expected to prove by the absent juror the same sort of prejudice, partiality, or bias, on the same facts as existed in regard to the other jurors, which are held to be no indication of bias or prejudice.

5. SAME—INDICTMENT—INDORSEMENT OF WITNESSES' NAMES.

The notes of the shorthand reporter of defendant's testimony on this trial were read to the grand jury when considering the case against defendant. *Held*, that the name of defendant was not required to be indorsed on the indictment as one of the witnesses.

6. SAME—TRIAL—REMARKS OF JUDGE—INSTRUCTIONS.

The judge remarked during the trial that he thought "the prosecution in criminal cases was too much handicapped," but in his charge to the jury said: "During the examination of Mr. Kohler, as to his qualifications to serve as a juror, some language was used by the court to which defendant's counsel took exception. I instruct you that it is your duty to ignore in your deliberations the remarks then made by the court, and that you must deal with the case on the law as it exists, and as the court states it to you, irrespective of your own opinion, or of any opinion the court might have, as to the wisdom of the law." *Held*, that the latter remarks of the court were sufficient to remove all apprehensions that the first remarks would have any effect on the jury prejudicial to defendant.

7. BRIBERY—EVIDENCE—DOCUMENTARY.

On indictment for offering a bribe to a juror in a civil case, the complaint and answer in the civil case are admissible to prove the allegations in the indictment relating thereto, and the fact that the juror who was named in the indictment as the person to whom a bribe was offered by defendant was a juror, and acted as such on the trial of that case, and it is proper to read them to the jury.

8. CRIMINAL LAW—APPEAL—OBJECTIONS NOT RAISED BELOW.

If there was anything in the complaint and answer not relevant to the issue, whether there was an issue of fact pending in the civil case for trial by jury, which might operate prejudicially to defendant, he should have requested an instruction limiting the scope of the evidence to the purpose for which it was offered; and, not having so requested, the defendant cannot allege the court's failure to give such instruction as error.

9. SAME—EVIDENCE OF ACCOMPLICE—ADMISSIONS.

Where defendant's counsel informs the court that he is going to contend that the juror alleged to have been bribed was an accomplice with defendant, it is not error to admit the testimony of the juror as to his conversation with a third person, in which the witness told the third person that defendant had offered to pay him money to favor defendant in rendering a verdict; and that the third person had advised witness to hear all that was to be said on the subject, because, if witness did not do so, defendant might approach other jurors, and that, in pursuance of such advice, witness had answered defendant, on the third conversation with him, that it was all right.

10. SAME--OBJECTIONS NOT RAISED BELOW.

The fact that the admissions of the defendant, as to the correctness of the written statement, were made while he was in prison, detained there as a witness in another criminal case, cannot be urged against the admissibility of the admissions in the appellate court; such objection not having been raised in the court below.

11. SAME.

The objection that the written statement of the evidence of the defendant before the grand jury was not admissible, because it was not affirmatively shown by evidence to have been voluntary on the part of defendant, cannot be urged on appeal, when it was not urged in the court below, and it also appears that the written statement of such evidence had been admitted by defendant to a third person to be substantially correct.

12. GRAND JURY--EVIDENCE OF TESTIMONY BEFORE THEM.

Pen. Code Cal. § 926, providing that a grand juror can be compelled to disclose the testimony of a witness examined before the jury only in certain cases mentioned, has no application to such admissions, no grand juror having been called to testify as to the admissions, and the rule of secrecy set forth in the statute being intended only for the protection of grand jurors, and not of witnesses before it, and witnesses cannot invoke it.

13. BRIBERY--CONVEYANCE OF OFFER.

The conveyance of the offer of a third person to a juror to bribe said juror is in itself an offer of a bribe, and the fact that the money to be paid was to come from said third person makes it no less an offer to give a bribe.

In bank. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Indictment against F. T. Northey, for offering to give a bribe to H. F. Woods, a juror in a civil case. Defendant was convicted, and sentenced to imprisonment for nine years. From the judgment and order denying a new trial defendant appeals.

Geo. A. Knight, for appellant. Atty. Gen. Geo. A. Johnson, for the People.

THORNTON, J. The defendant, Northey, was accused by indictment of willfully, corruptly, and feloniously offering to give a bribe to H. F. Woods, a juror on the trial of the action of *Wright et al. v. The Geary-Street Park & Ocean Railroad Company*, pending in the superior court (department 6 thereof) of the city and county of San Francisco, and in which an issue of fact had been joined, with the corrupt and felonious intent to corruptly influence the vote, opinion, verdict, and decision of Woods as juror, in favor of the defendant in the action above named. The defendant was convicted and sentenced to imprisonment in the state-prison for the term of nine years. A motion for a new trial was made by defendant, and denied, and he prosecutes this appeal from the judgment and order denying a new trial. The defendant, not having been held to answer before the finding of the indictment, when called on to plead, moved to set aside the indictment. *First*. "Because Stewart Menzies, Patrick Connolly, W. H. Coddington, Charles F. Doe, J. J. Donovan, Charles Holbrook, A. P. Hotaling, Patrick Lynch, P. V. Merle, Samuel Pollack, F. G. Wagner, Louis Abrahams, H. Brandt, A. R. Kelly, Sol. Kohlman, George C. Shreve, William Wolf, and Jacob Greenbaum, members of the grand jury which found the said indictment against defendant, were at the time they were impaneled as grand jurors on said grand jury, and at the time they found the said indictment, incompetent to act as grand jurors in the finding of said indictment, for the reason that there existed a state of mind in each of them in reference to the above-entitled case, and this case, and in reference to this defendant, which prevented them, and each of them, from acting impartially, or without prejudice to the substantial rights of defendant, in the finding of said indictment." *Second*. "That the names of all witnesses and persons appearing before said grand jury are not and were not inserted at the foot of said indictment or indorsed thereon."

It appears from a bill of exceptions found in the record that Patrick Connolly and Stewart Menzies, on their examination, on the hearing of the motion above stated, testified that they were members of said grand jury that found

the indictment against the defendant Northey, and that they voted for the finding of the indictment. Twelve grand jurors, including them, voted for the finding of the indictment. They were present in court when the case of *People v. Robert F. Morrow* was on trial for procuring Frank T. Northey to approach and offer to give a bribe to H. F. Woods, in the cause of *Florence M. Wright et al. v. Geary-Street Park & Ocean Railroad Company*, wherein defendant here was called as a witness for the prosecution, and declined to answer all questions put to him relating to the charge against Morrow, on the ground that they would have a tendency to convict him of a felony; and were present in the grand jury room when the charge against Morrow was examined, and when Northey testified, and heard defendant Northey then testify.

Connolly further testified that, after hearing the testimony of Northey given before the grand jury in the *Morrow Case*, he had formed an opinion that Northey was guilty; that that opinion was a fixed and decided opinion, and founded on Northey's own statement before the grand jury; that this opinion was formed before the finding of the indictment against Northey, and that he had this opinion when he went to examine the charge against Northey. Menzies was also called, and testified that he formed the opinion after hearing Northey's testimony on the examination of *Morrow's Case* before the grand jury; that Northey admitted his guilt in this testimony; that the opinion was decided as to his guilt; that he voted for the indictment against Northey; that it was founded on the testimony of Woods; that the indictment against Northey was found after the finding of the indictment against Morrow; that he acted fairly and impartially, and without prejudice, in finding the indictment under consideration. John T. Wagner, Alfred R. Kelly, F. G. Wagner, Charles F. Doe, William H. Coddington, Samuel Pollack, and Jacob Greenbaum, who were members of the same grand jury, and acted on the indictment against Northey, and voted for it, also testified that they heard Northey's testimony before the grand jury above mentioned, and on this testimony formed a fixed and decided opinion that Northey was guilty. Patrick Lynch was one of the same grand jury, and testified that the short-hand reporter's notes of Northey's testimony on the trial of the indictment against Morrow were read to the grand jury while it had *Northey's Case* under discussion. It appears, further, by the bill of exceptions, and is so stated therein, "that each and all of said above-named grand jurors testified, upon their examination on said motion, that, when they acted upon the case of defendant, and considered and found said indictment, they had no bias or prejudice against defendant, and acted without regard to any prior opinion of his guilt, and without prejudice, and were not influenced in any manner against defendant, or his substantial rights, but acted impartially and fairly upon the evidence introduced before them in the grand jury room on the hearing of the charge against the defendant, and not from comments in public journals, or public rumor, or common notoriety."

In connection with this inquiry, the counsel for defendant asked for a subpoena to procure the attendance of A. P. Hotaling, one of the members of the grand jury who had acted on and voted for the indictment against Northey. A subpoena had been regularly and with diligence issued for Hotaling, and placed in the hands of the sheriff, who returned that Hotaling was absent from the county, and could not be found, but that he would return in two days. The court inquired of counsel what he expected to prove by Hotaling, to which he replied that he proposed to show by Hotaling substantially the same facts as testified to by the other grand jurors,—that he had formed a fixed and decided opinion as to the guilt of Northey, from Northey's testimony before the grand jury above stated, and that opinion was that he was guilty. The court required of counsel to make his statement by affidavit, which counsel refused to make, and thereupon the court refused to grant further time to subpoena grand jurors. The court refused to set aside the indictment, and defendant

excepted. It is argued that the indictment should be set aside for the reason that it appears from the testimony of the grand jurors examined that a state of mind existed on the part of each of them, when they found these indictments against Northey, in reference to Northey and his case, which prevented them, and each of them, from acting impartially, or without prejudice to the substantial rights of the defendant in finding the indictment herein. The partiality and prejudice here charged against each grand juror is based on the fact that, in examining, in their capacity as grand jurors, a case against Robert F. Morrow, Northey was called as a witness before the grand jury, and on such examination testified that he was guilty of the offense charged in the indictment, and that in this testimony each of them had formed the opinion that he was so guilty. It clearly appears from the testimony of one of the grand jurors examined that Northey in his testimony admitted his guilt, and, as they all say that they formed their respective opinions on this testimony, the inference is irresistible that such was the character of Northey's testimony. It is admitted by each of these grand jurors that their opinion, formed on such testimony, was fixed and decided. Now, conceding that an indictment can be vitiated by the participation of a grand juror in finding it, who had formed, before entering on its examination, an unqualified, fixed, and decided opinion that the defendant so indicted was guilty, and for that reason should be set aside, can it be that an opinion formed under the circumstances in evidence herein is of that character? The facts upon which the opinion of each grand juror was formed herein came to his knowledge in the discharge of his duty as a grand juror, when the grand jury was engaged in the discharge of its official duties, in inquiring into a public offense against the people of the state, triable within the county of their impanelment. Northey is called as a witness before them, and testifies under oath in the presence of the jury, to facts which inculcate him in a public offense, within the scope of their inquiry. In effect, the witness admits his guilt. The grand jurors hear his sworn statement, and conclude that he is guilty. Can such an opinion—is it possible that an opinion so formed can—be disqualifying as to any member of the grand jury to act upon an indictment of the witness for the offense of which he admits his guilt? The opinion which disqualifies is one formed from something heard outside which has none of the sanction of an oath, and is merely hearsay. It might as well be charged against a judge that he is partial, or biased, or prejudiced against a person tried for a public offense before him, when, on a motion for a new trial of the cause, on the ground that the verdict is contrary to the evidence, he states, in denying it, that he has heard and considered the evidence, and formed the opinion when he heard it, and was still of opinion, that the defendant was guilty, and the verdict correct.

The counsel speaks of *Morrow's Case*, and the grand jury having under consideration *Morrow's Case* when Northey gave his testimony, and he seems to regard the grand jury as resembling a petit jury, and, like the latter, restricted to the examination of a particular case. We do not think this is a proper or reasonable view. The grand jury has within the scope of its inquiry all public offenses committed or triable within its county, (Pen. Code, § 915;) and though it takes up for examination a charge against one person, if it should appear from the testimony taken on such examination that sufficient reasons exist for putting another person on his trial, they can and should find an indictment against such other person. Suppose, in such a case, they should conclude that both persons should be indicted on an opinion formed, when the charge against one only was specially under examination. Both indictments might not be directed by the same order. The indictment against the witness might be ordered on a day subsequent to the order of the other. Could it, with any justice or propriety, be said, under these circumstances, that a grand juror was not impartial, or was prejudiced, because when the matter of directing an indictment against the witness was taken up he had already formed

an opinion on evidence regularly heard that the witness was guilty? Can bias or prejudice or partiality be charged against members of a grand jury because, having already formed an opinion of a party's guilt on testimony regularly and lawfully heard, they hear the testimony of another witness before ordering an indictment to be drawn up against such party? The foregoing questions can be answered in only one way, and that relieving a grand juror so acting from every imputation of bias or partiality. We see nothing of bias or prejudice in an opinion so formed. It is not a prejudgment at all. The opinion is formed on evidence coming regularly before the grand jury in the discharge of its lawful functions, and does not indicate a state of mind in reference to the case or the party indicted which will prevent a grand juror from acting impartially, and without prejudice to the substantial rights of both parties. We see no reason why this grand jury should not have indicted Northey on his own testimony, as given before it. If it saw proper to call a witness, (Woods,) as was done in this case before ordering the indictment, we see no reason why it could not do so. Such a course indicated no bias or prejudice on the part of the grand jury, or any member of it. In fact, *Northey's Case* may be said to have been under consideration from the time that he gave his testimony in relation to Morrow until the indictment against him was found. The disqualifying state of mind referred to in the statute must have existed when the examination of *Northey's Case* was commenced, when he was called before them as a witness, and it is not contended that any such state of mind existed at that time.

The fact that two of the grand jurors were in court when Morrow was on trial, and heard Northey plead his constitutional privilege when he was there called as a witness, is of no significance. It does not appear to have had anything to do with their voting for Northey's indictment. The contention as to bias or prejudice of the grand jurors, or either of them, cannot be sustained. We fail to see that Northey suffered any prejudice as to any substantial right, or any right whatever. The court committed no error in refusing a delay to procure the attendance of Hotaling. From the statement of counsel when he made the motion for delay, it appears that he expected to prove the same sort of prejudice, partiality, or bias, on the same facts as existed in regard to the other jurors, which we have held was no indication of bias or prejudice. It is further argued that the indictment should be set aside because the name of a witness whose deposition was read to the grand jury was not inserted at the foot of the indictment, or indorsed thereon. It appears that the notes of the short-hand reporter of Northey's testimony on Morrow's trial were read to the grand jury when considering the case against Northey, and it is said this was Northey's deposition, and that Northey's name should have appeared on the indictment in one of the modes above stated. The testimony of Northey was given orally on Morrow's trial, and the short-hand notes of such testimony were not a deposition. Code Civil Proc. §§ 2004, 2005. "The object of requiring the names of the witnesses to be thus indorsed upon the indictment is twofold—*First*, to inform the party who are his accusers; and, *second*, to inform the prosecutor who are the witnesses." *People v. Freeland*, 6 Cal. 99. It would be useless to inform the party that he was himself an accuser. If it was material or important that he should be informed of it, he already had that information. As to his being informed of the names of those who had testified before the grand jury, and might be called to testify on his trial on behalf of the prosecution, this could only refer to such witnesses as could be called by the prosecutor, and could be compelled to testify, or, at least, to be sworn. It could not refer to the party indicted, who could not, in any event, be called for the prosecution. We cannot see that the law required Northey's name, in any view, to be placed on the indictment in either of the modes above pointed out. It follows from the above that the court below properly refused to set aside the indictment. We do not think that there should

be a reversal on account of the remarks made by the judge of the court below as to the law, and that he thought "the prosecution in criminal cases was too much handicapped." The court, in consequence, no doubt, of the importance attributed to these remarks by counsel for defendant, and an apprehension on the part of counsel that they might have an effect on the eight jurors present in the jury-box when the remarks were made, prejudicial to his client, took occasion, in delivering its charge to the jury, to make to them the following observations: "You are the exclusive judges of all matters of fact, but must be guided by the law as laid down for you by the court, independently of any preconceived notions of your own, or of anything that counsel may have said, and of anything that may have been said in your presence or hearing as to the propriety or policy of any provision which the law may have laid down for the conduct of criminal cases. During the examination of Mr. Kohler as to his qualifications to serve as a juror, some language was used by the court to which defendant's counsel took exception. I instruct you that it is your duty to ignore in your deliberations the remarks then made by the court, and that you must deal with the case on the law as it exists, and as the court states it to you, irrespective of your own opinion, or any opinion the court might have, as to the wisdom of the law." We think that these observations to the jury, made to them by the court when giving them directions by which to guide their conduct in the consideration of the case, were sufficient to remove all apprehension that the remarks of the court, above referred to, would have any effect on their minds prejudicial to the defendant. To hold otherwise would be to attribute to the jurors a lack of ordinary intelligence; and this, we are bound to presume from their selection to try the cause, they possessed. To hold that the members of the jury in whose presence the remarks were made could not lay them aside as something irrelevant to the business they were charged with, and disregard them entirely in the discharge of their functions, would be irrational and incredible. If men of ordinary intellectual endowments are incapable of such a mental operation, trial by jury may justly be regarded as a failure. In view of all the circumstances, we see no ground justifying a reversal in this matter, the discussion of which here comes to an end.

The complaint and answer and the minutes of the court in the case of *Florence N. Wright et al. v. The Geary-Street, P. & O. R. Co.* were properly admitted in evidence to prove the allegations of the indictment in regard to that case, and the fact that the Woods who was named in the indictment as the person to whom a bribe was offered by defendant was a juror, and acted as such on the trial of the case. If these documents were admissible in evidence, it was proper to read them to the jury. Counsel for defendant contends that the complaint and answer were admissible only to show that there was an issue of fact pending in the case referred to, for trial before a jury; that it was error to permit them to be read to the jury against his objection; and, further, that, as the evidence was admitted for a special purpose, it was the duty of the court to have limited, by its instruction to the jury, the evidence to such special purpose, and that the failure to do so was error. We have already disposed of the objection to reading the above papers to the jury. What portion of this evidence would or could have operated to the prejudice of defendant we cannot see, nor has counsel pointed it out. If there was anything of the character above referred to in the papers, not relevant to the issue joined herein, and which counsel apprehended might operate prejudicially to the defendant, he should have requested an instruction limiting the evidence so as to restrict its scope to the purpose for which it was offered. Not having done so, he cannot here assail the failure of the court so to limit the evidence. That the court failed to instruct on such point is not error, conceding that such instruction should have been given if asked for. We think it may be stated, as a general rule in all cases, that, if the court in its charge has failed to direct

the jury on any point, its failure to do so is not error; and if counsel desires an instruction to be given, proper in itself, and which should be given, he should ask for it, and on his omission to ask for it the omission of the court to give it is not error. To entitle counsel to assail the action of the court for error, under such circumstances, a proper instruction must have been requested by counsel, refused by the court, and an exception reserved by counsel to the ruling.

The defendant excepted to the ruling of the court admitting Woods' testimony as to his conversation with Gamage. Woods stated that he had told Gamage what had occurred between him and Northey as to the offer of Northey to pay him money to favor the defendant as a juror in rendering a verdict in the case of *Wright, etc., v. The Geary-Street Park & Ocean Railroad Company*, and that Gamage had advised him to hear all there was to be said on the subject, and to seemingly acquiesce, because if he did not do so, he might approach some other juror, and that, in pursuance of such advice, he had answered Northey, on his third conversation with him, that it was all right. The counsel for defendant had informed the court that he was going to contend that Woods was an accomplice with Northey. On this issue, collateral to the main one, the evidence was admitted by the court. We think there was no error in this ruling. The testimony related to an occurrence which tended to illustrate the conduct of the witness Woods in his dealing with Northey, and was admissible on the issue above mentioned. The admission of the written statement of Northey's evidence before the grand jury, which Northey admitted to George Flourney to be substantially correct, was not error. The objection here made, that it was not admissible because it was not affirmatively shown by evidence to have been voluntary on the part of Northey, cannot be now urged. No such objection was ever made to it in the court below. The objection then made was that it was irrelevant and immaterial, and not permissible under section 926 of the Penal Code. The objection now urged was made for the first time in this court, and cannot be considered. When the admissions of Northey were made he was in prison, detained there as a witness in the case of *People v. Morrow*, and this is urged as a ground why they were not admissible. This point does not seem to have been urged in the court below, and cannot be urged or considered here. Indeed, the fact of Northey's imprisonment related to the voluntary character of the admissions, and, as we have seen, no objection as to their voluntary character was made when the testimony was offered and admitted. The ruling on that point covers this. Section 926 of the Penal Code, and the provisions therein contained, relate to a grand juror, when called as a witness, and provides that a grand juror may be required by any court to disclose the testimony of a witness examined before the grand jury in the cases mentioned in the section. Granting that a grand juror can only be compelled to disclose the testimony of such witness in the cases mentioned in the section referred to, it will be observed that no grand juror was called here to make any disclosure whatever. The only witness called in relation to this matter was Flourney. It may be further remarked that it seems that the rule of secrecy set forth in the statute is intended only for the protection of grand jurors, and not of the witnesses before them, and that the witnesses cannot invoke it. See *People v. Young*, 31 Cal. 564, 565. Stewart Menzies, foreman of the grand jury, testified: "Know Frank Northey. He was examined before the grand jury,—sworn and examined." To the above testimony counsel for defendant made no objection and reserved no exception. He cannot then assail it here as error. We may add that the evidence was clearly admissible, within the rule laid down in *People v. Young, supra*. The fact that a person was called, sworn, and examined as a witness before a grand jury does not come within the rule of secrecy. If it did, it is violated whenever an indictment is returned with the names of the witnesses indorsed on it or inserted at its foot. Publicity is thus given to the

fact, and a publicity, too, that is required by the statute. We think the verdict is sustained by the evidence. It would be an absurd refinement to hold that the defendant did not offer to give a bribe to Woods. When he conveyed Morrow's offer to Woods to bribe him he was offering himself to give a bribe. It was no less an offer to give a bribe on his part, because the money to be paid was not to come from his pocket. We find no error in the record. Judgment and order affirmed.

We concur: SEARLS, C. J.; MCFARLAND, J.; SHARPSTEIN, J.

PATERSON, J. I concur. I think, however, that the admission of Woods' testimony as to the conversation he had held with Gamage was error. I agree in saying that the error was not prejudicial on the grounds—*First*, that no objection was made to it because incompetent; and, *second*, that it is of such a character it did not tend, in my opinion, to prejudice the defendant before the jury.

77 Cal. 467

EVA v. McMAHON *et al.*— (No. 11,766.)
(Supreme Court of California. December 10, 1888.)

1. DAMAGES—LIQUIDATED—FAILURE TO DELIVER POSSESSION OF LAND—CONTRACT.

Under Civil Code Cal. §§ 1670, 1671, providing that contracts liquidating damages shall be void except in cases where it would be impossible, or extremely difficult, to fix the actual damage, and section 3334, providing that the detriment caused by the wrongful occupation of land, except in certain cases specified, shall be deemed the value of the use of the property for the time of such occupation, an agreement to pay \$200 per month and an attorney's fee, for failure to deliver possession of land on a certain day, is void.

2. EQUITY—REFORMATION OF CONTRACTS.

The agreement was made by the owner of the land at the time of a conveyance, which contained more land than he owned, and he called the attention of the grantee's attorney, drawing the instrument, to this fact, but the description was not changed in order that it might certainly embrace the lands of the grantor. It was understood that the grantor could not give possession to the portion he did not own. Held that, in an action on the agreement for damages for not delivering the portion not owned by the grantor, a prayer for a reformation of the conveyance should have been granted, and that the right to the reformation was a valid defense, though the reformation was not made.

Commissioners' decision. In bank. Appeal from superior court, Contra Costa county; A. VAN R. PATERSON, Judge.

Action by James Eva against Daniel McMahon and others for liquidated damages. Judgment for defendants, and plaintiff appeals. Civil Code Cal. §§ 1670, 1671, provide that contracts liquidating damages shall be void except in cases where it would be impossible or extremely difficult to fix the actual damage. Section 3334 provides that the detriment caused by the wrongful occupation of land, except in certain cases specified, shall be deemed the value of the use of the land for the time of such occupation.

J. C. Bates, for appellant. W. H. & J. R. Glascock, for respondents.

BELCHER, C. C. On the 15th day of August, 1883, the defendants sold and conveyed to the plaintiff a tract of land in Contra Costa county, described as containing about 200 acres. On the same day defendants executed and delivered to plaintiff an agreement, called "Exhibit A," by which it was stipulated that they might remain in possession of the premises until the 1st day of October, 1883, and that, if they should fail or neglect to surrender to the plaintiff the possession of the described premises on that day, then they would pay to him all costs, charges, and expenses to which he might be put to gain such possession, including a reasonable attorney's fee, and would also pay the further sum of \$200 per month for such time as plaintiff might be deprived of, or prevented from gaining possession of, the premises by reason of any act

or thing done, suffered, or committed by the defendants, while in possession thereof. The description in the deed included some 20 acres which the defendants did not own. On the day named they surrendered the possession of all the land which they did own, and the plaintiff took and afterwards retained the possession thereof. This action was commenced in May, 1885, to recover the sum of \$3,880,—being \$200 per month from October 1, 1883,—as “liquidated damages thus far incurred on account of deprivation of possession of part of said premises, and \$250 attorney’s fee.” The defendants answered, and, by way of cross-complaint, set up certain facts which entitled them, as they claimed, to have the deed and agreement reformed so as to contain a true and correct description of the property sold by them to the plaintiff. No demurrer or answer to the cross-complaint was filed by the plaintiff. The case was tried by the court, and judgment rendered in favor of the defendants; but their prayer for reformation was denied, because, as was said, “they did not sign the deed or agreement under any mistake as to their terms or meaning.” The plaintiff appealed from the judgment, and has brought the case here on the judgment roll.

The court found, among others, the following facts: In July, 1883, the defendants, being the owners in fee of a certain tract of land situated in the county of Contra Costa, and bounded on the north by the lands of one Blum, on the east by the lands of one Wagner, on the south by the lands of one Roland, and on the west by the lands of one Emmett, agreed to sell the same to plaintiff; he taking several days to examine the title thereof. During the time given plaintiff in which he examined the title, he and his attorney, J. C. Bates, were informed of the claim and title of Roland to that portion on the south embracing the creek, and also of the claim and title of Blum to the greater portion of that part on the north which is embraced in the diagram attached to the complaint, and marked “Exhibit B,” to-wit, about 20 acres thereof; the same being a part of the La Bocha rancho, owned by said Blum, a survey of which had been recently made by the United States authorities, and that a portion of the said rancho, to the extent of from eight to ten acres, was within the exterior limits of the old fences which had been put on defendant’s land many years prior thereto, and such portion was known to belong to Blum, of which plaintiff and his attorney had full notice. On or about the 15th of August, 1883, plaintiff’s attorney, in drawing the deed, followed the description by metes and bounds which had been used by defendants’ grantors long before the line of the La Bocha rancho was established, and before the purchase by Roland of the creek on the south; and upon defendants calling the attention of said attorney, who was acting for plaintiff in procuring said conveyance, to the fact that defendants did not own a portion of the land included within said boundaries on the north, and that they desired to sell only the lands to which they had title within said boundaries, plaintiff and his attorney, not having a precise description of the true boundary line on the north and the south, preferred to use, and did use for their own convenience, the old description used in the prior deeds, in order that the same might certainly embrace the lands to which defendants did have title, and which were intended to be sold by defendants and purchased by plaintiff. The said deed and agreement were made and delivered with the full and distinct understanding that the description by the said metes and bounds was not a correct description of the lands intended to be conveyed, and plaintiff in fact knew that a large portion included within said metes and bounds was not owned by defendants at the time of the conveyance. The deed and agreement (Exhibit A) were made and were taken with the understanding by plaintiff and his agent that defendants could not and should not make title or give or procure possession to such portions as they had no title to. At the time of the sale defendants had a tenant in possession whose lease did not expire until October 1, 1883, and plaintiff, being desirous that said tenant should leave promptly upon the expiration

of his lease, and not put him to trouble, induced the defendants to sign Exhibit A. It was not understood, agreed, or intended that said instrument should operate against defendants as a covenant of quiet and peaceable possession and enjoyment, but was distinctly understood between the parties that the possession of the premises to be delivered only applied to such lands as defendants had title to in fee, and had sold and conveyed to plaintiff, and to none other. The land of Blum, shown on the diagram, "Exhibit B," was, during all the time for which damages were asked, unproductive, and without value; and all that portion of it outside the old fence, containing about 20 acres, was never in the actual possession of defendants, nor claimed by them. Plaintiff, at the time of the negotiations for the purchase of said lands, went upon the lands, and viewed the same, and had actual knowledge of the location of the exterior fences, which were supposed to follow the lines described in the metes and bounds given in the deed; and while so viewing the premises he was notified by the agent of defendants that the fence on the north was on the land of Blum. Plaintiff had not been damaged in any sum whatever by reason of his failure to obtain possession of all the lands described in Exhibit A, or by reason of any act of defendants done or suffered by them, or either of them, while in possession of said lands, or at all. From these facts the court found, as a conclusion of law, "that from the nature of the case it was neither impracticable nor difficult to fix the actual damages which would arise from the failure of either of the parties interested to perform any of the terms or conditions of the contract on their part to be performed, and for that reason that part of the stipulation contained in Exhibit A, providing for damages for the breach of other provisions therein contained, is void."

This conclusion is in accord with the provisions of sections 1670 and 1671 of the Civil Code, and if warranted by the facts is decisive of the case. It is assailed by appellant, but we think it must be sustained. We see no difficulty in fixing the actual damages which one sustains by being deprived of the use of land to which he is entitled. Ordinarily the damage is the value of the use and occupation of the land for the time he is deprived of its possession. Civil Code, § 3334. There are exceptions to this rule provided for in other sections of the Code, but they do not affect the result. Here the plaintiff had sustained no damage at all, and it would seem to violate all rules of honesty and fair dealing to allow him to take from the defendants the large sum claimed.

But, however this may be, we think there is another ground on which the judgment may be sustained. Upon the facts found the defendants were entitled to have the deed and agreement reformed so as to contain a true description of the land actually sold by them to the plaintiff, and the reason assigned for refusing the reformation was not sound. *Murray v. Dake*, 46 Cal. 644; *Isenhoot v. Chamberlain*, 59 Cal. 630. And it is clear that, if the descriptions of the land had been properly reformed, the plaintiff could not have recovered. But, in order to constitute a defense, it was not necessary that the reformation be in fact made. It was enough that the defendants set up and established facts which entitled them to the relief demanded. *Hoppough v. Struble*, 60 N. Y. 430.

We find no error in the record prejudicial to the appellant, and therefore advise that the judgment be affirmed.

WE CONCUR: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

WORKS, J., (*concurring*.) I concur in the judgment and in the opinion, except so far as it announces the doctrine that the defendant could defeat the action by proving facts sufficient to show that the instrument sued on ought

to be reformed without such reformation being in fact made. As to the right to have the instrument reformed, the finding of the court below is against the defendant.

PATERSON, J., took no part in the decision of this case.

77 Cal. 511

CITY OF SAN DIEGO v. GRANNISS. (No. 12,856.)

(*Supreme Court of California.* December 12, 1888.)

MUNICIPAL CORPORATIONS—BOUNDARIES—CONSTRUCTION OF STATUTES.

The city of San Diego is built around three sides of a bay, shaped like a horseshoe, and was originally a pueblo, whose water-line was the bay. A peninsula began near the mouth, and at one side of the bay, running nearly in the center, and more than half way up the bay, around which the water for an indefinite distance was called the "Ship's Channel." Acts Cal. 1875-76, p. 806, reincorporated the city, with the same limits on the land side as before, but provided that the "water front line should be the ship's channel," and gave the city jurisdiction of the bay and of the sea for one league from shore. Another section divided the peninsula into wards for voting purposes, and drew the boundary line of one ward from one point to another across the mouth of the bay; thus including, practically, the whole peninsula. Other sections restricted the elective franchise to residents of the city, and authorized the city to acquire land outside of its boundaries for municipal purposes only. *Held*, that the act included the peninsula within the city limits.

In bank. Appeal from superior court, San Diego county; W. T. McNEALY, Judge.

Action by the city of San Diego against J. W. Granniss, for taxes. Judgment for defendant, and plaintiff appeals.

Harry L. Titus, for appellant. *A. B. Hotchkiss*, *Levi Chase*, and *W. H. C. Ecker*, for respondent.

McFARLAND, J. This case was submitted to the court below upon an agreed statement under section 1138 *et seq.*, Code Civil Proc. Judgment was rendered for the defendant, and plaintiff appeals. The matter involved is the right of plaintiff to assess and tax certain land of defendant, situated on what is known as the "Peninsula of San Diego,"—the question being whether or not said land is within the limits of the city, and its determination depends upon the true construction of an act of the legislature approved April 1, 1876, entitled "An act to reincorporate the city of San Diego." St. 1875-76, p. 806. From the maps before the court, and admitted to be substantially correct, it appears that the main body of the city is built around three sides of the bay of San Diego, somewhat in the shape of a horseshoe. The upper, or inland, end of the bay is towards the north, and the lower end, or mouth, is towards the south. Leaving the mainland at a point on the east side of the bay, and apparently not far from its mouth, is a strip of land which runs northerly, up through the bay, and is called the "Peninsula." The body of water lying immediately around the peninsula (on three sides) is called "Ship's Channel," and, on the westerly side, leads out to the open sea. The peninsula runs far beyond the middle of the bay, its exact distance from the northern shore not appearing; and it is in the very center of the horseshoe. It is, topographically, almost as much in the heart of the city as if the latter inclosed it on all sides, as in a circle. There is a line designated in the said act incorporating the city as "a line drawn from the south-west corner of the pueblo at Chollas valley due west to the light-house at Point Loma;" and it is admitted that if the southerly limits of the city extend to that line, (which is substantially a line between the two ends of the "horseshoe,") then the plaintiff should have had judgment. And the same admission is made if the city limits extend over the bay, "and into the ocean to the extent of one marine league from the shore." But San Diego was a pueblo, and received a patent as such from the United States in accordance with a certain survey made in 1858, by J. C. Hayes. This

patent does not include any part of the peninsula, but is confined to lands outside of the shores of the bay, and defendant contends that the limits of the city are bounded by the lines of the patent, except only that the water-front along the ship channel is slightly modified. (We have thus stated the situation sufficiently for an understanding of the subject with which the legislature was dealing.)

Defendant's contention, it seems to us, rests almost solely upon the proposition of considering the first clause of the first section of the act in question alone, and ignoring all other parts of the act which bear upon the question of the city's limits,—a proposition which cannot be maintained without violating well-settled rules of construction. One clause of a statute, or contract, apparently conclusive as to some particular thing, may be enlarged or limited by other provisions of the instrument upon the same subject; and in such a case the intent must be gathered from all the provisions considered together, the interpreter having his eye on the subject-matter of the instrument, and giving effect to each clause of the latter, when it can be done. The first section of said act is as follows: "Section 1. All that tract of land known as the 'Pueblo of San Diego,' included in the survey made for the city authorities in July, 1858, by J. C. Hayes, United States deputy surveyor general for the state of California, shall henceforth be known as the 'City of San Diego,' the boundaries of which shall be fixed by the field-notes of the said survey, except the water-front line on the bay, and this shall be 'Ship's Channel' of the said bay; and the municipal jurisdiction shall extend to said limits, and over the waters of said bay, and into the ocean to the extent of one marine league from the shore."

It will be observed that if this section 1 were to be alone considered, the construction contended for by defendant would not, by any means, be assured. It provides that the field-notes of the Hayes survey (the pueblo patent) shall furnish the boundaries of the city about to be incorporated, except as to the water-front line. The front line is therefore not to be fixed by the lines of the patent. How, then, is it to be fixed? The section first speaks of the line "Ship's Channel." But a glance at the map shows that the ship's channel is a very indefinite thing. It is a body of water of indefinite width, in the form of the letter U, commencing near the place where the peninsula leaves the main-land, and running up the easterly side, through the deep and wide northern part of the bay, around the head of the peninsula, and down the westerly side, into the ocean. Now, is the intent that the front of the city shall be a curved line, supposed to be drawn through the deep water along the outer undefined edge of this indefinite channel? Or is the intent that it shall include, at least, all that lies north of a line drawn through and connecting the southerly parts of this siphon-shaped figure? The former construction would be inconsistent with the clause of the section which immediately follows, and which provides that the municipal jurisdiction shall extend "to said limits," and into the ocean to the extent of one marine league from the shore. There is no limitation attached to the words "municipal jurisdiction," and they include, of course, all the powers which the municipal corporation is given by its charter; and the charter includes all the powers usually granted such corporations, the power of taxation being expressly mentioned. There is no ground for the position that the word "jurisdiction," as here used, should be construed as meaning jurisdiction for certain special purposes only. It is subject to no limitations other than those of the charter itself.

But there are other provisions of the act which throw strong light upon the question under discussion. Section 2, which divides the city into wards, provides as follows: "For voting purposes, the inhabitants of that portion of the peninsula of San Diego which lies north of a line drawn from the southwest corner of the pueblo at Chollas valley, due west to the light-house on

Point Loma, shall be considered as in the Second ward, and said inhabitants shall have the right to vote at city elections." (The land north of that line includes practically the whole of the peninsula.) And the only way to get rid of this provision, and maintain the contention of defendant, is to assume that the legislature intended to give the elective franchise to people who were not residents of the city, and lived beyond its limits, free of any burden of taxation. But such an assumption would be in the very teeth of the time-honored rule that no construction of words is admissible which gives to them an absurd signification, if any other reasonable construction is possible; and that this clause was put into the act upon the understanding by the legislature that it was making the peninsula a part of the territory of the city is apparent from subsequent provisions. Section 4 provides that no person shall be eligible to any city office, "nor shall any person be entitled to vote for the same, who shall not be a qualified voter according to the constitution of the state, and who shall not have resided in the city and ward for which he shall be elected, or offer to vote, for thirty days next preceding the election;" and section 5 provides that officers "shall be elected by the qualified voters of the city, as aforesaid." But section 27 makes it quite clear, we think, that the legislature intended to put into the area over which the new city government was to have municipal jurisdiction more "land" than was included in the patent for the pueblo, as described in the first clause of section 1. It is as follows: "Sec. 27. This charter or act shall not be construed as to give the city authorities, or the citizens of San Diego, any control or title to the land lying outside of the city or pueblo boundary line, as confirmed by the patent to the city of San Diego, except for municipal purposes only; nor shall any park, cemeteries, or other property set aside for public purposes be sold by the city authorities without an act of the legislature of this state being first obtained therefor." So there was land—not water merely, as contended by defendant—lying outside of the lines of the patent over which the city was to exercise control for municipal purposes; but as the city owned, as a proprietor, certain pueblo lands within the lines of the patent, (and this appears in the act itself,) it was thought prudent to provide that the act should not be so construed as to give the city any title, as a proprietor, to any of the land outside of those lines. But how could there be any such outside land under a construction which shuts its eyes to everything but the first part of the first section of the act?

Our conclusion, arrived at by reading and considering all the provisions of the act together, and keeping in view the subject-matter of the proposed legislation, is that the legislative intent was to erect a city government which should embrace all the land included in the lines of the pueblo patent, and also all the territory, whether covered by water or not, which lies within the sharply curved line around which the city is mainly built. To accomplish this purpose it is provided, first, that the boundaries of the new corporation shall be fixed by the field-notes of the survey which were followed in the patent, except the lines on the water front. This fixes the back and side lines on the main-land. As to the front or water lines, it is then provided that the jurisdiction shall extend over the bay, and into the ocean to the extent of one marine league from the shore. The peninsula is, then, expressly mentioned as part of the city, and it is provided that its inhabitants shall vote in the Second ward; and then, assuming that there is to be land within the limits of the proposed city outside of the pueblo boundaries, and knowing that the city will have a proprietary interest in certain lands within the pueblo, the legislature provided that as to the outside lands the act shall not be so construed as to give the city any title to them, but that it shall have over them the control and jurisdiction usually exercised by municipal corporations for municipal purposes. Our opinion, therefore, is that the said peninsula is within the corporate limits of San Diego. The judgment of the supe-

rior court is reversed, with directions to enter judgment for plaintiff for the amount mentioned in the agreed statement of facts.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; PATERSON, J.; THOMPSON, J.

WORKS, J., did not participate in the decision of the above case.

77 Cal. 473

ROBINSON v. DUNN, Comptroller. (No. 11,565.)

(Supreme Court of California. December 10, 1888.)

OFFICE AND OFFICERS—EXTRA COMPENSATION—CONSTITUTIONAL LAW.

Compensation of porters of the legislature being by Pol. Code Cal. § 268, fixed at "\$4 per day," services rendered on days when the sessions were unusually long are not "extra," and a resolution at the end of the session, voting additional pay therefor, comes within Const. Cal. art. 4, §§ 31, 32, prohibiting a gift to any person of public money, or extra compensation to any public officer or servant, after service has been rendered.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco: F. W. LAWLER, Judge.

D. M. Delmas and George A. Johnson, Atty. Gen., for appellant. Cary, Sullivan & Sullivan, for respondent.

HAYNE, C. Appeal by the defendant from a judgment commanding him to draw his warrant in favor of the plaintiff for the sum of \$60. The plaintiff was porter of the senate during the session of 1885, and bases his claim upon the following resolution of that body, viz.: "Whereas, during the present session of the legislature the senate has been in session during a period of several weeks, from 11 o'clock A. M. to 11 o'clock P. M., thus entailing extra work, amounting to sixteen hours, upon the porters, pages, watchmen, gate-keepers, mail-carrier and the mailing-clerk: Resolved, that the pages, porters, watchmen, gate-keepers, mail-carrier, and the mailing-clerk be, and they are hereby, allowed \$1 per day for extra services for the session, and the comptroller is hereby authorized and directed to draw his warrants in the sum of \$60 for each of the above enumerated employes, payable out of the contingent fund of the senate." This resolution is alleged in the complaint to have been passed a few days before the end of the session, and from this fact, and from its language, it is apparent that the compensation was for services which had been already rendered. The idea upon which the resolution rests is that the services were "extra," or, in other words, something outside of the regular duties of the employment; and, since it is not pretended that the services were different in kind from the regular duties, they are "extra" because they were for a longer time than seems to have been considered usual. But the compensation of the porters is fixed by law at "\$4 per day." Pol. Code, § 268. They are not paid by the amount of work which they do, but by the day; and we think it too clear for discussion that the word "day," as used in the statute, covers whatever period of the twenty-four hours the legislators choose to remain in session. The language of the law fixing the compensation of the employes is similar to that fixing the compensation of the legislators themselves, who are allowed "\$8 per day;" and it would be as reasonable to say that extra compensation should be made for a long session in the one case as in the other. The services, therefore, were not "extra," but were such as the employes were bound to render; and, this being the case, the sum voted to them must either have been a gift or extra compensation "after service has been rendered," both of which are expressly forbidden by the constitution. See sections 31, 32, art. 4.¹ This view of the

¹Sections 31 and 32 prohibit the gift of any public money to any individual, or any extra compensation to any public officer or servant, after service has been rendered.

case renders it unnecessary to express any opinion as to whether the legislature has in any case power to recognize a merely moral claim. We therefore advise that the judgment be reversed, with directions to dismiss the proceedings.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the court below directed to dismiss the proceedings.

77 Cal. 458

GARDNER v. TATUM. (No. 11,459.)

(*Supreme Court of California.* December 10, 1885.)

1. PRACTICE IN CIVIL CASES—DISMISSAL—ENTRY OF JUDGMENT.

Under Code Civil Proc. § 581, subd. 6, (as amended in 1885,) providing that an action may be dismissed when, after verdict, "the party entitled to judgment neglects to demand and have the same entered for more than six months," it is not error to refuse to dismiss an action where six months have not elapsed since the act went into effect, though more than six months have elapsed since verdict. WORKS, J., dissenting.

2. SAME—REQUEST TO ENTER JUDGMENT.

The action will not be dismissed under the above act, where the party entitled to judgment orally requested the clerk to enter judgment, and paid him the fee for so doing; and it is immaterial that the clerk kept a book in which demands for entry of judgment were requested to be made in writing, the book not being required by law, and the clerk having promised to enter the judgment.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Langhorne & Miller, for appellant. *S. G. Hilborn* and *J. E. Wendell*, for respondent.

HAYNE, C. Appeal from an order refusing to dismiss an action. The case was tried and a verdict rendered for the plaintiff on April 7, 1885. No judgment was entered thereon, and after the expiration of six months from the entry of the verdict the defendant moved to dismiss the action under subdivision 6 of section 581 of the Code of Civil Procedure, as amended in 1885, which provides that "an action may be dismissed * * * (6) by the court when, after verdict or final submission, the party entitled to judgment neglects to demand and have the same entered for more than six months."

Assuming in favor of the appellant that the order is appealable, we think the refusal to dismiss was right for the following reasons:

1. It is conceded that the amendment did not take effect until May 9, 1885, and the motion was noticed for November 6th of the same year. Consequently six months had not elapsed between the time of the taking effect of the act and the time the motion was made. And we think that the intention of the legislature must have been that the provision should not apply to existing verdicts unless there was six months' neglect after the taking effect of the act. It could never have been the intention to make the provision apply to cases where the six months had already expired when the act took effect. Nor do we think it could have been intended to make the provision apply where five months and twenty-nine days of the six months had expired when the act took effect. And we see nothing which would enable us to say that the expiration of only half or a third or a quarter of the period would present a different case. The act, therefore, does not apply to the case presented to the court below.

2. But if it were otherwise, we nevertheless think that the refusal to dismiss the action was proper, under the circumstances. The rule established by the statute applies to cases where the party has been guilty of negligence. The language is that the dismissal may be had where "the party entitled

to judgment neglects to demand and have the same entered." It cannot be supposed that the words "have the same entered" look to any compulsion by the party upon the clerk in case he should refuse to do his duty; for it would not be impossible that, if the question should be litigated, the litigation over it might be protracted beyond the six months. The very clumsy phraseology of the provision can only be held to mean that, if there has been negligence on the part of the prevailing party for six months, the action may be dismissed; and in this case it appears that the party cannot be accused of negligence. He paid the clerk his fees for the entry of judgment, and requested him to enter it, and "understood from said clerk that said judgment would be entered as requested by him," and "always supposed that judgment had been entered as requested by him, and had no intimation that the same had not been done until the service of the notice of the motion to dismiss." Upon this state of facts, to dismiss the action would be to make the litigant suffer for the negligence of the officer. It is true that the order to enter the judgment was verbal, and that the clerk kept an order book "in which all demands for entry of judgments are required by him to be given and made in writing," and that it was customary so to make them. But this book was not required by law to be kept. It was kept merely for the convenience of the clerk. And when he accepts his fees for entering the judgment, and promises to enter it, it is his duty to do so without reference to the order book. If the plaintiff was guilty of any negligence in relying on the promise of the clerk, it was of such a slight character as not to bring him within the scope of the provision. We therefore advise that the order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

WORKS, J., (*concurring*.) I concur in the judgment on the second ground stated in the foregoing opinion, but do not wish to be understood as agreeing to the first proposition laid down therein.

77 Cal. 479

In re BURRELL'S ESTATE. (No. 11,924.)
(*Supreme Court of California.* December 10, 1888.)

1. WILLS—CONTEST—PLEADING—ATTESTATION.

Contestant's allegations that testator's signature to the will was obtained by misleading and deceiving him as to its contents, and that when it was signed and witnessed testator was deceived, and under the undue influence of the proponent, are not sufficient to raise an issue as to whether or not the will was attested by two witnesses, who signed at the request and in the presence of testator.

2. SAME—INSTRUCTIONS—DUE EXECUTION.

On trial of a will contest, the court charged the jury that the question of the "due execution" of the instrument was not for them to consider; meaning that the question of proper witnessing was withdrawn. The issues as to mental capacity and undue influence were submitted to and passed upon by the jury. *Held*, that contestants were not prejudiced by the inaccurate use of the words "due execution," it being apparent that the jury were not misled.

Commissioners' decision. In bank. Appeal from superior court, Santa Clara county; FRANCIS E. SPENCER, Judge.

D. W. Herrington, for appellants. T. H. Laine, for respondent.

BELCHER, C. C. Lyman J. Burrell died in Santa Clara county in 1884, leaving what purported to be his last will and testament. The paper was dated March 9, 1882, and was signed by the decedent, and appeared to have

been properly witnessed. Philomela T. Burrell, the widow of decedent, was named as executrix, and presented the will for probate. The children of decedent objected to the probate of the will, and filed written grounds of opposition thereto. The proponent made answer to the opposition, denying all of its material allegations. The contestants then demanded a trial by jury, and asked to have the following issues submitted to the jury: "(1) Was Lyman J. Burrell on March 9, 1882, at the time of the alleged making of said will, of sound and disposing mind? (2) Was the making of said will procured through or by any fraudulent misrepresentations, or false statements or suggestions, of the proponent, Philomela T. Burrell? (3) Was said will procured to be made by the undue influence of any person? (4) Had the proponent, Philomela T. Burrell, any undue influence over the deceased which operated in the disposition of his property in the making of his will? (5) Was said will, at the alleged time of the making thereof, signed by two witnesses, at the request and in the presence of Lyman J. Burrell, deceased?" The court settled and submitted to the jury the first four of these issues, but, upon objection of counsel for proponent that there were no sufficient allegations to warrant it, refused to submit to them the last one. At the conclusion of the testimony the court instructed the jury very fully upon all of the questions involved, and among other things said to them: "Evidence has been introduced relating to the execution of the propounded paper. Such evidence you are at liberty to consider as bearing upon the two questions of testamentary capacity and of undue influence. The fact of due execution of the instrument, however, is withdrawn from your consideration, and with that you have nothing to do." The jury answered the first issue submitted to them in the affirmative, and the other three in the negative. The will was then admitted to probate, the court finding and certifying that the decedent died on the 9th day of June, 1884, in the county of Santa Clara, where he was then a resident; that the will was duly executed by decedent, and signed by him, in the presence of three witnesses; "that he acknowledged the execution of the same in their presence, and declared the same to be his last will and testament; and the said witnesses attested the same at his request, in his presence, and in the presence of each other; that the said decedent, at the time of executing said will, was of the age of eighteen years and upward, was of sound and disposing mind, and not acting under duress, menace, fraud, undue influence, or misrepresentation, nor in any respect incompetent to devise and bequeath his estate." The contestants moved for a new trial, and, their motion being denied, appealed from the order admitting the will to probate, and from the order denying their motion.

It is argued for appellants that the court erred in refusing to submit to the jury the fifth issue requested by them, and in instructing the jury that the due execution of the will was withdrawn from their consideration. The contestants were plaintiffs in the matter of *Estate of Dalrymple*, 67 Cal. 444, 7 Pac. Rep. 906, and it devolved upon them to allege all of the facts necessary to sustain their claim that the will was not properly signed and witnessed, and a statement in the language of the statute, or of the evidence of the facts, was not sufficient. *Estate of Gharky*, 57 Cal. 274. One of the allegations relied upon by the appellants is that, at the time of the making of the alleged will, the testator believed that he was by the will providing for the future division and distribution to the contestants of a large amount of land, to-wit, the 1,000 acres, etc.; "and contestants charge that, acting under and in pursuance of said belief, the signature of said Lyman J. Burrell was procured to be and was made, and not otherwise; and the said will is not the will of the said Lyman J. Burrell, and has never been ratified or confirmed by him, but was procured to be signed to said will, and witnessed as aforesaid, and so published and declared by him under the belief aforesaid." Another allegation is "that said will was signed and witnessed in the presence of said Philomela

T., and while said Lyman J. was so under the absolute control and dominion of said Philomela T., and by and under her directions, supervision, and control, and with the object and purpose, on the part of said Philomela T., of securing to herself unlawfully the whole and every part of the estate and property of deceased, to the exclusion of these contestants, his heirs at law, from all and every part thereof, and from all benefit arising therefrom, contrary to the will and wish of said deceased, uninfluenced by said proponent." The question is, were these allegations sufficient to raise an issue as to whether or not the will was attested by two witnesses, who signed it at the request and in the presence of the testator? We do not think they were. They were evidently made upon the theory that the will was procured to be made by the fraudulent misrepresentations and undue influence of the respondent. Now, assuming that the testator was mistaken as to the disposition made of his property, and was under the dominion and control of his wife, still he may have signed the paper, and may have declared to the attesting witnesses that it was his will, and they may have signed it at his request and in his presence; nor does it follow, if the facts were as supposed, that the testator was not "mentally capable of recognizing the act which was being performed before him," or that he was not "actually conscious of the transaction in which the witnesses were engaged." 1 Jarm. Wills, (5th Amer. Ed.) 87. The words "due execution of the instrument," used in the instruction complained of, may have a broader meaning than was intended to be given them by the learned judge of the court below, but, if so, they were harmless to appellants. They were evidently intended to refer only to the witnessing of the will, and we so understood by the jury; the other questions having been submitted to and passed upon by them. We find no material error in the record, and therefore advise that both of the orders appealed from be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion both the orders appealed from are affirmed.

77 Cal. 476

CHAFOIN v. RICH *et al.* (No. 11,409.)

(Supreme Court of California. December 10, 1883.)

PRINCIPAL AND SURETY—LIABILITY OF SURETY—DEMAND ON PRINCIPAL.

Under the provisions of Civil Code Cal., relating to sureties and guarantors, the same circumstances which would release a guarantor will also exonerate a surety; and therefore one who signs a note apparently as a joint maker, but who is known to the payee to be a surety for the other, is not discharged by the payee's neglect to demand payment of the principal, and to give notice of non-payment, as by section 2807 a guarantor is liable, on default of the principal, without demand or notice.

Commissioners' decision. In bank. Appeal from superior court, San Mateo county; E. F. HEAD, Judge.

Action by Martin Chafoin against A. G. Rich and Michael Dubs, on a promissory note. Judgment against Rich, and in favor of Dubs. Plaintiff appeals.

Geo. W. Fox, (Edward J. Pringle, of counsel,) for appellant. Edwin F. Fitzpatrick and Joseph S. Wallis, for respondent Dubs.

BELCHER, C. C. The question presented for decision in this case is this: If a promissory note is executed by two persons as apparent makers, but one of them is in fact a surety for the other, and is known to be such by the payee, must the payee, in order to fix the liability of the surety, present the note and demand payment thereof from the principal at or about the time of its maturity, and promptly give notice to the surety of its non-payment; or, in other words, has the surety the rights and liabilities of an indorser? Before the

adoption of the Codes, it was held that one who signed his name to a negotiable instrument as a guarantor had the rights of an indorser, and must have notice of presentment and non-payment. *Riggs v. Waldo*, 2 Cal. 485; *Geiger v. Clark*, 13 Cal. 579; *Jones v. Goodwin*, 39 Cal. 493; *Crooks v. Tully*, 50 Cal. 254. This rule did not, however, apply to sureties. A surety was held to be liable as a maker, and not to be entitled to notice of demand and non-payment. *Aud v. Magruder*, 10 Cal. 282; *Dane v. Corduan*, 24 Cal. 157; *Shriver v. Lovejoy*, 32 Cal. 574; *Damon v. Pardow*, 34 Cal. 278. Has the rule as to sureties been changed by the Codes? It is claimed for respondent that it has, and the court below seems to have so held. There are many provisions in the Civil Code in reference to sureties, guarantors, and indorsers, but those bearing on the question in hand are as follows: "Sec. 2832. One who appears to be a principal, whether by the terms of a written instrument or otherwise, may show that he is in fact a surety, except as against persons who have acted on the faith of his apparent character of principal." "Sec. 2840. A surety is exonerated (1) in like manner with a guarantor," etc. "Sec. 2844. A surety has all the rights of a guarantor, whether he becomes personally responsible or not." "Sec. 2787. A guaranty is a promise to answer for the debt, default, or miscarriage of another person." "Sec. 2807. A guarantor of payment or performance is liable to the guarantee immediately upon the default of the principal, and without demand or notice." "Sec. 2819. A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended." "Sec. 2823. Mere delay on the part of a creditor to proceed against the principal, or to enforce any other remedy, does not exonerate a guarantor." "Sec. 3108. One who writes his name upon a negotiable instrument, otherwise than as a maker or acceptor, and delivers it, with his name thereon, to another person, is called an 'indorser,' and his act is called 'indorsement.'" "Sec. 3117. One who indorses a negotiable instrument before it is delivered to the payee is liable to the payee thereon as an indorser." In these sections we see nothing to sustain the contention of respondent. Being a surety, he had all the rights of a guarantor. But the general rule, established by the Code, is that guarantors are liable without demand or notice. Section 2807, *supra*. It is true that guarantors, who are in effect indorsers, are excepted from this rule. *Fessenden v. Summers*, 62 Cal. 484. The respondent was not, however, an indorser, and hence does not come within the exception. We therefore advise that the judgment in favor of defendant Dubs be reversed, and that the cause be remanded, with directions to the court below to enter judgment against him on the findings.

We concur: HAYNE C.; FOOTE, C.

PER CURIAM. The judgment in favor of defendant Dubs is reversed, and cause remanded to the court below, with directions to enter judgment against him on the findings.

77 Cal. 464

PEOPLE v. TODD. (No. 20,428.)

(Supreme Court of California. December 10, 1888.)

FORGERY—INDICTMENT—EVIDENCE OF INJURY.

An indictment for the forgery of a will, by which the wife of the testator was alleged to be injured, when it sets out the will, which is valid on its face, and which purports to bequeath an estate to the wife and the accused, though it does not show how the wife could be injured by the forgery, nor that the testator had any estate, is sufficient under Pen. Code Cal. § 470, providing that every person who, with intent to defraud another, falsely alters or forges a will, shall be guilty of forgery.

Commissioners' decision. In bank. Appeal from superior court, Alameda county, W. E. GREENE, Judge.

W. B. Todd was convicted of the forgery of a will. Pen. Code Cal. § 470, provides, among other matters, that whoever, with intent to defraud another, falsely makes, forges, or alters a will, shall be guilty of forgery.

Taylor & Craig, for appellant. *Atty. Gen. George A. Johnson*, for the People.

FOOTE, C. The defendant was convicted of a forgery of a will, and from the judgment rendered against him this appeal is prosecuted. The only point made for the reversal of the judgment is that the court erred in not sustaining the defendant's demurrer to the indictment. It is claimed that it did not state facts sufficient to constitute a public offense. To sustain this contention, the defendant asserts that the alleged forged will, which is set out in the indictment, does not show upon its face in what way Minerva J. Todd, the wife of the testator, the person alleged to have been injured, could be affected by the forgoing of the will, and offering it for probate, nor the fact that the testator had any property to bequeath, and that the indictment does not set out those extrinsic facts. The will is a valid one upon its face, and it purports to give and bequeath an estate to Minerva J. Todd and the defendant. Whether or not the testator had any estate as a matter of fact, or whether Minerva J. Todd, as his wife, occupied such a relation towards him as that a bequest of certain of his property to Walter B. Todd would result in her injury by reason of the fact that if the forgery of the will had been undiscovered she would have received a smaller part of the estate than she would otherwise, are extrinsic facts, which it was not necessary to set out in the indictment, as they were mere matters of evidence which would tend to prove or disprove the intention to defraud and to commit forgery, and were admissible as such under the allegations of the indictment, which was sufficient under section 470 of the Penal Code. There is nothing in the case of *People v. Tomlinson*, 35 Cal. 506, which conflicts with this view of the law. That was a case where the alleged forged instrument was invalid on its face, and it was held that in such a case the indictment for forgery should have stated matters *aliunde* which, added to the face of the instrument, would constitute the alleged crime. Here the will is valid upon its face, and, if unchallenged, would, according to its apparent legal character, have invested the defendant with an estate. The injury done to Minerva J. Todd, who was named as a legatee in the forged will, depended upon whether or not the testator had any estate, and whether, if he had any, the bequest to the defendant, if valid, would have reduced her share of it. These facts were matters of proof, and went to show whether or not the intent to defraud and injure existed, or the contrary, but they were not necessary allegations in the indictment to show the validity of the will on its face. The "legal character" of the instrument once established, as was shown by setting out the apparent will, extrinsic facts were to be proved, but it was not necessary to allege them in the indictment. The indictment is framed in strict conformity to section 470 of the Penal Code, and the alleged forged instrument set out therein is valid upon its face; therefore the indictment was sufficient. In *People v. Ah Woo*, 28 Cal. 212, it was said by the appellate court: "So far as it is claimed that the indictment fails to show in what manner Ah Woo was or could be defrauded by the transaction, it is sufficient to say that all that is matter of evidence. The charge is direct that the transfer was made with intent to defraud Ah Woo, which is sufficient, so far as the indictment is concerned." In *Ex parte Finley*, 66 Cal. 263, 5 Pac. Rep. 222, the court declares that "the rule does not require that the indictment or information shall contain an express allegation of the existence of every fact the existence of which is assumed in the forged instrument. It is enough if the writing is one which, if genuine, might apparently be of le-

gal efficacy." In 2 Bish. Crim. Proc. §§400-418, the same view of the law is upheld. We therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.





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